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In this Volume English Cases reported up to 1st July, 1925, are included, and other cases are included so far as the Volumes of Reports of the same were available in London on that date.

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REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS

A. C. (preceded by date)	Law Reports, Appeal Cases, House of Lords, since 1890 (<i>e.g.</i> , [1891] A. C.)	Eng.
A. Jur. Rep.	Australian Jurist Reports	Aus.
A. L. T.	Australian Law Times	Aus.
A. R.	Ontario Appeals	Can.
Act.	Acton's Reports, Prize Causes, 2 vols., 1809-1811	Eng.
Ad. & El.	Adolphus and Ellis's Reports, King's Bench and Queen's Bench, 12 vols., 1831-1842	Eng.
Adam	Adam's Justiciary Reports (Scotland), 1893-(current)	Scot.
Add.	Addams' Ecclesiastical Reports, 3 vols., 1822-1826	Eng.
Agra	Agra High Court	Ind.
Agra F. B.	Agra High Court, Full Bench	Ind.
Alc. & N.	Alcock and Napier's Reports, King's Bench (Ireland), 1 vol., 1813-1833	Ir.
Alc. Reg. Cas.	Alcock's Registry Cases (Ireland), 1 vol., 1832-1841	Ir.
Aleyn	Aleyn's Reports, King's Bench, fol., 1 vol., 1616-1649	Eng.
All.	New Brunswick Reports (Allen)	Can.
Alta. L. R.	Alberta Law Reports	Can.
Amb.	Ambler's Reports, Chancery, 1 vol., 1716-1783	Eng.
And.	Anderson's Reports, Common Pleas, fol., 2 parts in one vol., 1535-1605	Eng.
Andr.	Andrews' Reports, King's Bench, fol., 1 vol., 1737-1740	Eng.
Anst.	Anstruther's Reports, Exchequer, 3 vols., 1792-1797	Eng.
App. Cas.	Law Reports, Appeal Cases, House of Lords, 15 vols., 1875-1890	Eng.
App. Ct. Rep.	Appeal Court Reports	N.Z.
App. D.	South African Law Reports, Appellate Division	S. Af.
Architects' L. R.	Architects' Law Reports, 4 vols., 1901-1909	Eng.
Argus L. R.	Argus Law Reports	Aus.
Arkley	Arkley's Justiciary Reports (Scotland), 1 vol., 1846-1848	Scot.
Arm. M. & O.	Armstrong, Macartney, and Ogle's Civil and Criminal Reports (Ireland), 1840-1842	Ir.
Arn.	Arnold's Reports, Common Pleas, 2 vols., 1838-1839	Eng.
Arn. & H.	Arnold and Hodges' Reports, Queen's Bench, 1 vol., 1840-1841	Eng.
Ashb.	Ashburner's Principles of Equity, 1902	Eng.
Asp. M. L. C.	Aspinall's Maritime Law Cases, 1870-(current)	Eng.
Atk.	Atkyns' Reports, Chancery, 3 vols., 1736-1754	Eng.
Ayl. Pan.	Ayliffe's New Pandect of Roman Civil Law	Eng.
Ayl. Par.	Ayliffe's Parergon Juris Canonici Anglicani	Eng.
B.	Barber's Gold Law	S. Af.
B. & Ad.	Barnewall and Adolphus' Reports, King's Bench, 5 vols., 1830-1834	Eng.
B. & Ald.	Barnewall and Alderson's Reports, King's Bench, 5 vols., 1817-1822	Eng.
B. & C.	Barnewall and Crosswell's Reports, King's Bench, 10 vols., 1822-1830	Eng.
B. & C. R. (preceded by date)	Reports of Bankruptcy and Companies Winding up Cases, 1918-(current) (<i>e.g.</i> , [1918-19] B. & C. R.)	Eng.
B. & S.	Best and Smith's Reports, Queen's Bench, 10 vols., 1861-1870	Eng.
B. C. R.	British Columbia Reports	Can.
B. Dig.	Bose's Digest	Ind.
B. L. R.	Bengal Law Reports	Ind.
B. L. R. A. C.	Bengal Law Reports, Appeal Cases	Ind.
B. L. R. P. C.	Bengal Law Reports, Privy Council	Ind.
B. L. R. Sup. Vol.	Bengal Law Reports, Supp. Vol.	Ind.
B. W. C. C.	Butterworths' Workmen's Compensation Cases, 1907-(current)	Eng.
Bac. Abr.	Bacon's Abridgment	Eng.
Bail Ct. Cas.	Bail Court Cases (Lowndes and Maxwell), 1 vol., 1852-1854	Eng.
Baild.	Baildon's Select Cases in Chancery (Selden Society, Vol. X.)	Eng.
Ball & B.	Ball and Beatty's Reports, Chancery (Ireland), 2 vols., 1807-1814	Ir.

Cl. & Sc. Dr. Cas.	...	Clark and Scully's Drainage Cases	...	...	...	Can.
Clay.	...	Clayton's Reports and Pleas of Assizes at Yorke, 1 vol., 1631—1650	...	...	...	Eng.
Clif. & Rick.	...	Clifford and Rickards' Locus Standi Reports, 3 vols., 1873—1884	...	...	...	Eng.
Clif. & Steph.	...	Clifford and Stephens' Locus Standi Reports, 2 vols., 1867—1872	...	...	...	Eng.
Co. A.	...	Cook's Lower Canada Admiralty Court Cases	...	...	...	Can.
Co. Ent.	...	Coke's Entries	...	...	...	Eng.
Co. Inst.	...	Coke's Institutes	...	...	...	Eng.
Co. L. J.	...	Colonial Law Journal	...	...	...	N.Z.
Co. Litt.	...	Coke on Littleton (1 Inst.)	...	...	...	Eng.
Co. Rep.	...	Coke's Reports, 13 parts, 1572—1616	...	...	...	Eng.
Coch.	...	Nova Scotia Reports (Cochran)	...	...	...	Can.
Cockb. & Rowe	...	Cockburn and Rowe's Election Cases, 1 vol., 1833	...	...	...	Eng.
Coll.	...	Collyer's Reports, Chancery, 2 vols., 1844—1846	...	...	...	Eng.
Coll. Jurid.	...	Collectanea Juridica, 2 vols.	...	...	...	Eng.
Colles	...	Colles' Cases in Parliament, 1 vol., 1697—1713	...	...	...	Eng.
Coll.	...	Coltman's Registration Cases, 1 vol., 1879—1885	...	...	...	Eng.
Com.	...	Comyns' Reports, King's Bench, Common Pleas, and Exchequer, fol., 2 vols., 1695—1740	...	...	...	Eng.
Com. Cas.	...	Commercial Cases, 1895—(current)	...	...	...	Eng.
Com. Dig.	...	Comyns' Digest	...	...	...	Eng.
Comb.	...	Comberbach's Reports, King's Bench, fol., 1 vol., 1685—1698	...	...	...	Eng.
Con. & Law.	...	Connor and Lawson's Reports, Chancery (Ireland), 2 vols., 1841—1843	...	...	...	Ir.
Cong. Dig.	...	Congdon's Digest	...	...	...	Can.
Const.	...	Const's edition of Bott's Poor Laws, 3 vols., 1807	...	...	...	Eng.
Cooke & Al.	...	Cooke and Alcock's Reports, King's Bench (Ireland), 1 vol., 1833—1834	...	...	...	Ir.
Cooke, Pr. Cas.	...	Cooke's Practice Reports, Common Pleas, 1 vol., 1706—1747	...	...	...	Eng.
Cooke, Pr. Reg.	...	Cooke's Practical Register of the Common Pleas, 1 vol., 1702—1742	...	...	...	Eng.
Coop. G.	...	G. Cooper's Reports, Chancery, 1 vol., 1792—1815	...	...	...	Eng.
Coop. Pr. Cas.	...	C. P. Cooper's Reports, Chancery Practice, 1 vol., 1837—1838	...	...	...	Eng.
Coop. temp. Brough.	...	C. P. Cooper's Cases temp. Brougham, Chancery, 1 vol., 1833—1834	...	...	...	Eng.
Coop. temp. Cott.	...	C. P. Cooper's Cases temp. Cottenham, Chancery, 2 vols., 1840—1848 (and miscellaneous earlier cases)	...	...	...	Eng.
Cor.	...	Coryton's Reports	...	...	...	Ind.
Corb. & D.	...	Corbett and Daniell's Election Cases, 1 vol., 1819	...	...	...	Eng.
Correspondances Jud.	...	Correspondances Judiciaires	...	...	...	Can.
Couper	...	Couper's Justiciary Reports (Scotland), 5 vols., 1868—1885	...	...	...	Scot.
Cout.	...	Coutlees' Unreported Cases	...	...	...	Can.
Cout. Dig.	...	Coutlees' Digest	...	...	...	Can.
Cowp.	...	Cowper's Reports, King's Bench, 2 vols., 1774—1778	...	...	...	Eng.
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Exch.	...	Exchequer Reports (Welsby, Hurlstone, and Gordon), 11 vols., 1847—1856	...	Eng.
Exch. C. R.	...	Exchequer Court Reports	...	Can.
F. (Cl. of Sess.)	...	Fraser, Court of Session Cases (Scotland), 5th series, 1898—1906	...	Scot.
F.	...	Foord's Reports of the Supreme Court of the Cape of Good Hope, 1870—1880	...	S. Af.
F. & F.	...	Foster and Finlason's Reports, Nisi Prius, 4 vols., 1856—1867	...	Eng.
F. N. D.	...	Finnemore's Notes and Digest of Natal Cases, 1863—1867	...	S. Af.
Fac. Coll.	...	Faculty of Advocates, Collection of Decisions, Court of Session (Scotland), 38 vols., 1752—1841	...	Scot.
Falc.	...	Falconer's Decisions, Court of Session (Scotland), 2 vols., fol., 1744—1751	...	Scot.
Falc. & Fitz.	...	Falconer and Fitzherbert's Election Cases, 1 vol., 1835—1838	...	Eng.
Fenton	...	Fenton, Important Judgments	...	N.Z.
Ferg.	...	Ferguson's Consistorial Decisions (Scotland), 1 vol., 1811—1817	...	Scot.
Fitz. Nat. Brev.	...	Fitzherbert's Natura Brevium	...	Eng.
Fitz-G.	...	Fitz-Gibbons' Reports, King's Bench, fol., 1 vol., 1727—1731	...	Eng.
Fl. & K.	...	Flanagan and Kelly's Reports, Rolls Court (Ireland), 1 vol., 1840—1842	...	Ir.
Fonbl.	...	Fonblanque's Reports, Bankruptcy, 2 parts, 1819—1852	...	Eng.
For.	...	Forrest's Reports, Exchequer, 1 vol., 1800—1801	...	Eng.
Forb.	...	Forbes' Decisions, Court of Session (Scotland), fol., 1 vol., 1705—1713	...	Scot.
Fort. De Laud.	...	Fortesque, De Laudibus Legum Angliæ	...	Eng.
Fortes. Rep.	...	Fortescue's Reports, fol., 1 vol., 1692—1736	...	Eng.
Post.	...	Postler's Crown Cases, 1 vol., 1708—1760	...	Eng.
Count.	...	Fountainhall's Decisions, Court of Session (Scotland), fol., 2 vols., 1678—1712	...	Scot.
Fox & S. Ir.	...	M. C. Fox and T. B. C. Smith's Reports, King's Bench (Ireland), 2 vols., 1822—1825	...	Ir.
Fox & S. Reg.	...	J. S. Fox and C. L. Smith's Registration Cases, 1 vol., 1880—1895	...	Eng.
Fraser.	...	Fraser (Simon), Election Cases, 2 vols., 1793	...	Eng.
Freem. Ch.	...	Freeman's Reports, Chancery, 1 vol., 1660—1700	...	Eng.
Freem. K. B.	...	Freeman's Reports, King's Bench and Common Pleas, 1 vol., 1670—1704	...	Eng.
G.	...	Gregorowski's Reports of the High Court of the Orange Free State from 1883	...	S. Af.
G. & R.	...	Nova Scotia Reports (Geldert & Russell)	...	Can.
G. I. Dig.	...	General Index Digest	...	Can.
Gale & Dav.	...	Gale and Davison's Reports, Queen's Bench, 3 vols., 1841—1843	...	Eng.
Gale	...	Gale's Reports, Exchequer, 2 vols., 1835—1836	...	Eng.
Gaz. L. R.	...	New Zealand Gazette Law Reports	...	N.Z.
Geld. Dig.	...	Geldert's Digest	...	Can.
Gib. Cod.	...	Gibson's Codex Juris Ecclesiastici Anglicani	...	Eng.
Giff.	...	Giffard's Reports, Chancery, 5 vols., 1857—1865	...	Eng.
Gilb.	...	Gilbert's Cases in Law and Equity, 1 vol., 1713—1714	...	Eng.
Gilb. C. P.	...	Gilbert's History and Practice of the Court of Common Pleas	...	Eng.
Gilb. Ch.	...	Gilbert's Reports, Chancery and Exchequer, fol., 1 vol., 1706—1726	...	Eng.
Gilm. & F.	...	Gilmour and Falconer's Decisions, Court of Session (Scotland), 2 parts, Part I. (Gilmour) 1661—1666, Part II. (Falconer) 1661—1680	...	Scot.
G. & J.	...	Glyn and Jameson's Reports, Bankruptcy, 2 vols., 1819—1828	...	Eng.
Glanv.	...	Glanville, De Legibus et Consuetudinibus Regni Angliæ	...	Eng.
Glanv. El. Cas.	...	Glanville's Election Cases, 1 vol., 1623—1624	...	Eng.
Glasecock	...	Glasecock's Reports (Ireland), 1 vol., 1831—1832	...	Ir.
Godb.	...	Godbolt's Reports, King's Bench, Common Pleas, and Exchequer, 1 vol., 1574—1637	...	Eng.
Gouldsb.	...	Gouldsbrough's Reports, Queen's Bench and King's Bench, 1 vol., 1586—1601	...	Eng.
Gow	...	Gow's Reports, Nisi Prius, 1 vol., 1818—1820	...	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Gr.	...	...	Upper Canada Chancery (Grant) ...	...	...	...	...	Can.
Griffin's Patent Cases	...	...	Griffin's Patent Cases, 1884—1887	...	...	...	...	Eng.
Gwill.	...	...	Gwillim's Tithe Cases, 4 vols., 1224—1824	...	...	...	...	Eng.
H.	...	...	Hertzog's Reports of the High Court of the South African Republic, 1893	...	...	...	...	S. Af.
H. & C.	...	...	Hurlstone and Coltman's Reports, Exchequer, 4 vols., 1862—1868	...	...	...	...	Eng.
H. & N.	...	...	Hurlstone and Norman's Reports, Exchequer, 7 vols., 1856—1862	...	...	...	...	Eng.
H. & Tw.	...	...	Hall and Twells' Reports, Chancery, 2 vols., 1848—1850	...	...	...	...	Eng.
H. & W.	...	...	Hurlstone and Walmsley's Reports, Exchequer, 1 vol., 1840—1841	...	...	...	...	Eng.
H. B. R. (preceded by date)	...	...	Hansell's Reports of Bankruptcy and Companies' Winding up Cases, 3 vols., 1915—1917 (e.g., [1915] H. B. R.)	...	...	...	...	Eng.
H. C.	...	...	Reports of the High Court of Griqualand West	...	...	...	...	S. Af.
H. E. C.	...	...	Hodgin's Election Reports	...	...	...	...	Can.
H. L. Cas.	...	...	Clark's Reports, House of Lords, 11 vols., 1847—1866	...	...	...	...	Eng.
Hag. Adm.	...	...	Haggard's Reports, Admiralty, 3 vols., 1822—1838	...	...	...	...	Eng.
Hag. Con.	...	...	Haggard's Consistorial Reports, 2 vols., 1789—1821	...	...	...	...	Eng.
Hag. Ecc.	...	...	Haggard's Ecclesiastical Reports, 4 vols., 1827—1833	...	...	...	...	Eng.
Hailes	...	...	Hailes's Decisions, Court of Session (Scotland), 2 vols., 1766—1791	...	...	...	...	Scot.
Hale, C. L.	...	...	Hale's Common Law	...	...	...	...	Eng.
Hale, P. C.	...	...	Hale's Pleas of the Crown, 2 vols.	...	...	...	...	Eng.
Han.	...	...	New Brunswick Reports (Hannay)	...	...	...	...	Can.
Har. & Ruth.	...	...	Harrison and Rutherford's Reports, Common Pleas, 1 vol., 1865—1866	...	...	...	...	Eng.
Har. & W.	...	...	Harrison and Wollaston's Reports, King's Bench and Bail Court, 2 vols., 1835—1836	...	...	...	...	Eng.
Harc.	...	...	Harcarse's Decisions, Court of Session (Scotland), fol., 1 vol., 1681—1691	...	...	...	...	Scot.
Hard.	...	...	Hardres' Reports, Exchequer, fol., 1 vol., 1655—1669	...	...	...	...	Eng.
Hare	...	...	Hare's Reports, Chancery, 11 vols., 1841—1853	...	...	...	...	Eng.
Hawk. P. C.	...	...	Hawkins's Pleas of the Crown, 2 vols.	...	...	...	...	Eng.
Hay	...	...	Hay's Reports	...	...	...	...	Ind.
Hay & Marr.	...	...	Hay & Marriott's Decisions, Admiralty, 1 vol., 1776—1779	...	...	...	...	Eng.
Hayes	...	...	Hayes's Reports, Exchequer (Ireland), 1 vol., 1830—1832	...	...	...	...	Ir.
Hayes & Jo.	...	...	Hayes and Jones's Reports, Exchequer (Ireland), 1 vol., 1832—1834	...	...	...	...	Ir.
Hem. & M.	...	...	Hemming and Miller's Reports, Chancery, 2 vols., 1862—1865	...	...	...	...	Eng.
Het.	...	...	Hetley's Reports, Common Pleas, fol., 1 vol., 1627—1631	...	...	...	...	Eng.
Hob.	...	...	Hobart's Reports, Common Pleas, fol., 1 vol., 1613—1625	...	...	...	...	Eng.
Hodg.	...	...	Hodges' Reports, Common Pleas, 3 vols., 1835—1837	...	...	...	...	Eng.
Hog.	...	...	Hogan's Reports, Rolls Court (Ireland), 2 vols., 1816—1834	...	...	...	...	Ir.
Holt, Adm.	...	...	W. Holt's Rule of the Road Cases, Admiralty, 1 vol., 1863—1867	...	...	...	...	Eng.
Holt, Eq.	...	...	W. Holt's Equity Reports, 2 vols., 1845...	...	...	...	...	Eng.
Holt, K. B.	...	...	Sir John Holt's Reports, King's Bench, fol., 1 vol., 1688—1710	...	...	...	...	Eng.
Holt, N. P.	...	...	F. Holt's Reports, Nisi Prius, 1 vol., 1815—1817	...	...	...	...	Eng.
Home, Ct. of Sess.	...	...	Home's Decisions, Court of Session (Scotland), fol., 1 vol., 1735—1744	...	...	...	...	Scot.
Hong Kong L. R.	...	...	Hong Kong Law Reports	...	...	...	...	Hong Kong
Hop. & Colt.	...	...	Hopwood and Coltman's Registration Cases, 2 vols., 1868—1878	...	...	...	...	Eng.
Hop. & Ph.	...	...	Hopwood and Philbrick's Registration Cases, 1 vol., 1863—1867	...	...	...	...	Eng.
Horn & H.	...	...	Horn and Hurlstone's Reports, Exchequer, 2 vols., 1838—1839	...	...	...	...	Eng.
Hov. Supp.	...	...	Hovenden's Supplement to Vesey Jun.'s Reports, Chancery, 2 vols., 1753—1817	...	...	...	...	Eng.
How. C.	...	...	Howard's Chancery Practice	...	...	...	...	Ir.
How. C. S.	...	...	Howard's Supplement to Rules, etc., of the High Court of Chancery in Ireland	...	...	...	...	Ir.
How. E. E.	...	...	Howard's Equity Exchequer	...	...	...	...	Ir.
How. P. L.	...	...	Howard on the Popery Laws	...	...	...	...	Ir.
Hud. & B.	...	...	Hudson and Brooke's Reports, King's Bench and Exchequer (Ireland), 2 vols., 1827—1831	...	...	...	...	Ir.
Hudson's B. C.	...	...	Hudson on Building Contracts, 2 vols.	...	...	...	...	Eng.
Hume	...	...	Hume's Decisions, Court of Session (Scotland), 1 vol., 1781—1822	...	...	...	...	Scot.
Hut.	...	...	Hutton's Reports, Common Pleas, fol., 1 vol., 1617—1638	...	...	...	...	Eng.
Hy. Bl.	...	...	Henry Blackstone's Reports, Common Pleas, 2 vols., 1788—1796	...	...	...	...	Eng.
Hyde	...	...	Hyde's Reports	...	...	...	...	Ind.
I. C. L. R.	...	...	Irish Common Law Reports, 17 vols., 1849—1866	...	...	...	...	Ir.
I. Ch. R.	...	...	Irish Chancery Reports, 17 vols., 1850—1867	...	...	...	...	Ir.
I. Eq. R.	...	...	Irish Equity Reports, 13 vols., 1838—1851	...	...	...	...	Ir.
I. L. R.	...	...	Irish Law Reports, 13 vols., 1838—1851	...	...	...	...	Ir.
I. L. R. (Vol.) All.	...	...	Indian Law Reports, Allahabad	...	...	...	...	Ind.
I. L. R. (Vol.) Bom.	...	...	Indian Law Reports, Bombay	...	...	...	...	Ind.
I. L. R. (Vol.) Calc.	...	...	Indian Law Reports, Calcutta	...	...	...	...	Ind.
I. L. R. (Vol.) Lah.	...	...	Indian Law Reports, Lahore	...	...	...	...	Ind.

xx **REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.**

I. L. R. (Vol.) Mad.	...	Indian Law Reports, Madras	...	...	...	...	...	Ind.
I. L. T.	...	Irish Law Times, 1867—(current)	...	...	...	...	...	Ir.
I. L. T. Jo.	...	Irish Law Times Journal, 1867—(current)	...	...	...	...	...	Ir.
I. R. (preceded by date)	...	Irish Reports, since 1893 (<i>e.g.</i> , [1894] 1 I. R.)	...	...	...	...	...	Ir.
I. R. (Vol.) C. L.	...	Irish Reports, Common Law, 11 vols., 1866—1877	...	...	...	...	...	Ir.
I. R. Eq.	...	Irish Reports, Equity, 11 vols., 1866—1877	...	...	...	...	...	Ir.
I. R., R. & L.	...	Irish Reports, Registry Appeals in the Court of Exchequer Chamber and Appeals in the Court for Land Cases Reserved, 1 vol., 1868—1876	...	...	...	...	...	Ir.
Ind. Awards	...	Industrial Awards Recommendations	...	...	...	...	...	N.Z.
Ind. Jur. N. S.	...	Indian Jurist, New Series	...	...	...	...	...	Ind.
Ind. Jur. O. S.	...	Indian Jurist, Old Series	...	...	...	...	...	Ind.
Ir. Cir. Rep.	...	Reports of Irish Circuit Cases, 1 vol., 1841—1843	...	...	...	...	...	Ir.
Ir. Jur.	...	Irish Jurist, 18 vols., 1849—1866	...	...	...	...	...	Ir.
Ir. L. Rec. 1st ser.	...	Law Recorder (Ireland), 1st series, 4 vols., 1827—1831	...	...	...	...	...	Ir.
Ir. L. Rec. N. S.	...	Law Recorder (Ireland), New Series, 6 vols., 1833—1838	...	...	...	...	...	Ir.
Irv.	...	Irvine's Justiciary Reports (Scotland), 5 vols., 1852—1867	...	...	...	...	...	Scot.
J. Bridg.	...	Sir John Bridgman's Reports, Common Pleas, fol., 1 vol., 1613—1621	...	...	...	...	...	Eng.
J. D. R.	...	Juta's Daily Reporter, reporting Cases in the Cape Provincial Division	...	...	...	...	...	S. Af.
P.	...	Justice of the Peace, 1837—(current)	...	...	...	...	...	Eng.
P. Jo.	...	Justice of the Peace (Weekly Notes of Cases)	...	...	...	...	...	Eng.
R.	...	Jurist Reports	...	...	...	...	...	N.Z.
R. N. S.	...	Jurist Reports, New Series	...	...	...	...	...	N.Z.
Shaw, Just.	...	J. Shaw's Justiciary Reports (Scotland), 1 vol., 1848—1852	...	...	...	...	...	Scot.
Jac.	...	Jacob's Reports, Chancery, 1 vol., 1821—1823	...	...	...	...	...	Eng.
Jac. & W.	...	Jacob and Walker's Reports, Chancery, 2 vols., 1819—1821	...	...	...	...	...	Eng.
James	...	Nova Scotia Reports (James)	...	...	...	...	...	Can.
Jebb & B.	...	Jebb and Bourke's Reports, Queen's Bench (Ireland), 1 vol., 1841—1842	...	...	...	...	...	Ir.
Jebb & S.	...	Jebb and Symes' Reports, Queen's Bench (Ireland), 2 vols., 1838—1841	...	...	...	...	...	Ir.
Jebb, C. G.	...	Jebb's Crown Cases Reserved (Ireland), 1 vol., 1822—1840	...	...	...	...	...	Ir.
Jebb, Cr. & Pr. Cas.	...	Jebb's Crown and Presentment Cases	...	...	...	...	...	Ir.
Jenk.	...	Jenkins' Reports, 1 vol., 1220—1623	...	...	...	...	...	Eng.
Jo. & Car.	...	Jones and Carey's Reports, Exchequer (Ireland), 1 vol., 1838—1839	...	...	...	...	...	Eng.
Jo. & Lat.	...	Jones and La Touche's Reports, Chancery (Ireland), 3 vols., 1844—1846	...	...	...	...	...	Ir.
Jo. Ex. Ir.	...	T. Jones' Reports, Exchequer (Ireland), 2 vols., 1834—1838	...	...	...	...	...	Ir.
John.	...	Johnson's Reports, Chancery, 1 vol., 1858—1860	...	...	...	...	...	Eng.
John. & H.	...	Johnson and Henning's Reports, Chancery, 2 vols., 1859—1862	...	...	...	...	...	Eng.
Jur.	...	Jurist Reports, 18 vols., 1837—1854	...	...	...	...	...	Eng.
Jur. N. S.	...	Jurist Reports, New Series, 12 vols., 1855—1867	...	...	...	...	...	Eng.
K.	...	Kotze's Reports of the High Court of the Transvaal Province, 1877—1881	...	...	...	...	...	S. Af.
K. & G.	...	Keane and Grant's Registration Cases, 1 vol., 1854—1862	...	...	...	...	...	Eng.
K. & J.	...	Kay and Johnson's Reports, Chancery, 4 vols., 1854—1858	...	...	...	...	...	Eng.
K. B. (preceded by date)	...	Law Reports, King's Bench Division, since 1900 (<i>e.g.</i> , [1901] 2 K. B.)	...	...	...	...	...	Eng.
Kames, Dict. Dec.	...	Kames, Dictionary of Decisions, Court of Session (Scotland), fol., 2 vols., 1540—1741	...	...	...	...	...	Scot.
Kames, Rem. Dec.	...	Kames, Remarkable Decisions, Court of Session (Scotland), 2 vols., 1716—1752	...	...	...	...	...	Scot.
Kames, Sel. Dec.	...	Kames, Select Decisions, Court of Session (Scotland), 1 vol., 1752—1768	...	...	...	...	...	Scot.
Kay	...	Kay's Reports, Chancery, 1 vol., 1853—1854	...	...	...	...	...	Eng.
Keb.	...	Keble's Reports, fol., 3 vols., 1661—1677	...	...	...	...	...	Eng.
Keen	...	Keen's Reports, Rolls Court, 2 vols., 1836—1838	...	...	...	...	...	Eng.
Kell.	...	Kellwey's Reports, King's Bench, fol., 1 vol., 1327—1578	...	...	...	...	...	Eng.
Kel.	...	Sir John Kelyng's Reports, Crown Cases, fol., 1 vol., 1662—1707	...	...	...	...	...	Eng.
Kel. W.	...	W. Kelynge's Reports, fol., 1 vol., Chancery, 1730—1732; King's Bench, fol., 1731—1731	...	...	...	...	...	Eng.
Keny.	...	Kenyon's Notes of Cases, King's Bench, 2 vols., 1753—1750	...	...	...	...	...	Eng.
Keny. Ch.	...	Chancery Cases in Vol. II. of Kenyon's Notes of Cases, 1753—1754	...	...	...	...	...	Eng.
Kerr	...	New Brunswick Reports (Kerr)	...	...	...	...	...	Can.
Kilkerran	...	Kilkerran's Decisions, Court of Session (Scotland), fol., 1 vol., 1738—1752	...	...	...	...	...	Scot.
Kn. & Omb.	...	Knapp and Ombler's Election Cases, 1 vol., 1831—1835	...	...	...	...	...	Eng.
Knapp	...	Knapp's Reports, Privy Council, 3 vols., 1829—1836	...	...	...	...	...	Eng.
Knox	...	Knox's Reports	...	...	...	...	...	...
Konst. & W. Rat. App.	...	Konstam and Ward's Reports of Rating Appeals, 1 vol., 1909—1912	...	...	...	...	...	Eng.
Konst. Rat. App.	...	Konstam's Reports of Rating Appeals, 2 vols., 1904—1908	...	...	...	...	...	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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L. & G. <i>temp.</i> Plunk.	...	Lloyd and Gould's Reports <i>temp.</i> Plunkett, Chancery (Ireland), 1 vol., 1834—1839	...	Ir.
L. & G. <i>temp.</i> Sugd.	...	Lloyd and Gould's Reports <i>temp.</i> Sugden, Chancery (Ireland), 1 vol., 1835	...	Ir.
L. & Welsb.	...	Lloyd and Welsby's Commercial and Mercantile Cases, 1 vol., 1829—1830	...	Eng.
L. C. & M. Gaz.	...	Local Courts and Municipal Gazette	...	Can.
L. C. J.	...	Lower Canada Jurist	...	Can.
L. C. L. J.	...	Lower Canada Law Journal	...	Can.
L. C. R.	...	Lower Canada Reports	...	Can.
L. G. R.	...	Local Government Reports, 1902—(current)	...	Eng.
L. J. Adm.	...	Law Journal, Admiralty, 1865—1875	...	Eng.
L. J. Bey.	...	Law Journal, Bankruptcy, 1832—1880	...	Eng.
L. J. C. C.	...	Law Journal (County Courts Reporter), 1912—(current)	...	Eng.
L. J. C. P.	...	Law Journal, Common Pleas, 1831—1875	...	Eng.
L. J. Ch.	...	Law Journal, Chancery, 1831—(current)	...	Eng.
L. J. Eccl.	...	Law Journal, Ecclesiastical Cases, 1866—1875	...	Eng.
L. J. Ex.	...	Law Journal, Exchequer, 1831—1875	...	Eng.
L. J. Ex. Eq.	...	Law Journal, Exchequer in Equity, 1835—1841	...	Eng.
L. J. K. B. or Q. B.	...	Law Journal, King's Bench or Queen's Bench, 1831—(current)	...	Eng.
L. J. M. C.	...	Law Journal, Magistrates' Cases, 1831—1890	...	Eng.
L. J. N. C.	...	Law Journal, Notes of Cases, 1800—1892 (from 1803, see Law Journal)	...	Eng.
L. J. O. S.	...	Law Journal, Old Series, 10 vols., 1822—1831	...	Eng.
L. J. P.	...	Law Journal, Probate, Divorce and Admiralty, 1875—(current)	...	Eng.
L. J. P. & M.	...	Law Journal, Probate and Matrimonial Cases, 1858—1859, 1860—1875	...	Eng.
L. J. P. C.	...	Law Journal, Privy Council, 1865—(current)	...	Eng.
L. J. P. M. & A.	...	Law Journal, Probate, Matrimonial and Admiralty, 1860—1865	...	Eng.
L. Jo.	...	Law Journal Newspaper, 1896—(current)	...	Eng.
L. L. R.	...	Leader Law Reports	...	S. Af.
L. M. & P.	...	Lowndes, Maxwell, and Pollock's Reports, Bail Court and Practice, 2 vols., 1850—1851	...	Eng.
L. N.	...	Legal News	...	Can.
L. R. A. & E.	...	Law Reports, Admiralty and Ecclesiastical Cases, 4 vols., 1865—1875	...	Eng.
L. R. C. C. R.	...	Law Reports, Crown Cases Reserved, 2 vols., 1865—1875	...	Eng.
L. R. C. P.	...	Law Reports, Common Pleas, 10 vols., 1865—1875	...	Eng.
L. R. Eq.	...	Law Reports, Equity Cases, 20 vols., 1865—1875	...	Eng.
L. R. Exch.	...	Law Reports, Exchequer, 10 vols., 1865—1875	...	Eng.
L. R. H. L.	...	Law Reports, English and Irish Appeals and Peerage Claims, House of Lords, 7 vols., 1866—1875	...	Eng.
L. R. Ind. App.	...	Law Reports, Indian Appeals, Privy Council, 1873—(current)	...	Eng.
L. R. Ind. App. Supp. Vol.	...	Law Reports, India Appeals Privy Council, Supplementary Volume, 1872—1873	...	Eng.
L. R. Ir.	...	Law Reports (Ireland), Chancery and Common Law, 32 vols., 1877—1893	...	Ir.
L. R. P. & D.	...	Law Reports, Probate and Divorce, 3 vols., 1865—1875	...	Eng.
L. R. P. C.	...	Law Reports, Privy Council, 6 vols., 1865—1875	...	Eng.
L. R. Q. B.	...	Law Reports, Queen's Bench, 10 vols., 1865—1875	...	Eng.
L. R. Q. B.	...	Quebec Reports, Queen's Bench	...	Can.
L. R. Sc. & Div.	...	Law Reports, Scotch and Divorce Appeals, House of Lords, 2 vols., 1866—1875	...	Eng.
L. T.	...	Law Times Reports, 1859—(current)	...	Eng.
L. T. Jo.	...	Law Times Newspaper, 1843—(current)	...	Eng.
L. T. O. S.	...	Law Times Reports, Old Series, 34 vols., 1843—1860	...	Eng.
L. Th.	...	La Themis	...	Can.
Lane	...	Lane's Reports, Exchequer, fol., 1 vol., 1605—1611	...	Eng.
Lat.	...	Latch's Reports, King's Bench, fol., 1 vol., 1625—1628	...	Eng.
Laws. Reg. Cas.	...	Lawson's Registration Cases, 1895—(current)	...	Eng.
Id. Raym.	...	Lord Raymond's Reports, King's Bench and Common Pleas, 3 vols., 1694—1732	...	Eng.
Le. & Ca.	...	Leigh and Cave's Crown Cases Reserved, 1 vol., 1861—1865	...	Eng.
Leach	...	Leach's Crown Cases, 2 vols., 1730—1814	...	Eng.
Lee	...	Sir G. Lee's Ecclesiastical Judgments, 2 vols., 1724—1758	...	Eng.
Lee <i>temp.</i> Hard.	...	T. Lee's Cases <i>temp.</i> Hardwicke, King's Bench, 1 vol., 1733—1738	...	Eng.
Leg. Rep.	...	Legal Reporter	...	Ir.
Legge	...	Legge's Reports	...	Aus.
Leon.	...	Leonard's Reports, King's Bench, Common Pleas and Exchequer, fol., 4 parts, 1552—1615	...	Eng.
Lev.	...	Levinz's Reports, King's Bench and Common Pleas, fol., 3 vols., 1660—1696	...	Eng.
Lew. C. C.	...	Lewin's Crown Cases on the Northern Circuit, 2 vols., 1822—1838	...	Eng.
Ley	...	Ley's Reports, King's Bench, fol., 1 vol., 1608—1629	...	Eng.

Lib. Ass.	...	Liber Assisarum, Year Books, 1—51 Edw. III.	...	Eng.
Lilly	...	Lilly's Reports and Pleadings of Cases in Assize, fol., 1 vol.	...	Eng.
Litt.	...	Littleton's Reports, Common Pleas, fol., 1 vol., 1627—1631	...	Eng.
Lloyd, L. R.	...	Lloyd's List Law Reports, 1919—(current)	...	Eng.
Lloyd, Pr. Cas.	...	Lloyd's Reports of Prize Cases, 5 vols., 1914—1918	...	Eng.
Lofft	...	Lofft's Reports, King's Bench, fol., 1 vol., 1772—1774	...	Eng.
Long. & T.	...	Longfield and Townsend's Reports, Exchequer (Ireland), 1 vol., 1841—1842	...	Ir.
Lords Journals	...	Journals of the House of Lords	...	Eng.
Lud. E. C.	...	Luder's Election Cases, 3 vols., 1784—1787	...	Eng.
Lumley, P. L. C.	...	Lumley's Poor Law Cases, 2 vols., 1834—1842	...	Eng.
Lush.	...	Lushington's Reports, Admiralty, 1 vol., 1859—1862	...	Eng.
Lut.	...	Sir E. Lutwyche's Entries and Reports, Common Pleas, 2 vols., 1682—1704	...	Eng.
Lut. Reg. Cas.	...	A. J. Lutwyche's Registration Cases, 2 vols., 1843—1853	...	Eng.
Lynd.	...	Lyndwood, Provinciale, fol., 1 vol.	...	Eng.
M.	...	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	...	S. Af.
M. & S.	...	Maule and Selwyn's Reports, King's Bench, 6 vols., 1813—1817	...	Eng.
M. & W.	...	Meeson and Welsby's Reports, Exchequer, 10 vols., 1836—1847	...	Eng.
M. C. R.	...	Montreal Condensed Reports	...	Can.
M. H. C. R.	...	Madras High Court Reports	...	Ind.
M. L. R. (Vol.) K. B. or Q. B.	...	Montreal Law Reports, King's Bench or Queen's Bench	...	Can.
M. L. R. (Vol.) S. C.	...	Montreal Law Reports, Superior Court	...	Can.
M. M. Cas.	...	Martin's Reports of Mining Cases	...	Can.
Mac.	...	Macassey's New Zealand Reports	...	N.Z.
Mac. & G.	...	Macnaghten and Gordon's Reports, Chancery, 3 vols., 1849—1852	...	Eng.
Mac. & H.	...	Macrae and Hertslet's Insolvency Cases, 1 vol., 1817—1852	...	Eng.
M'Cle.	...	M'Clelland's Reports, Exchequer, 1 vol., 1824	...	Eng.
M'Cle. & Yo.	...	M'Clelland and Younge's Reports, Exchequer, 1 vol., 1824—1825	...	Eng.
Macfarlane	...	Macfarlane's Jury Trials, Court of Session (Scotland), 3 parts, 1838—1839	...	Scot.
Macf. & Rob.	...	Maclean and Robinson's Scotch Appeals (House of Lords), 1 vol., 1839	...	Scot.
Macph. (Ct. of Sess.)	...	Macpherson, Court of Session (Scotland), 3rd series, 11 vols., 1802—1873	...	Scot.
Macq.	...	Macqueen's Scotch Appeals, House of Lords, 4 vols., 1819—1865	...	Scot.
Macr.	...	Macrory's Patent Cases, 2 parts, 1847—1856	...	Eng.
Mad.	...	Madras High Court Reports	...	Ind.
Madd.	...	Maddock's Reports, Chancery, 6 vols., 1815—1821	...	Eng.
Madd. & G.	...	Maddock and Geldart's Reports, Chancery, 1 vol., 1819—1822 (Vol. VI. of Madd.)	...	Eng.
Madox	...	Madox's Formulæ Anglicanum	...	Eng.
Madox, Exch.	...	Madox's History and Antiquities of the Exchequer, 2 vols.	...	Eng.
Mag.	...	Magistrate and Municipal and Parochial Lawyer, London, 5 vols., 1848—1852	...	Eng.
Man. & G.	...	Manning and Granger's Reports, Common Pleas, 7 vols., 1840—1845	...	Eng.
Man. & Ry. K. B.	...	Manning and Ryland's Reports, King's Bench, 5 vols., 1827—1830	...	Eng.
Man. & Ry. M. C.	...	Manning and Ryland's Magistrates' Cases, 3 vols., 1827—1830	...	Eng.
Man. L. J.	...	Manitoba Law Journal	...	Can.
Man. L. R.	...	Manitoba Law Reports	...	Can.
Man. R. temp. Wood	...	Manitoba Reports temp. Wood	...	Can.
Mans.	...	Manson's Bankruptcy and Company Cases, 21 vols., 1893—1914	...	Eng.
Mar. L. C.	...	Maritime Law Reports (Crockford), 3 vols., 1860—1871	...	Eng.
March	...	March's Reports, King's Bench and Common Pleas, 1 vol., 1639—1642	...	Eng.
Marr.	...	Hay & Marriott's Decisions, Admiralty, 1 vol., 1770—1779	...	Eng.
Marsh.	...	Marshall's Reports, Common Pleas, 2 vols., 1813—1816	...	Eng.
Marsh.	...	Marshall's Reports	...	Ind.
Mayn.	...	Maynard's Reports, Exchequer Memoranda of Edw. I. and Year Books of Edw. II., Year Books, Part I., 1273—1326	...	Eng.
Meg.	...	Megone's Companies Acts Cases, 2 vols., 1889—1891	...	Eng.
Men.	...	Menzie's Reports of the Supreme Court of the Cape of Good Hope, 1828—1850	...	S. Af.
Mer.	...	Merivale's Reports, Chancery, 3 vols., 1815—1817	...	Eng.
Milw.	...	Milward's Ecclesiastical Reports (Ireland), 1 vol., 1819—1843	...	Ir.
Mod. Rep.	...	Modern Reports, 12 vols., 1669—1755	...	Eng.
Mol.	...	Molloy's Report's, Chancery (Ireland), 3 vols., 1808—1831	...	Ir.
Mont.	...	Montagu's Reports, Bankruptcy, 1 vol., 1829—1832	...	Eng.
Mont. & A.	...	Montagu and Ayrton's Reports, Bankruptcy, 3 vols., 1832—1838	...	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Mont. & B. ...	Montagu and Bligh's Reports, Bankruptcy, 1 vol., 1832—1833	Eng.
Mont. & Ch. ...	Montagu and Chitty's Reports, Bankruptcy, 1 vol., 1838—1840	Eng.
Mont. & M. ...	Montagu and Macarthur's Reports, Bankruptcy, 1 vol., 1826—1830	Eng.
Mont. D. & De G. ...	Montagu, Deacon, and De Gex's Reports, Bankruptcy, 3 vols., 1810—1844	Eng.
Moo. & P. ...	Moore and Payne's Reports, Common Pleas, 5 vols., 1827—1831	Eng.
Moo. & S. ...	Moore and Scott's Reports, Common Pleas, 4 vols., 1831—1834	Eng.
Moo. Ind. App. ...	Moore's Indian Appeal Cases, Privy Council, 14 vols., 1836—1872	Eng.
Moo. P. C. C. ...	Moore's Privy Council Cases, 15 vols., 1836—1863	Eng.
Moo. P. C. C. N. S. ...	Moore's Privy Council Cases, New Series, 9 vols., 1862—1873	Eng.
Mood. & M. ...	Moody and Malkin's Reports, Nisi Prius, 1 vol., 1826—1830	Eng.
Mood. & R. ...	Moody and Robinson's Reports, Nisi Prius, 2 vols., 1830—1844	Eng.
Mood. C. C. ...	Moody's Crown Cases Reserved, 2 vols., 1824—1844	Eng.
Moore, C. P. ...	J. B. Moore's Reports, Common Pleas, 12 vols., 1817—1827	Eng.
Moore, K. B. ...	Sir F. Moore's Reports, King's Bench, fol., 1 vol., 1485—1620	Eng.
Mor. Dict. ...	Morison's Dictionary of Decisions, Court of Session (Scotland), 43 vols., 1532—1808	Scot.
Morr. ...	Morrell's Reports, Bankruptcy, 10 vols., 1884—1893	Eng.
Mos. ...	Moseley's Reports, Chancery, fol., 1 vol., 1726—1730	Eng.
Mun. Rep. ...	Municipal Reports	Can.
Murd. Epit. ...	Murdoch's Epitome	Can.
Murp. & H. ...	Murphy and Hurlstone's Reports, Exchequer, 1 vol., 1837	Eng.
Murr. ...	Murray's Reports, Jury Court (Scotland), 5 vols., 1816—1830	Scot.
My. & Cr. ...	Myline and Craig's Reports, Chancery, 5 vols., 1835—1841	Eng.
My. & K. ...	Myline and Keen's Reports, Chancery, 3 vols., 1832—1835	Eng.
N. (preceded by date) ...	Northern Ireland Law Reports, 1925—(current) (<i>e.g.</i> , [1925] N.)	Ir.
N. A. C. ...	Native Appeal Cases	S. Af.
N. & S. ...	Nichols and Stop's Reports (Tasmania)	Tasmania
N. B. Dig. ...	New Brunswick Digest (Stevens)	Can.
N. B. Eq. Rep. ...	New Brunswick Equity Reports	Can.
N. B. R. ...	New Brunswick Reports	Can.
N. B. R. (All.) ...	New Brunswick Reports (Allen)	Can.
N. B. R. (Ber.) ...	New Brunswick Reports (Berton)	Can.
N. B. R. (Carl.) ...	New Brunswick Reports (Carleton)	Can.
N. B. R. (Chip.) ...	New Brunswick Reports (Chipman)	Can.
N. B. R. (Han.) ...	New Brunswick Reports (Hannay)	Can.
N. B. R. (Kerr) ...	New Brunswick Reports (Kerr)	Can.
N. B. R. (P. & B.) ...	New Brunswick Reports (Pugsley and Burbidge)	Can.
N. B. R. (P. & T.) ...	New Brunswick Reports (Pugsley and Trueman)	Can.
N. B. R. (Pug.) ...	New Brunswick Reports (Pugsley)	Can.
N. B. R. (Tru.) ...	New Brunswick Reports (Trueman)	Can.
N. L. R. ...	Natal Law Reports	S. Af.
N. S. R. ...	Nova Scotia Reports	Can.
N. S. R. (Coch.) ...	Nova Scotia Reports (Cochran)	Can.
N. S. R. (G. & R.) ...	Nova Scotia Reports (Geldert & Russell)	Can.
N. S. R. (James) ...	Nova Scotia Reports (James)	Can.
N. S. R. (Old.) ...	Nova Scotia Reports (Oldrights)	Can.
N. S. R. (R. & C.) ...	Nova Scotia Reports (Russell and Chesley)	Can.
N. S. R. (R. & G.) ...	Nova Scotia Reports (Russell and Geldert)	Can.
N. S. R. (Thom.) ...	Nova Scotia Reports (Thomson)	Can.
N. S. W. Adm. or Ad. ...	New South Wales Reports, Admiralty	Aus.
N. S. W. B. ...	New South Wales Reports, Bankruptcy	Aus.
N. S. W. Bkpty. Cas. ...	New South Wales Bankruptcy Cases	Aus.
N. S. W. Eq. ...	New South Wales Reports, Equity	Aus.
N. S. W. Ind. Arbtrn. Cas. ...	New South Wales Industrial Arbitration Cases	Aus.
N. S. W. L. R. ...	New South Wales Law Reports	Aus.
N. S. W. Land App. Cts. ...	New South Wales Land Appeal Courts	Aus.
N. S. W. S. C. R. (Eq.) ...	New South Wales Supreme Court Reports (Equity)	Aus.
N. S. W. S. C. R. (L.) ...	New South Wales Supreme Court Reports (Law)	Aus.
N. S. W. S. C. R. N. S. ...	New South Wales Supreme Court Reports, New Series	Aus.
N. S. W. W. N. ...	New South Wales Weekly Notes	Aus.
N. W. ...	North-Western Provinces High Court Reports	Ind.
N. W. T. R. ...	North-West Territories Reports	Can.
N. Z. Jur. ...	New Zealand Jurist	N.Z.
N. Z. Jur. Mining Law ...	New Zealand Jurist Mining Law	N.Z.
N. Z. Jur. N. S. ...	New Zealand Jurist, New Series	N.Z.
N. Z. L. R. ...	New Zealand Law Reports, 1883—(current)	N.Z.
N. Z. L. R. C. A. ...	New Zealand Law Reports, Court of Appeal, 5 vols., 1883—1887	N.Z.
Nels. ...	Nelson's Reports, Chancery, 1 vol., 1625—1693	Eng.
Nev. & M. K. B. ...	Neville and Manning's Reports, King's Bench, 6 vols., 1832—1836	Eng.
Nev. & M. M. C. ...	Neville and Manning's Magistrates' Cases, 3 vols., 1832—1836	Eng.
Nev. & P. K. B. ...	Neville and Perry's Reports, King's Bench, 3 vols., 1836—1838	Eng.
Nev. & P. M. C. ...	Neville and Perry's Magistrates' Cases, 1 vol., 1836—1837	Eng.
New Mag. Cas. ...	New Magistrates' Cases (Bittleston, Wise and Parnell), 5 vols., 1844—1850	Eng.

xxiv REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

New Pract. Cas.	...	New Practice Cases (Bittleston and others), 3 vols., 1844—1848	Eng.
New Rep.	...	New Reports, 6 vols., 1862—1865	Eng.
New Sess. Cas.	...	New Sessions Magistrates' Cases (Carrow, Hamerton, Allen, etc.), 4 vols., 1844—1851	Eng.
Nfld. L. R.	...	Newfoundland Reports	Nfld.
Nolan	...	Nolan's Magistrates' Cases, 1 vol., 1791—1793	Eng.
Notes of Cases	...	Notes of Cases in the Ecclesiastical and Maritime Courts, 7 vols., 1841—1850	Eng.
Noy	...	Noy's Reports, King's Bench, fol., 1 vol., 1558—1649	Eng.
O. B. & F.	...	Ollivier Bell and Fitzgerald's Reports	N.Z.
O. B. S. P.	...	Old Bailey Session Papers	Eng.
O. Bridg.	...	Sir Orlando Bridgman's Reports, Common Pleas, 1 vol., 1660—1660	Eng.
O. F. S.	...	Reports of the High Court of the Orange Free State, 1879—1883	S. Af.
O. L. R.	...	Ontario Law Reports	Can.
O'M. & H.	...	O'Malley and Hardcastle's Election Cases, 1869—(current)	Eng.
O. P. D.	...	South African Law Reports, Orange Free State Provincial Division	S. Af.
O. R.	...	Ontario Reports	Can.
O. R.	...	Official Reports of the South African Republic, 1894—1899	S. Af.
O. R. C.	...	Reports of the High Court of the Orange River Colony	S. Af.
O. S.	...	Upper Canada Queen's Bench, Old Series	Can.
O. W. N.	...	Ontario Weekly Notes	Can.
O. W. R.	...	Ontario Weekly Reporter	Can.
Old.	...	Nova Scotia Reports (Oldrights)	Can.
Ont. Dig.	...	Digest of Ontario Case Law, 4 vols., 1823—1900	Can.
Owen	...	Owen's Reports, King's Bench and Common Pleas, fol., 1 vol., 1557—1614	Eng.
P. (preceded by date)	...	Law Reports, Probate, Divorce, and Admiralty Division, since 1890 (<i>e.g.</i> , [1891] P.)	Eng.
P. & B.	...	New Brunswick Reports (Pugsley and Burbidge)	Can.
P. & T.	...	New Brunswick Law Reports (Pugsley and Trueman)	Can.
P. Cas.	...	Prize Cases Heard and Decided in the Prize Court During the Great War, 3 vols., 1914—1922	Eng. & Col.
P. D.	...	Law Reports, Probate, Divorce, and Admiralty Division, 15 vols., 1875—1890	Eng.
P. E. I.	...	Prince Edward Island Reports	Can.
P. R.	...	Ontario Practice	Can.
P. Wms.	...	Pecro Williams' Reports, Chancery and King's Bench, 3 vols., 1695—1735	Eng.
Palm.	...	Palmer's Reports, King's Bench, fol., 1 vol., 1619—1629	Eng.
Park.	...	Parker's Reports, Exchequer, fol., 1 vol., 1743—1767; App. 1678—1717	Eng.
Pat. App.	...	Paton's Scotch Appeals, House of Lords, 6 vols., 1726—1822	Scot.
Pater. App.	...	Paterson's Scotch Appeals, House of Lords, 2 vols., 1851—1873	Scot.
Peake	...	Peake's Reports, Nisi Prius, 1 vol., 1700—1704	Eng.
Peake, Add. Cas.	...	Peake's Additional Cases, Nisi Prius, 1 vol., 1795—1812	Eng.
Peck.	...	Peckwell's Election Cases, 2 vols., 1803—1806	Eng.
Pelham	...	Pelham (S. A.) Reports	Aus.
Per. & Dav.	...	Perry and Davison's Reports, Queen's Bench, 4 vols., 1838—1841	Eng.
Per. & Kn.	...	Perry and Knapp's Election Cases, 1 vol., 1833	Eng.
Per. C. S.	...	Perrault's Conseil Supérieur	Can.
Per. P.	...	Perrault's Prévosté de Quebec, 1726—1756	Can.
Ph.	...	Phillips' Reports, Chancery, 2 vols., 1841—1849	Eng.
Phil. El. Cas.	...	Phillips' Election Cases, 1 vol., 1780	Eng.
Phillim.	...	J. Phillimore's Ecclesiastical Reports, 3 vols., 1809—1821	Eng.
Phillim. Eccl. Jud.	...	Sir R. Phillimore's Ecclesiastical Judgments, 1 vol., 1867—1875	Eng.
Phip.	...	Phipson's Digest of Natal Reports, 1858—1859	S. Af.
Pig. & R.	...	Pigott and Rodwell's Registration Cases, 1 vol., 1843—1845	Eng.
Pitc.	...	Pitcairn's Criminal Trials (Scotland), 3 vols., 1488—1624	Scot.
Plowd.	...	Plowden's Reports, fol., 2 vols., 1550—1580, and Plowden's Quercus, Vol. I.	Eng.
Poll.	...	Pollexfen's Reports, King's Bench, fol., 1 vol., 1670—1682	Eng.
Poph.	...	Popham's Reports, King's Bench, fol., 1 vol., 1591—1627	Eng.
Pow. R. & D.	...	Power, Rodwell, and Dew's Election Cases, 2 vols., 1848—1856	Eng.
Pratt	...	Pratt's Supplement to Bott's Poor Laws, 1833	Eng.
Proc. Ch.	...	Precedents in Chancery, fol., 1 vol., 1689—1722	Eng.
Price	...	Price's Reports, Exchequer, 13 vols., 1814—1824	Eng.
Price	...	Price's Mining Commissioners' Cases	Can.
Pug.	...	New Brunswick Reports (Pugsley)	Can.
Py. R.	...	Pykes' Lower Canada Reports	Can.
Q. B.	...	Queen's Bench Reports (Adolphus and Ellis, New Series), 18 vols., 1841—1852	Eng.
Q. B. (preceded by date)	...	Law Reports, Queen's Bench Division, 1891—1901 (<i>e.g.</i> , [1891] 1 Q. B.)	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Q. B. D.	Law Reports, Queen's Bench Division, 25 vols., 1875—1890 ...	Eng.
Q. J. P.	Queensland Justice of Peace Reports	Aus.
Q. L. J.	Queensland Law Journal and Reports, 11 vols., 1870—1901 ...	Aus.
Q. L. R.	Quebec Law Reports	Can.
Q. L. R. (Beor)	Queensland Law Reports by Beor, 1876—1878	Aus.
Q. P. R.	Quebec Practice Reports	Can.
Q. R. (Vol.) K. B. or Q. B.	Rapports Judiciaires de Québec, Cour du Banc du Roi, 1892—(current)	Can.
Q. R. (Vol.) S. C.	Rapports Judiciaires de Québec, Cour Supérieure, 1892—(current)	Can.
Q. S. C. R.	Queensland Supreme Court Reports, 5 vols., 1860—1881 ...	Aus.
Q. S. R.	Queensland State Reports	Aus.
Q. W. N.	Weekly Notes, Queensland	Aus.
R.	The Reports, 15 vols., 1893—1895	Eng.
R.	Roscoe's Reports of the Supreme Court of the Cape of Good Hope, 1861—1867, 1871—1872, 1877—1878	S. Af.
R. (Ct. of Sess.)	Rettie, Court of Session Cases (Scotland), 4th series, 25 vols., 1873—1898	Scot.
R. A. C.	Ramsay, Appeal Cases	Can.
R. & C.	Nova Scotia Reports (Russell & Chesley)	Can.
R. & G.	Nova Scotia Reports (Russell and Geldert)	Can.
R. C.	La Revue Critique de Législation et de Jurisprudence de Canada	Can.
R. de J.	Revue de Jurisprudence	Can.
R. de L.	Revue de Législation et de Jurisprudence, 3 vols., 1845—1848	Can.
R. E. D.	New South Wales, Reserved and Equity Decisions	Aus.
R. E. D.	Ritchie's Equity Decisions (Russell)	Can.
R. J. R. Q.	Quebec Revised Reports	Can.
R. L. N. S.	Revue Légale, New Series, 1895—(current)	Can.
R. L. O. S.	Revue Légale, Old Series, 21 vols., 1869—1892	Can.
R. P. C.	Reports of Patent Cases, 1884 - (current)	Eng.
R. R.	Revised Reports	Eng.
Rast.	Rastell's Entries	Eng.
Rayn.	Rayner's Tithe Cases, 3 vols., 1575 - 1782	Eng.
Real Prop. Cas.	Real Property Cases, 2 vols., 1843—1847	Eng.
Rep. Ch.	Reports in Chancery, fol., 3 vols., 1615 - 1710	Eng.
Rep. in C. of A.	Reports in Courts of Appeal	N.Z.
Res. & Eq. Jud.	New South Wales Reserved and Equity Judgments	Aus.
Reserv. Cas.	Reserved Cases	Ir.
Rick. & M.	Rickards and Michael's Locus Standi Reports, 1 vol., 1885 - 1889	Eng.
Rick. & S.	Rickards and Saunders' Locus Standi Reports, 1 vol., 1890—1894	Eng.
Ridg. L. & S.	Ridgeway, Lapp, and Schoales' Reports (Ireland), 1 vol., 1793—1795	Ir.
Ridg. Parl. Rep.	Ridgeway's Parliamentary Reports (Ireland), 3 vols., 1784—1790	Ir.
Ridg. temp. II.	Ridgeway's Reports temp. Hardwicke, 1 vol., King's Bench, 1733—1736; Chancery, 1744—1746	Eng.
Ritch. Eq. Rep.	Ritchie's Equity Reports	Can.
Rob. Eccl.	Robertson's Ecclesiastical Reports, 2 vols., 1844—1853	Eng.
Rob. L. & W.	Roberts, Leeming, and Wallis' New County Court Cases, 1 vol., 1849—1851	Eng.
Robert. App.	Robertson's Scotch Appeals, House of Lords, 1 vol., 1709—1727	Scot.
Robin. App.	Robinson's Scotch Appeals, House of Lords, 2 vols., 1840—1841	Scot.
Roll. Abr.	Rolle's Abridgment of the Common Law, fol., 2 vols.	Eng.
Roll. Rep.	Rolle's Reports, King's Bench, fol., 2 vols., 1614 - 1625	Eng.
Rom.	Romilly's Notes of Cases in Equity, 1 part, 1772 - 1787	Eng.
Roscoe's B. C.	Roscoe, Digest of Building Cases	Eng.
Rose	Rose's Reports, Bankruptcy, 2 vols., 1810 - 1816	Eng.
Ross, L. C.	Ross's Leading Cases in Commercial Law (England and Scotland), 3 vols.	Eng.
Rowe	Rowe's Reports (England and Ireland), 1 vol., 1798—1823	Eng.
Rul. Cas.	Campbell's Ruling Cases, 25 vols.	Eng.
Russ.	Russell's Reports, Chancery, 5 vols., 1824 - 1829	Eng.
Russ. & M.	Russell and Mylne's Reports, Chancery, 2 vols., 1820 - 1833	Eng.
Russ. & Ry.	Russell and Ryan's Crown Cases Reserved, 1 vol., 1800—1823	Eng.
Rus. E. R.	Russell's Election Reports	Can.
Ry. & Can. Cas.	Railway and Canal Cases, 7 vols., 1835—1854	Eng.
Ry. & Can. Tr. Cas.	Railway and Canal Traffic Cases, 1855—(current)	Eng.
Ry. & M.	Ryan and Moody's Reports, Nisi Prius, 1 vol., 1823 - 1826	Eng.
Ryde & K. Rat. App.	Ryde and Konstam's Reports of Rating Appeals, 1 vol., 1894—1904	Eng.
Ryde, Rat. App.	Ryde's Rating Appeals, 3 vols., 1871—1893	Eng.
S.	Searle's Reports of the Supreme Court of the Cape of Good Hope	S. Af.
S. A. L. J.	South African Law Journal	S. Af.

xxvi REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

S. A. L. R.	South Australian Law Reports	Aus.
S. A. L. R.	South African Law Reports	S. Af.
S. A. R.	Reports of the High Court of the South Africa. Republic, 1881—1892	S. Af.
S. A. S. R.	South Australian State Reports, since 1921 (<i>e.g.</i> , [1921] S. A. S. R.)	Aus.
S. C.	Reports of the Supreme Court of the Cape of Good Hope from 1880	S. Af.
S. C. (preceded by date)	Court of Session Cases (Scotland), since 1906 (<i>e.g.</i> , [1906] S. C.)	Scot.
S. C. (H. L.) (preceded by date).	Court of Session Cases (Scotland) (House of Lords), since 1906 (<i>e.g.</i> , [1906] S. C. (H. L.))	Scot.
S. C. (J.) (preceded by date).	Court of Justiciary Cases (Scotland), since 1906 (<i>e.g.</i> , [1906] S. C. (J.))	Scot.
S. C. R.	Canada, Supreme Court Reports	Can.
S. L. T.	Scots Law Times, 1893 (current)	Scot.
S. Q. R.	Queensland State Reports	Aus.
S. R.	Reports of the High Court of Southern Rhodesia	S. Af.
S. R. C.	Stuart's Lower Canada Reports	Can.
S. R. N. S. W.	New South Wales, State Reports	Aus.
S. R. Q.	Queensland Reports, Supreme Court	Aus.
S. V. A. R.	Stuart's Vice-Admiralty Reports	Can.
Saint	Saint's Digest of Registration Cases, 1843—1906, 1 vol.	Eng.
Salk.	Salkeld's Reports, King's Bench, 3 vols., 1689—1712	Eng.
Sask. L. R.	Saskatchewan Law Reports	Can.
Sau. & Sc.	Sausee and Scully's Reports, Rolls Court (Ireland), 1 vol., 1837—1840	Ir.
Saund.	Saunders's Reports, King's Bench, 2 vols., 1666—1672	Eng.
Saund. & A.	Saunders and Austin's Locus Standi Reports, 2 vols., 1895—1904	Eng.
Saund. & B.	Saunders and Bidder's Locus Standi Reports, 1905—(current)	Eng.
Saund. & C.	Saunders and Cole's Reports, Bail Court, 2 vols., 1846—1848	Eng.
Saund. & M.	Saunders and Macrae's County Courts and Insolvency Cases (County Courts Cases and Appeals, Vols. II. and III.), 2 vols., 1852—1858	Eng.
Sav.	Savile's Reports, Common Pleas, fol., 1 vol., 1580—1591	Eng.
Say.	Sayer's Reports, King's Bench, fol., 1 vol., 1751—1756	Eng.
Sc. Jur.	Scottish Jurist, 46 vols., 1829—1873	Scot.
Sc. L. R.	Scottish Law Reporter, 1865—(current)	Scot.
Sc. R. R.	Scots Revised Reports	Scot.
Sch. & Lef.	Schoales and Lefroy's Reports, Chancery (Ireland), 2 vols., 1802—1806	Ir.
Scott	Scott's Reports, Common Pleas, 8 vols., 1834—1840	Eng.
Scott, N. R.	Scott's New Reports, Common Pleas, 8 vols., 1810—1845	Eng.
Sea. & Sm.	Searle and Smith's Reports, Probate and Divorce, 1 vol., 1859—1860	Eng.
Sel. Cas. Ch.	Select Cases in Chancery, fol., 1 vol., 1685—1698 (Pt. III. of Cas. in Ch.)	Eng.
Selwyn's N. P.	Selwyn's Abridgement of the Law of Nisi Prius	Eng.
Sess. Cas. K. B.	Sessions Settlement Cases, King's Bench, 2 vols., 1710—1747	Eng.
Sett. & Rem.	Cases adjudged in K. B. concerning Settlements & Removals, 1 vol., 1710—1742	Eng.
Sh. (Ct. of Sess.)	Shaw, Court of Session Cases (Scotland), 1st series, 16 vols., 1821—1838	Scot.
Sh. & MacL.	Shaw and Maclean's Scotch Appeals, House of Lords, 3 vols., 1835—1838	Scot.
Sh. Dig.	P. Shaw's Digest of Decisions (Scotland), ed. by Bell and Lamond, 3 vols., 1726—1808	Scot.
Sh. Just.	P. Shaw's Justiciary Decisions (Scotland), 1 vol., 1819—1831	Scot.
Sh. Sc. App.	P. Shaw's Scotch Appeals, House of Lords, 2 vols., 1821—1824	Scot.
Sh. Teind Ct.	P. Shaw's Teind Court Decisions (Scotland), 1 vol., 1821—1831	Scot.
Shep. Touch.	Sheppard's Touchstone of Common Assurances	Eng.
Show.	Showers Reports, King's Bench, 2 vols., 1678—1695	Eng.
Show. Parl. Cas.	Showers's Cases in Parliament, fol., 1 vol., 1694—1699	Eng.
Sid.	Siderfin's Reports, King's Bench, Common Pleas and Exchequer, fol., 2 vols., 1657—1670	Eng.
Sim.	Simons' Reports, Chancery, 17 vols., 1826—1852	Eng.
Sim. & St.	Simons and Stuart's Reports, Chancery, 2 vols., 1822—1826	Eng.
Sim. N. S.	Simons' Reports, Chancery, New Series, 2 vols., 1850—1852	Eng.
Skin.	Skinner's Reports, King's Bench, fol., 1 vol., 1681—1697	Eng.
Sm. & Bat.	Smith and Batty's Reports, King's Bench (Ireland), 1 vol., 1824—1825	Ir.
Sm. & G.	Smale and Giffard's Reports, Chancery, 3 vols., 1852—1857	Eng.
Smith, K. B.	J. P. Smith's Reports, King's Bench, 3 vols., 1803—1806	Eng.
Smith, L. C.	Smith's Leading Cases, 2 vols.	Eng.
Smith, Reg. Cas.	C. L. Smith's Registration Cases, 1895—(current)	Eng.
Smythe	Smythe's Reports, Common Pleas (Ireland), 1 vol., 1830—1840	Ir.
Sol. Jo.	Solicitors' Journal, 1856—(current)	Eng.

REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

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Spence	Spence's Equitable Jurisdiction of the Court of Chancery ...	Eng.
Spinks	Spinks' Prize Court Cases, 2 parts, 1854—1856 ...	Eng.
St. R. Qd. (preceded by date)	Queensland State Reports, since 1902 (<i>e.g.</i> , [1902] St. R. Qd.)	Aus.
Stair Rep.	Stair's Decisions, Court of Session (Scotland), fol., 2 vols., 1661—1681	Scot.
Stark.	Starkie's Reports, Nisi Prius, 3 vols., 1814—1823	Eng.
State Tr.	State Trials, 34 vols., 1163—1820	Eng.
State Tr. N. S.	State Trials, New Series, 8 vols., 1820—1858	Eng.
Stewart	Stewart's Nova Scotia Admiralty Reports, 1803—1813 ...	Can.
Stockton	Stockton's Vice-Admiralty Report and Digest	Can.
Story	Story's Commentaries on Equity Jurisprudence	Eng.
Stra.	Strange's Reports, 2 vols., 1716—1747	Eng.
Stu. M. & P.	Stuart, Milne, and Peddie's Reports (Scotland), 2 vols., 1851—1853	Scot.
Stuart	Sessions Cases (Stuart)	Scot.
Stuart, Adm.	Stuart's Vice-Admiralty (Lower Canada) Cases, 1836—1856 ...	Can.
Stuart, Adm. N. S.	Stuart's Vice-Admiralty (Lower Canada) Cases, 2nd series, 1859—1874	Can.
Stuart, K. B.	Stuart's Reports of Cases in King's Bench, etc. (Lower Canada), 1810—1835	Can.
Sty.	Style's Reports, King's Bench, fol., 1 vol., 1646—1655 ...	Eng.
Sw.	Swabey's Report, Admiralty, 1 vol., 1855—1859	Eng.
Sw. & Tr.	Swabey and Tristram's Reports, Probate and Divorce, 4 vols., 1858—1865	Eng.
Swan.	Swanston's Reports, Chancery, 3 vols., 1818—1821	Eng.
Swin.	Swinton's Justiciary Reports (Scotland), 2 vols., 1835—1841 ...	Scot.
Syme	Syme's Justiciary Reports (Scotland), 1 vol., 1826—1829 ...	Scot.
T. & M.	Temple and Mew's Criminal Appeal Cases, 1 vol., 1848—1851 ...	Eng.
T. H.	Reports of the Witwatersrand High Court (Transvaal Colony), 1902—1909	S. Af.
T. Jo.	Sir T. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1667—1685	Eng.
T. L.	Reports of the Witwatersrand High Court (Transvaal Colony), 1910—(current)	S. Af.
T. L. R.	The Times Law Reports, 1884—(current)	Eng.
T. P.	Reports of the Supreme Court of the Transvaal, 1910—(current)	S. Af.
T. P. D.	South African Law Reports, Transvaal Provincial Division ...	S. Af.
T. Raym.	Sir T. Raymond's Reports, King's Bench, fol., 1 vol., 1660—1683	Eng.
T. S.	Reports of the Supreme Court of the Transvaal, 1902—1909 ...	S. Af.
Taml.	Tamlyn's Reports, Rolls Court, 1 vol., 1829—1830	Eng.
Tas. L. R.	Tasmanian Law Reports	Aus.
Taunt.	Taunton's Reports, Common Pleas, 8 vols., 1807—1819 ...	Eng.
Tax Cas.	Tax Cases, 1875—(current)	Eng.
Tay.	Taylor's King's Bench Reports	Can.
Temp. Wood	Manitoba Reports <i>temp.</i> Wood	Can.
Term Rep.	Term Reports (Durnford and East), fol., 8 vols., 1785—1800 ...	Eng.
Terr. L. R.	Territories Law Reports	Can.
Thom.	Nova Scotia Reports (Thomson)	Can.
Toth.	Tothill's Transactions in Chancery, 1 vol., 1559—1616 ...	Eng.
Town St. Tr.	Townsend, Modern State Trials	Eng.
Trem. P. C.	Tremaine Pleas of the Crown, 1 vol., 1667	Eng.
Trist.	Tristram's Consistory Judgments, 1 vol., 1872—1890	Eng.
Tru.	New Brunswick Reports (Trueman)	Can.
Tudor, L. C. Merc. Law.	Tudor's Leading Cases on Mercantile and Maritime Law ...	Eng.
Tudor, L. C. Real Prop.	Tudor's Leading Cases on Real Property	Eng.
Turn. & R.	Turner and Russell's Reports, Chancery, 1 vol., 1822—1825 ...	Eng.
Tyr.	Tyrwhitt's Reports, Exchequer, 5 vols., 1830—1835	Eng.
Tyr. & Gr.	Tyrwhitt and Granger's Reports, Exchequer, 1 vol., 1835—1836 ...	Eng.
U. C. Jur.	Upper Canada Jurist	Can.
U. C. L. J. N. S.	Canada Law Journal, New Series, 1865—(current)	Can.
U. C. L. J. O. S.	Canada Law Journal, Old Series, 10 vols., 1855—1864 ...	Can.
U. C. R.	Upper Canada Reports, Queen's Bench	Can.
Udal	Fiji Law Reports (Udal)	Fiji.
V. L. R.	Victorian Law Reports	Aus.
V. R.	Victorian Reports	Aus.
V. R. (Adm.)	Victorian Reports (Admiralty)	Aus.
V. R. (Eq.)	Victorian Reports (Equity)	Aus.
V. R. (Law)	Victorian Reports (Law)	Aus.
Vaugh.	Vaughan's Reports, Common Pleas, fol., 1 vol., 1666—1673 ...	Eng.
Vent.	Ventris' Reports (Vol. I., King's Bench; Vol. II., Common Pleas), fol., 2 vols., 1668—1691	Eng.

xxviii REPORTS INCLUDED IN THIS WORK AND THEIR ABBREVIATIONS.

Vern.	...	Vernon's Reports, Chancery, 2 vols., 1680—1719	...	Eng.
Vern. & Scr.	...	Vernon and Scriven's Reports, King's Bench (Ireland), 1 vol., 1786—1788	...	Ir.
Ves.	...	Vesey Jun.'s Reports, Chancery, 19 vols., 1789—1817	...	Eng.
Ves. & B.	...	Vesey and Beames's Reports, Chancery, 3 vols., 1812—1814	...	Eng.
Ves. Sen.	...	Vesey Sen.'s Reports, 2 vols., 1747—1756	...	Eng.
Vin. Abr.	...	Viner's Abridgment of Law and Equity, fol., 22 vols.	...	Eng.
Vin. Supp.	...	Supplement to Viner's Abridgment of Law and Equity, 6 vols.	...	Eng.
W.	...	Watermeyer's Reports of the Supreme Court of the Cape of Good Hope, 1857	...	S. Af.
W. A. L. R.	...	West Australian Law Reports	...	Aus.
W. A'B. & W.	...	Webb, A'Beckett and Williams' Victorian Reports	...	Aus.
W. & W.	...	Wyatt and Webb	...	Aus.
W. C. C.	...	Workmen's Compensation Cases (Minton-Senhouse), 9 vols., 1898—1907	...	Eng.
W. H. C.	...	South African Law Reports, Witwatersrand High Court	...	S. Af.
W. Jo.	...	Sir W. Jones's Reports, King's Bench and Common Pleas, fol., 1 vol., 1620—1640	...	Eng.
W. L. D.	...	South African Law Reports, Witwatersrand Local Division	...	S. Af.
W. L. R.	...	Western Law Reporter	...	Can.
W. L. T.	...	Western Law Times	...	Can.
W. N. (preceded by date)	...	Law Reports, Weekly Notes, 1866—(current) (<i>e.g.</i> , [1866] W.N.)	...	Eng.
W. N.	...	Calcutta Weekly Notes	...	Ind.
W. R.	...	Weekly Reporter, 54 vols., 1852—1906	...	Eng.
W. R.	...	Sutherland's Weekly Reporter	...	Ind.
W. R.	...	Weekly Reporter, reporting cases in the Cape Provincial Division	...	S. Af.
W. W. & A'B.	...	Wyatt, Webb and A'Beckett	...	Aus.
W. W. R.	...	Western Weekly Reports	...	Can.
Wallis by Lyne	...	Wallis' Reports, Chancery (Ireland), 1 vol., 1766—1791	...	Ir.
Web. Pat. Cas.	...	Webster's Patent Cases, 2 vols., 1602—1855	...	Eng.
Welsh, Reg. Cas.	...	Welsh's Registry Cases (Ireland), 1 vol., 1832—1840	...	Ir.
Went. Off. Ex.	...	Wentworth's Office and Duty of Executors	...	Eng.
West	...	West's Reports, House of Lords, 1 vol., 1839—1841	...	Eng.
West temp. Hard.	...	West's Reports temp. Hardwicke, Chancery, 1 vol., 1736—1740	...	Eng.
West. Tithe Cas.	...	Western's London Tithe Cases, 1 vol., 1592—1822	...	Eng.
White	...	White's Justiciary Reports (Scotland), 3 vols., 1886—1893	...	Scot.
White & Tud. L. C.	...	White and Tudor's Leading Cases in Equity, 2 vols.	...	Eng.
Wight	...	Wightwick's Reports, Exchequer, 1 vol., 1810—1811	...	Eng.
Will. Woll. & Dav.	...	Willmore, Wollaston, and Davison's Reports, Queen's Bench and Bail Court, 1 vol., 1837	...	Eng.
Will. Woll. & H.	...	Willmore, Wollaston, and Hodges' Reports, Queen's Bench and Bail Court, 2 vols., 1838—1839	...	Eng.
Willes	...	Willes' Reports, Common Pleas, 1 vol., 1737—1758	...	Eng.
Wilm.	...	Wilmot's Notes of Opinions and Judgments, 1 vol., 1757—1770	...	Eng.
Wils.	...	G. Wilson's Reports, King's Bench and Common Pleas, fol., 3 vols., 1712—1774	...	Eng.
Wils. & S.	...	Wilson and Shaw's Scotch Appeals, House of Lords, 7 vols., 1825—1835	...	Scot.
Wils. Ch.	...	J. Wilson's Reports, Chancery, 2 vols., 1818—1819	...	Eng.
Wils. Ex.	...	J. Wilson's Reports, Exchequer in Equity, 1 part, 1817	...	Eng.
Win.	...	Winch's Reports, Common Pleas, fol., 1 vol., 1621—1625	...	Eng.
Wm. Bl.	...	William Blackstone's Reports, King's Bench and Common Pleas, fol., 2 vols., 1716—1779	...	Eng.
Wm. Rob.	...	William Robinson's Reports, Admiralty, 3 vols., 1838—1850	...	Eng.
Wms. Saund.	...	Williams' Notes to Saunders' Reports, 2 vols.	...	Eng.
Wolf. & B.	...	Wolferstan and Bristowe's Election Cases, 1 vol., 1859—1864	...	Eng.
Wolf. & D.	...	Wolferstan and Dew's Election Cases, 1 vol., 1857—1858	...	Eng.
Woll.	...	Wollaston's Reports, Bail Court and Practice, 1 vol., 1810—1811	...	Eng.
Wood	...	Wood's Tithe Cases, Exchequer, 4 vols., 1650—1798	...	Eng.
Y. A. D.	...	Young's Vice-Admiralty Reports	...	Can.
Y. & C. Ch. Cas.	...	Younge and Collyer's Reports, Chancery Cases, 2 vols., 1841—1843	...	Eng.
Y. & C. Ex.	...	Younge and Collyer's Reports, Exchequer in Equity, 4 vols., 1833—1841	...	Eng.
Y. & J.	...	Younge and Jervis' Reports, Exchequer, 3 vols., 1826—1830	...	Eng.
Y. B.	...	Year Books	...	Eng.
Y. B. (Rolls Series)	...	Year Books (Rolls Series)	...	Eng.
Y. B. (Sel. Soc.)	...	Year Books (Selden Society)	...	Eng.
Yelv.	...	Yelverton's Reports, King's Bench, fol., 1 vol., 1602—1613	...	Eng.
You.	...	Younge's Reports, Exchequer in Equity, 1 vol., 1830—1832	...	Eng.

ABBREVIATIONS

USED IN THIS WORK.

(For Abbreviations used in citing Reports, *see* pp. xiii.—xxviii., *ante*.)

A.-G.	.	.	.	.	.	for Attorney-General.
Act.	.	.	.	.	.	„ Actiengesellschaft.
Admlty.	.	.	.	.	.	„ Admiralty.
Affd.	.	.	.	.	.	„ Affirmed.
Affg.	.	.	.	.	.	„ Affirming.
Akt.	.	.	.	.	.	„ Aktiengesellschaft ; Aktiebolaget ; Aktieselskabet.
Anon.	.	.	.	.	.	„ Anonymous.
Apld.	.	.	.	.	.	„ Applied.
Appct.	.	.	.	.	.	„ Applicant.
Appln.	.	.	.	.	.	„ Application.
Appln.	.	.	.	.	.	„ Application to Register a Trade Mark.
Applt.	.	.	.	.	.	„ Appellant.
Apprvd.	.	.	.	.	.	„ Approved.
Arbn.	.	.	.	.	.	„ Arbitration.
Archbp.	.	.	.	.	.	„ Archbishop.
Art.	.	.	.	.	.	„ Article.
Ass. Tax Case	.	.	.	.	.	„ Assessed Tax Case.
Assce.	.	.	.	.	.	„ Assurance.
Assocn.	.	.	.	.	.	„ Association.
B. C.	.	.	.	.	.	„ Borough Council.
Bkpcy.	.	.	.	.	.	„ Bankruptcy.
Bkpt.	.	.	.	.	.	„ Bankrupt.
Bldg. Soc.	.	.	.	.	.	„ Building Society.
Bp.	.	.	.	.	.	„ Bishop.
C. A.	.	.	.	.	.	„ Court of Appeal.
C. & S. L. Ry. Co.	.	.	.	.	.	„ City & South London Railway Co.
C. C. A.	.	.	.	.	.	„ Court of Criminal Appeal.
C. C. R.	.	.	.	.	.	„ County Court Rules.
C. C. R.	.	.	.	.	.	„ Court of Crown Cases Reserved.
C. L. P. Act.	.	.	.	.	.	„ Common Law Procedure Act.
C. L. Ry. Co.	.	.	.	.	.	„ Central London Railway Co.
C. O. R.	.	.	.	.	.	„ Crown Office Rules.
C. S. U. C.	.	.	.	.	.	„ Consolidated Statutes of Upper Canada.
Ca. sa.	.	.	.	.	.	„ <i>Capias ad satisfaciendum</i> .
Cale. Ry. Co.	.	.	.	.	.	„ Caledonian Railway Co.
Ch.	.	.	.	.	.	„ Chancery.
Ch. Div.	.	.	.	.	.	„ Chancery Division.
Co.	.	.	.	.	.	„ Company.
Co-op. Assocn.	.	.	.	.	.	„ Co-operative Supply Association.
Comrs.	.	.	.	.	.	„ Commissioners.
Consd.	.	.	.	.	.	„ Considered.
Corpn.	.	.	.	.	.	„ Corporation.
Ct.	.	.	.	.	.	„ Court.
Ct. of Ch.	.	.	.	.	.	„ Court of Chancery.
Ct. of Eq.	.	.	.	.	.	„ Court of Equity.
Ct. of R.	.	.	.	.	.	„ Court of Review.
D. C.	.	.	.	.	.	„ Divisional Court.
Dbtd.	.	.	.	.	.	„ Doubted.
Deft.	.	.	.	.	.	„ Defendant.

Distd.	for Distinguished.
Div. Ct.	„ Divisional Court.
Eccl. Comrs.	„ Ecclesiastical Commissioners.
Eccl. Ct.	„ Ecclesiastical Court.
Ex. Ch.	„ Exchequer Chamber.
<i>Ex p.</i>	„ <i>Ex parte</i> .
Exch.	„ Exchequer.
Exor.	„ Executor.
Exorship.	„ Executorship.
Expld.	„ Explained.
Extd.	„ Extended.
Extrix.	„ Executrix.
<i>Fi. fa.</i>	„ <i>Fieri facias</i> .
Folld.	„ Followed.
G. & S. W. Ry. Co.	„ Glasgow & South Western Railway Co.
G. C. Ry. Co.	„ Great Central Railway Co.
G. E. Ry. Co.	„ Great Eastern Railway Co.
G. N. of Scotland Ry. Co.	„ Great North of Scotland Railway Co.
G. N. Picc. & Brompton Ry. Co.	„ Great Northern, Piccadilly & Brompton Railway Co.
G. N. Ry. Co.	„ Great Northern Railway Co.
G. S. & W. Ry. Co. of Ireland	„ Great Southern & Western Railway Co. of Ireland.
G. W. Ry. Co.	„ Great Western Railway Co.
Govt.	„ Government.
Grdns.	„ Guardians or Guardians of the Poor.
H. C. of A.	„ High Court of Australia.
H. L.	„ House of Lords.
I. R. Comrs.	„ Inland Revenue Commissioners.
Insee.	„ Insurance.
JJ.	„ Justices.
Jud. Act	„ Judicature Act.
K. B. Div.	„ King's Bench Division.
L. & B. Ry. Co.	„ London & Brighton Railway Co.
L. & N. E. Ry. Co.	„ London & North Eastern Railway Co.
L. & N. W. Ry. Co.	„ London & North Western Railway Co.
L. & S. W. Ry. Co.	„ London & South Western Railway Co.
L. & Y. Ry. Co.	„ Lancashire & Yorkshire Railway Co.
L. B.	„ Local Board.
L. B. & S. C. Ry. Co.	„ London, Brighton & South Coast Railway Co.
L. C.	„ Lord Chancellor.
L. C. & D. Ry. Co.	„ London, Chatham & Dover Railway Co.
L. C. C.	„ London County Council.
L. Elec. Ry. Co.	„ London Electric Railway Co.
L. G. Board	„ Local Government Board.
L.J.	„ Lord Justice.
L.JJ.	„ Lords Justices.
L. M. & S. Ry. Co.	„ London, Midland & Scottish Railway Co.
L. T. & S. Ry. Co.	„ London, Tilbury & Southend Railway Co.
M. S. Act	„ Merchant Shipping Act.
M. S. & L. Ry. Co.	„ Manchester, Sheffield & Lincolnshire Railway Co.
Mags.	„ Magistrates.
Mentd.	„ Mentioned.
Met. Dist. Ry. Co.	„ Metropolitan District Railway Co.
Met. Ry. Co.	„ Metropolitan Railway Co.
Mid. G. W. Ry. Co.	„ Midland Great Western Railway Co.
Mid. Ry. Co.	„ Midland Railway Co.
Mtge.	„ Mortgage.
Mtgee.	„ Mortgagee.
Mtgor.	„ Mortgagor.
N. B. Ry. Co.	„ North British Railway Co.
N. E. Ry. Co.	„ North Eastern Railway Co.
N. F.	„ Not Followed.
N. P.	„ Nisi Prius.
Ord.	„ Order.
Overd.	„ Overruled.

ABBREVIATIONS.

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P. C.	.	.	.	.	.	for Privy Council.
Petn.	.	.	.	.	.	„ Petition or Election Petition.
Pltf.	.	.	.	.	.	„ Plaintiff.
Q. B. Div.	.	.	.	.	.	„ Queen's Bench Division.
Qu.	.	.	.	.	.	„ <i>Quære</i> .
R. C.	.	.	.	.	.	„ Rural Council.
R. D. C.	.	.	.	.	.	„ Rural District Council.
R. S. A.	.	.	.	.	.	„ Rural Sanitary Authority.
R. S. C.	.	.	.	.	.	„ Revised Statutes of Canada.
R. S. C.	.	.	.	.	.	„ Rules of the Supreme Court, 1883.
Refd.	.	.	.	.	.	„ Referred.
Regn. of Trade Mk.	.	.	.	.	.	„ Registration of Trade Mark.
Regr. of Trade Mks.	.	.	.	.	.	„ Registrar of Trade Marks.
Resp.	.	.	.	.	.	„ Respondent.
Restg.	.	.	.	.	.	„ Restoring.
Revsd.	.	.	.	.	.	„ Reversed.
Revsd.	.	.	.	.	.	„ Reversing.
Ry. Co.	.	.	.	.	.	„ Rail. Co. or Railway Co.
S. C.	.	.	.	.	.	„ Same Case.
S. C. (name of colony following)	.	.	.	.	.	„ Supreme Court of a Colony.
S. E.	.	.	.	.	.	„ Settled Estates.
S. E. & C. Ry. Co.	.	.	.	.	.	„ South Eastern & Chatham Railway Co.
S. E. Ry. Co.	.	.	.	.	.	„ South Eastern Railway Co.
S. P.	.	.	.	.	.	„ Same Point.
S.S.	.	.	.	.	.	„ Steamship.
Sched.	.	.	.	.	.	„ Schedule.
<i>Sci. fa.</i>	.	.	.	.	.	„ <i>Scire facias</i> .
Sect.	.	.	.	.	.	„ Section.
Set. Land Act	.	.	.	.	.	„ Settled Land Act.
Settlmt.	.	.	.	.	.	„ Settlement.
Soc.	.	.	.	.	.	„ Society.
Soc. Anon.	.	.	.	.	.	„ Société Anonyme, etc.
Solr.	.	.	.	.	.	„ Solicitor.
Trade Mk.	.	.	.	.	.	„ Trade Mark.
Tram. Co.	.	.	.	.	.	„ Tramways Company.
U. C.	.	.	.	.	.	„ Urban Council.
U. D. C.	.	.	.	.	.	„ Urban District Council.
U. S. A.	.	.	.	.	.	„ United States of America.
Union Assmt. Com.	.	.	.	.	.	„ Union Assessment Committee.
Urban S. A.	.	.	.	.	.	„ Urban Sanitary Authority.
V.-C.	.	.	.	.	.	„ Vice-Chancellor.
Workmen's Comp. Act	.	.	.	.	.	„ Workmen's Compensation Act.

MEANING OF TERMS

USED IN CLASSIFYING ANNOTATING CASES.

THE different expressions used to describe the effect of the annotating cases have the following meanings, and the classification of the annotating cases has been done strictly in accordance with these meanings. The annotating cases, except such as are classified as "Mentioned," are grouped according to the points in the case which they annotate: within these groups they are listed chronologically, except such as are classified as "Referred to," which come at the end of the group and are arranged *inter se* in chronological order. Cases which annotate the annotated case generally are grouped together after cases which annotate specific points, similarly arranged, and are followed by cases classified as "Mentioned" arranged chronologically *inter se*. The terms used in classifying the annotating cases are as follows:—

- "APPLIED" (Apld.).—This expression is used to denote the fact that the principle of law enunciated in the annotated case has been applied to a new set of facts and circumstances in the annotating case.
- "APPROVED" (Apprvd.).—This expression is used to denote the fact that the annotated case has been considered to be good law in the annotating case where the latter is in a higher court than the former.
- "CONSIDERED" (Consd.).—This expression is used where the remarks in the annotating case are devoid of adverse criticism and merely denote the giving of more or less careful consideration to the annotated case.
- "DISTINGUISHED" (Distd.).—This expression is used where the earlier case is not necessarily doubted, but where some essential difference (either on the facts or in law) between it and the annotated case is pointed out.
- "DOUBTED" (Dbtd.).—This expression is used where the court in the annotating case without definitely going to the length of saying that the annotated case is wrong, adduces reasons which seem to show that it is not accurate.
- "EXPLAINED" (Expld.).—This expression is used where the earlier case is not necessarily doubted, but the decision arrived at is justified or accounted for by calling attention to some point of fact or of law which is usually, but not necessarily, one not obvious on the face of the report.
- "EXTENDED" (Extd.).—Compare "APPLIED," *supra*.
- "FOLLOWED" (Folld.).—This expression is used to denote that the same principles of law are applied in the two cases. It does not necessarily imply that the facts are substantially identical in the two cases.
- "NOT FOLLOWED" (N.F.).—Compare "FOLLOWED," *supra*, to which it is the adverse.
- "OVERRULED" (Overd.).—This expression is used where the annotating case is on substantially identical facts with the annotated case and in a higher court and the rule in the latter case is held to be wrong.
- "REFERRED" (Refd.).—This expression is used only where the annotating case deals with the point of the Digest paragraph and is without comment of any definite character on the case annotated, and where there is no delicate shade of approval or disapproval which would justify the use of any of the foregoing words.
- "MENTIONED" (Mentd.).—This expression is used only where none of the foregoing terms apply. In other words, it is used only where the case annotated is cited on a point having nothing to do with the point in the Digest paragraph.

TABLE OF CASES.

NOTE.—A FULL TABLE OF CASES CONTAINING ALL CASES
APPEARING IN BOTH VOLUMES XXIII. AND XXIV.
WILL BE FOUND AT THE COMMENCEMENT OF VOLUME
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SUB-SECT. 1. DUTY TO KEEP ACCOUNTS.

SUB-SECT. 2. WHAT ACCOUNTS MAY BE ORDERED.

A. Ordinary Account.

B. Account on Footing of Wilful Default.

(a) In General.

(b) When Ordered.

(c) Pleading.

SUB-SECT. 3. ENFORCEMENT OF LIABILITY.

A. By Whom Enforceable.

B. Effect of Lapse of Time.

SUB-SECT. 4. ASSETS TO WHICH LIABILITY EXTENDS.

A. In General.

B. Profits of Dealings with Assets.

(a) In General.

(b) Leases and Mortgages.

C. On Footing of Wilful Default.

SUB-SECT. 5. ALLOWANCES IN ACCOUNT.

A. In General.

B. Expenses of Administration.

C. Employment of Agent.

(a) In General.

(b) Representative Acting as Agent.

D. Employment of Solicitor.

(a) In General.

(b) Representative Acting as Solicitor.

SUB-SECT. 6. INTEREST.

A. In General.

B. Right to Interest.

C. Liability for Interest.

(a) Misapplication of Assets.

(b) Assets Improperly Retained.

D. Rate of Interest.

SUB-SECT. 7. PRACTICE AS TO TAKING ACCOUNT

A. In General.

B. Proof of Account.

SUB-SECT. 8. SURCHARGE AND FALSIFICATION.

SUB-SECT. 9. RE-OPENING SETTLED ACCOUNT.

SECT. 7. ON ADMISSION OF ASSETS.

SUB-SECT. 1. WHAT CONSTITUTES ADMISSION.

A. Express Admission.

B. By Pleading or Judgment.

C. Conduct.

- (a) Payment of Legacies and Interest on Legacies.
- (b) Submission to Arbitration.
- (c) Payment of Death Duties.
- (d) Other Cases.

SUB-SECT. 2. EXTENT OF ADMISSION.

SUB-SECT. 3. WITHDRAWAL AND WAIVER.

SUB-SECT. 4. EFFECT OF ADMISSION.

- A. In General.
- B. Order for Payment into Court.
- C. On Liability to Account.

SECT. 8. PAYMENT OF ESTATE AND OTHER DEATH DUTIES.

PART VII. ACTIONS BY AND AGAINST REPRESENTATIVE.

SECT. 1. ACTIONS BY REPRESENTATIVE.

SUB-SECT. 1. RIGHT TO BRING ACTIONS.

SUB-SECT. 2. RIGHT TO CONTINUE ACTIONS. *See PRACTICE.*

SUB-SECT. 3. HOW REPRESENTATIVE MAY SUE.

SUB-SECT. 4. PARTIES.

SUB-SECT. 5. JOINDER OF CAUSES OF ACTION.

SUB-SECT. 6. PLEADING.

- A. Claims.
- B. Defences.
 - (a) In General.
 - (b) Lapse of Time.

SUB-SECT. 7. EVIDENCE.

SUB-SECT. 8. SET-OFF AND COUNTERCLAIM AGAINST REPRESENTATIVE.

SUB-SECT. 9. COSTS.

- A. Personal Liability of Representative.
- B. Security for Costs.

SUB-SECT. 10. EXECUTION.

SECT. 2. ACTIONS AGAINST REPRESENTATIVE.

SUB-SECT. 1. CONTINUANCE OF ACTION AGAINST REPRESENTATIVE.

SUB-SECT. 2. HOW REPRESENTATIVE MAY DEFEND.

SUB-SECT. 3. PARTIES.

SUB-SECT. 4. JOINDER OF CLAIMS.

SUB-SECT. 5. PLEADING.

- A. Claims.
- B. Defences.
 - (a) In General.
 - (b) *Ne unques Executor.*
 - (c) *Plene administravit.*
 - i. In General.
 - ii. When Available as Defence.
 - (d) *Plene administravit præter.*
 - (e) *No assets ultra.*
 - (f) *Release and Satisfaction.*
 - (g) *Lapse of Time.*
 - i. In General.
 - ii. Statutes of Limitation.

SUB-SECT. 6. EVIDENCE.

- A. In General.
- B. On Plea of *plene administravit.*

SUB-SECT. 7. SET-OFF BY REPRESENTATIVE.

SUB-SECT. 8. JUDGMENTS.

- A. In General.
- B. After Plea of *plene administravit.*
 - (a) In General.
 - (b) Judgment *quando acciderint.*
- C. Personal Liability of Representative.
- D. Effect of Judgment as Admission of Assets.

EXECUTORS AND ADMINISTRATORS.

C. Remedies for Devastavit.

- (a) In General.
- (b) Where Representative becomes Bankrupt.
- (c) Defences open to Representative.
 - i. In General.
 - ii. Plea of Devastavit in Administration Action.

D. Relief of Representative.

SUB-SECT. 6. LOSS ON INVESTMENTS.

SECT. 5. FOR ACTS OF CO-REPRESENTATIVE.

SUB-SECT. 1. IN RESPECT OF ASSETS RECEIVED.

SUB-SECT. 2. NEGLIGENCE OF DUTY.

SUB-SECT. 3. ENTRUSTING ASSETS TO CO-REPRESENTATIVE.

SUB-SECT. 4. JOINT ACTS.

- A. In General.
- B. Joinder in Sale of Property.
- C. Joinder in giving Receipt for Money.

SECT. 6. ACCOUNTS.

SUB-SECT. 1. DUTY TO KEEP ACCOUNTS.

SUB-SECT. 2. WHAT ACCOUNTS MAY BE ORDERED.

- A. Ordinary Account.
- B. Account on Footing of Wilful Default.
 - (a) In General.
 - (b) When Ordered.
 - (c) Pleading.

SUB-SECT. 3. ENFORCEMENT OF LIABILITY.

- A. By Whom Enforceable.
- B. Effect of Lapse of Time.

SUB-SECT. 4. ASSETS TO WHICH LIABILITY EXTENDS.

- A. In General.
- B. Profits of Dealings with Assets.
 - (a) In General.
 - (b) Leases and Mortgages.
- C. On Footing of Wilful Default.

SUB-SECT. 5. ALLOWANCES IN ACCOUNT.

- A. In General.
- B. Expenses of Administration.
- C. Employment of Agent.
 - (a) In General.
 - (b) Representative Acting as Agent.
- D. Employment of Solicitor.
 - (a) In General.
 - (b) Representative Acting as Solicitor.

SUB-SECT. 6. INTEREST.

- A. In General.
- B. Right to Interest.
- C. Liability for Interest.
 - (a) Misapplication of Assets.
 - (b) Assets Improperly Retained.
- D. Rate of Interest.

SUB-SECT. 7. PRACTICE AS TO TAKING ACCOUNT

- A. In General.
- B. Proof of Account.

SUB-SECT. 8. SURCHARGE AND FALSIFICATION.

SUB-SECT. 9. RE-OPENING SETTLED ACCOUNT.

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SUB-SECT. 1. WHAT CONSTITUTES ADMISSION.

- A. Express Admission.
- B. By Pleading or Judgment.

C. Conduct.

- (a) Payment of Legacies and Interest on Legacies.
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- (c) Payment of Death Duties.
- (d) Other Cases.

SUB-SECT. 2. EXTENT OF ADMISSION.

SUB-SECT. 3. WITHDRAWAL AND WAIVER.

SUB-SECT. 4. EFFECT OF ADMISSION.

- A. In General.
- B. Order for Payment into Court.
- C. On Liability to Account.

SECT. 8. PAYMENT OF ESTATE AND OTHER DEATH DUTIES.

PART VII. ACTIONS BY AND AGAINST REPRESENTATIVE.

SECT. 1. ACTIONS BY REPRESENTATIVE.

SUB-SECT. 1. RIGHT TO BRING ACTIONS.

SUB-SECT. 2. RIGHT TO CONTINUE ACTIONS. *See PRACTICE.*

SUB-SECT. 3. HOW REPRESENTATIVE MAY SUE.

SUB-SECT. 4. PARTIES.

SUB-SECT. 5. JOINDER OF CAUSES OF ACTION.

SUB-SECT. 6. PLEADING.

- A. Claims.
- B. Defences.
 - (a) In General.
 - (b) Lapse of Time.

SUB-SECT. 7. EVIDENCE.

SUB-SECT. 8. SET-OFF AND COUNTERCLAIM AGAINST REPRESENTATIVE.

SUB-SECT. 9. COSTS.

- A. Personal Liability of Representative.
- B. Security for Costs.

SUB-SECT. 10. EXECUTION.

SECT. 2. ACTIONS AGAINST REPRESENTATIVE.

SUB-SECT. 1. CONTINUANCE OF ACTION AGAINST REPRESENTATIVE.

SUB-SECT. 2. HOW REPRESENTATIVE MAY DEFEND.

SUB-SECT. 3. PARTIES.

SUB-SECT. 4. JOINDER OF CLAIMS.

SUB-SECT. 5. PLEADING.

- A. Claims.
- B. Defences.
 - (a) In General.
 - (b) *Ne unques Executor.*
 - (c) *Plene administravit.*
 - i. In General.
 - ii. When Available as Defence.
 - (d) *Plene administravit præter.*
 - (e) *No assets ultra.*
 - (f) *Release and Satisfaction.*
 - (g) *Lapse of Time.*
 - i. In General.
 - ii. Statutes of Limitation.

SUB-SECT. 6. EVIDENCE.

- A. In General.
- B. On Plea of *plene administravit.*

SUB-SECT. 7. SET-OFF BY REPRESENTATIVE.

SUB-SECT. 8. JUDGMENTS.

- A. In General.
- B. After Plea of *plene administravit.*
 - (a) In General.
 - (b) *Judgment quando acciderint.*
- C. Personal Liability of Representative.
- D. Effect of Judgment as Admission of Assets.

SUB-SECT. 9. COSTS.

- A. In General.
- B. On Plea of plene administravit.
- C. On Plea of plene administravit præter.

SUB-SECT. 10. EXECUTION.

- A. In General.
- B. For Debts of Deceased.
 - (a) Judgment recovered in Deceased's Lifetime.
 - (b) Judgment recovered against Representative.
- C. For Private Debts of Representative.
- D. Personal Liability of Representative.
 - (a) In General.
 - (b) Liability to Attachment.

PART VIII. ADMINISTRATION BY COURT.

SECT. 1. JURISDICTION.

SUB-SECT. 1. OF CHANCERY DIVISION.

SUB-SECT. 2. OF COUNTY COURTS.

SUB-SECT. 3. FOREIGN DOMICIL AND ASSETS.

SUB-SECT. 4. COURTS OF DOMINIONS AND DEPENDENCIES.

SECT. 2. PARTIES.

SUB-SECT. 1. WHO MAY COMMENCE PROCEEDINGS.

SUB-SECT. 2. WHO ARE NECESSARY PARTIES.

- A. In General.
- B. Personal Representatives.
 - (a) In General.
 - (b) Where More than One Representative.
 - (c) Death of Personal Representative.
- C. Heir-at-Law.
- D. Next of Kin.
- E. Legatees.
- F. Residuary Legatees and Devisees.
- G. Appointees, Annuitants, and Remaindermen.

SUB-SECT. 3. REPRESENTATIVE PARTIES.

SUB-SECT. 4. PARTIES OUT OF JURISDICTION.

SUB-SECT. 5. MISJOINDER OF PARTIES.

SUB-SECT. 6. ADDING PARTIES.

SUB-SECT. 7. EFFECT OF DEATH OR CHANGE OF PARTIES.

SECT. 3. WHAT MATTERS MAY BE DETERMINED OR DEALT WITH.

SUB-SECT. 1. BY ACTION.

SUB-SECT. 2. BY SUMMONS.

- A. Under Chancery Practice Amendment Act, 1852, s. 45.
- B. By Originating Summons.

SECT. 4. PRACTICE.

SUB-SECT. 1. IN GENERAL.

SUB-SECT. 2. HOW PROCEEDINGS COMMENCED.

SUB-SECT. 3. TIME FOR COMMENCING PROCEEDINGS.

SUB-SECT. 4. AFFIDAVIT IN SUPPORT.

SUB-SECT. 5. SERVICE.

- A. On Whom.
- B. Service out of the Jurisdiction.

SUB-SECT. 6. TRANSFER OF PROCEEDINGS.

SUB-SECT. 7. CONSOLIDATION OF PROCEEDINGS.

SUB-SECT. 8. STAY OF PROCEEDINGS

- A. Where more than one Action Pending.
- B. Where Administration Decree obtained.
 - (a) In General.
 - (b) Other Proceedings seeking more Comprehensive Relief.
 - (c) Decree Unfairly obtained.
- C. Costs.

SUB-SECT. 9. CONDUCT OF ACTION.

A. In General.

B. To Whom given.

(a) On Consolidation of Actions.

(b) Where First Suit Stayed on Decree obtained in Subsequent Suit.

C. Loss of Right to Conduct.

SUB-SECT. 10. PROOF OF WILL.

SUB-SECT. 11. INTERROGATORIES.

SECT. 5. JUDGMENT OR ORDER FOR ADMINISTRATION.

SUB-SECT. 1. WHEN GRANTED.

SUB-SECT. 2. FORM AND AMENDMENT. *See* JUDGMENTS.

SUB-SECT. 3. PROCEEDINGS UNDER.

A. In General.

B. Payment into Court.

(a) By Representative.

(b) By Other Persons.

C. Appointment of Receiver. *See* RECEIVERS.

D. Accounts.

E. Inquiries.

F. Getting in Assets.

G. Sale of Real Estate.

H. Claims Against the Estate.

(a) In General.

(b) Claims by Creditors.

(c) Claims arising after Distribution.

(d) Evidence in Support.

(e) Interest on Claims.

I. Payment out of Court.

J. Provision for Annuities.

SUB-SECT. 4. EFFECT OF JUDGMENT OR ORDER.

A. In General.

B. On Whom Binding.

C. On Position of Representative.

D. As Stay of Proceedings.

SUB-SECT. 5. HOW ENFORCED.

SECT. 6. ACTION BY CREDITORS.

SUB-SECT. 1. IN GENERAL.

SUB-SECT. 2. WHEN MAINTAINABLE.

SUB-SECT. 3. BY WHOM MAINTAINABLE.

SUB-SECT. 4. ON WHOSE BEHALF MAINTAINED.

A. Administration of Realty.

(a) Before 1898.

(b) Since 1897.

B. Administration of Personalty.

SUB-SECT. 5. AGAINST WHOM MAINTAINABLE.

SUB-SECT. 6. STATUTES OF LIMITATION.

SUB-SECT. 7. PARTIES.

A. Personal Representatives.

B. Other Persons.

C. Effect of Death of Parties.

SUB-SECT. 8. WHAT CREDITORS MAY PROVE.

SUB-SECT. 9. IN RESPECT OF WHAT DEBTS.

SUB-SECT. 10. CONTROL OF ACTION BY CREDITORS.

SECT. 7. ADMINISTRATION OF INSOLVENT ESTATES.

SUB-SECT. 1. ADMINISTRATION IN BANKRUPTCY.

EXECUTORS AND ADMINISTRATORS.

SUB-SECT. 2. ADMINISTRATION APART FROM BANKRUPTCY.

- A. When Bankruptcy Rules Applied.
- B. To What Extent Bankruptcy Rules Applied.
 - (a) In respect of What Debts.
 - (b) Nature of Assets to be Administered.
 - (c) Order of Payment of Debts.
 - (d) Extent to which Crown Bound.
 - (e) Right of Retainer.
 - (f) Interest on Debt.
 - (g) Property Acquired after Bankruptcy.
 - (h) Estate of Deceased Partner.
 - (j) Creditor Claiming against Two Estates.
 - (k) Disposal of Unclaimed Shares.
 - (l) Position of Secured Creditors.
 - i. Before Judicature Act, 1875.
 - ii. After Judicature Act, 1875.
 - (m) Time for Proving Debts.

SECT. 8. COSTS.

SUB-SECT. 1. COSTS OF REPRESENTATIVE.

- A. In General.
- B. When Deprived of or Liable for Costs.
 - (a) Mistake or Neglect.
 - (b) Breach of Trust.
 - (c) Conduct in relation to Accounts.
 - (d) Unnecessary or Unreasonable Proceedings by Representative.
 - i. Actions by Representative.
 - ii. In Actions against Representative.
 - iii. Severance of Defence.
 - (e) Bankruptcy of Representative.
 - i. In General.
 - ii. Where Co-Representative Solvent.
 - iii. Assignee of Representative.
 - (f) Representative of Defaulting Representative.
 - (g) Retention of Assets by Representative.
 - (h) Other Cases.

SUB-SECT. 2. COSTS OF PERSONS OTHER THAN REPRESENTATIVE.

- A. In General.
- B. Proceedings Instituted by Other Persons.
 - (a) In General.
 - (b) Improper or Vexatious Proceedings.
 - (c) Unreasonable Proceedings by Creditors.
 - (d) On Construction of Will.
 - (e) By Debtor to Estate.
 - (f) By Mortgagee.
 - (g) Other Proceedings.
- C. Parties in Same Interest.
- D. Parties Having Leave to Attend.
- E. Solicitors. *See SOLICITORS.*

SUB-SECT. 3. ASSETS OUT OF WHICH PAYABLE.

- A. In General.
- B. Personality.
- C. Realty.
- D. Mixed Fund.
- E. Assets Charged with Testamentary Expenses.
- F. Property Undisposed of by Reason of Lapse, etc.
- G. Funds Affected by Particular Proceedings.
 - (a) Inquiry as to Persons Entitled.
 - (b) Proof of Title.
 - (c) Undistributed Residue.
 - (d) Other Cases.

SUB-SECT. 4. SCALE OF COSTS.

- A. As between Solicitor and Client or Party and Party.
 - (a) Representative.
 - (b) Creditors.
 - (c) Legatees.
 - (d) Other Persons.
- B. Higher or Lower Scale.

SUB-SECT. 5. PRIORITY.

- A. In General.
- B. As between Parties.
 - (a) Representatives.
 - (b) Mortgagees.
 - (c) Other Persons.

SUB-SECT. 6. PROCEEDINGS ON ORIGINATING SUMMONS.

SUB-SECT. 7. CONCURRENT ACTIONS.

- A. Costs where Action Stayed.
- B. Costs where No Stay.

SUB-SECT. 8. TAXATION OF COSTS. *See* SOLICITORS.

SUB-SECT. 9. APPEAL AS TO COSTS.

- A. By Representative.
- B. By Other Persons.

<i>Administration of Bankrupt's Assets</i> . . .	<i>See</i> BANKRUPTCY.	<i>Escheat</i> . . .	<i>See</i> CROWN PRACTICE; DESCENT; REAL PROPERTY.
<i>Administration of Convict's Property</i> . . .	CRIMINAL LAW.	<i>Estate Duty</i> . . .	ESTATE AND OTHER DEATH DUTIES.
<i>Administrative Powers and Duties of Trustees</i> . . .	SETTLEMENTS; TRUSTS AND TRUSTEES.	<i>Estates and Interests in Real Estate, generally</i> . . .	REAL PROPERTY.
<i>Advancement</i> . . .	EQUITY; GIFTS; INFANTS; TRUSTS AND TRUSTEES.	<i>Executory Devise</i> . . .	REAL PROPERTY; TRUSTS AND TRUSTEES.
<i>Appointment, Powers of</i> . . .	PERPETUITIES; POWERS.	<i>Fiduciary Powers</i> . . .	TRUSTS AND TRUSTEES.
<i>Appointment of Trustees</i> . . .	SETTLEMENTS; TRUSTS AND TRUSTEES.	<i>Freebench</i> . . .	COPYHOLDS.
<i>Bona vacantia</i> . . .	CONSTITUTIONAL LAW; DESCENT.	<i>Gifts</i> . . .	GIFTS.
<i>Burial</i> . . .	BURIAL.	<i>Income and Capital</i> . . .	REAL PROPERTY; RENTCHARGES AND ANNUITIES; SETTLEMENTS; WILLS.
<i>Capital and Income</i> . . .	REAL PROPERTY; RENTCHARGES AND ANNUITIES; SETTLEMENTS; WILLS.	<i>Incorporeal Rights and Interests in Land</i> . . .	EASEMENTS; REAL PROPERTY.
<i>Codicils</i> . . .	WILLS.	<i>Interpretation of Wills</i> . . .	WILLS.
<i>Construction of Wills, generally</i> . . .	WILLS.	<i>Judicial Trustees</i> . . .	TRUSTS AND TRUSTEES.
<i>Conversion</i> . . .	EQUITY.	<i>Legacies, Failure, Ademption and Satisfaction of</i> . . .	EQUITY; WILLS.
<i>Curtesy, Estate by</i> . . .	COPYHOLDS; REAL PROPERTY.	<i>Legacy Duty</i> . . .	ESTATE AND OTHER DEATH DUTIES.
<i>Cy-près Doctrine</i> . . .	CHARITIES; WILLS.	<i>Limitation, Statutes of</i> . . .	LIMITATION OF ACTIONS.
<i>Descent of Real Estate</i> . . .	DESCENT; REAL PROPERTY.	<i>Mortmain</i> . . .	CHARITIES; CORPORATIONS; REAL PROPERTY.
<i>Distribution of Personal Estate</i> . . .	DESCENT.	<i>Paraphernalia</i> . . .	HUSBAND AND WIFE.
<i>Donationes mortis causâ</i> . . .	GIFTS.	<i>Perpetuities</i> . . .	PERPETUITIES.
<i>Dower</i> . . .	REAL PROPERTY.		

<i>Portions</i>	<i>See</i> EQUITY; POWERS; SETTLEMENTS.	<i>Succession Duty</i>	<i>See</i> ESTATE AND OTHER DEATH DUTIES.
<i>Powers</i>	POWERS.	<i>Tenant for Life, Statutory Powers of</i>	REAL PROPERTY; SETTLEMENTS.
<i>Probate Duty</i>	ESTATE AND OTHER DEATH DUTIES.	<i>Testamentary Capacity</i>	WILLS.
<i>Public Trustee</i>	TRUSTS AND TRUSTEES.	<i>Testamentary Dispositions</i>	WILLS.
<i>Registration of Death</i>	REGISTRATION OF BIRTHS, MARRIAGES, AND DEATHS.	<i>Transfer of Land</i>	REAL PROPERTY; SALE OF LAND.
<i>Revocation and Revival of Will</i>	WILLS.	<i>Trusts and Trustees</i>	TRUSTS AND TRUSTEES.
<i>Sale of Land</i>	SALE OF LAND.	<i>Uses and Trusts</i>	REAL PROPERTY; TRUSTS AND TRUSTEES.
<i>Settlement Estate Duty</i>	ESTATE AND OTHER DEATH DUTIES.	<i>Wills, Formalities of</i>	WILLS.
<i>Settlements</i>	SETTLEMENTS.		

Part I.—The Office of Executor or Administrator.

SECT. 1.—IN GENERAL.

See, now, Administration of Estates Act, 1925 (c. 23), s. 55 (1), xi.; Settled Land Act, 1925 (c. 18), s. 117 (1), xviii.; Trustee Act, 1925 (c. 19), s. 68 (9); & Law of Property Act, 1925 (c. 20), s. 205 (1), xviii., replacing Land Transfer Act, 1897 (c. 65), s. 24 (2).

1. **Executor & administrator distinguished.**—*SAYM v. ST. JOHN* (1809), Sel. Soc.'s Year Books of Edw. 2, Vol. II., p. 20.

2. — **Effect of clearance of estate.**—An administrator who has paid all expenses & debts & cleared the intestate's estate stands in the same position towards the next of kin as that which an exor. who has cleared the estate stands in towards the residuary legatees; he ceases to be an administrator & becomes a trustee, & the ct. can appoint a new trustee to act jointly with him.—*Re PONDER, PONDER v. PONDER*, [1921] 2 Ch. 59; 90 L. J. (Ch. 426; 125 L. T. 568; 65 Sol. Jo. 455.

Meaning of "personal representatives."—*See Law of Property Act, 1922 (c. 16), s. 188 (18).*

Source of representative's title—Executor.—*See Settled Land Act, 1925 (c. 18), s. 117 (1), xviii.; Trustee Act, 1925 (c. 19), s. 68 (9); & Law of Property Act, 1925 (c. 20), s. 205 (1), xviii.*

— **Administrator.**—*See Sect. 14, sub-sect. 1, post.*

Executor as trustee.—*See TRUSTS & TRUSTEES.*

What is an intestacy.—*See DESCENT, Vol. XVIII., p. 3; Administration of Estates Act, 1925 (c. 23), s. 55 (1), vi.*

SECT. 2.—WHO MAY BE APPOINTED EXECUTOR.

SUB-SECT. 1.—IN GENERAL.

3. **General rule.**—(1) *Prima facie*, all, who are nominated to the office of exor. by a testator, are entitled to a grant of probate. To exclude

any one very stringent grounds must be alleged (*SIR H. JENNER FUST*).

(2) To exclude an exor. from the grant, his lunacy, or idiocy, or whatever else may be the ground, must be distinctly pleaded (*SIR H. JENNER FUST*).

(3) The ct. has jurisdiction to inquire into the capacity of an exor., as well as into the capacity of a testator (*SIR H. JENNER FUST*).—*EVANS v. TYLER* (1849), 2 Rob. Eccl. 128; 7 Notes of Cases, 296; 13 L. T. O. S. 264; 14 L. T. O. S. 450; 13 Jur. 413; 14 Jur. 47; 163 E. R. 1266.

Alien.—*See British Nationality & Status of Aliens Act, 1914 (c. 17), s. 17.*

Alien enemy.—*See ALIENS, Vol. II., p. 158.*

Corporation or company.—*See CORPORATIONS, Vol. XIII., p. 353; Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 161.*

Infant.—*See Administration of Estates Act, 1708 (c. 87), s. 6; Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 165.*

Lunatic.—*See Part II., Sect. 6, sub-sect. 5, post.*

Married woman.—*See Married Women's Property Act, 1882 (c. 75), ss. 1 (2), 24.*

4. **Partnership firm—Effect of appointment—Dissolution of firm.**—A firm of partnership had been appointed as co-exors. That firm had dissolved partnership, & had ceased to exist:—*Held*: the partners in the firm must severally renounce, & the other exors. could not be treated as the sole exors. of the will.

A renunciation from all the persons who composed this firm can be procured without any difficulty. That will be the best course to take, & on their renouncing the probate may pass to the other two exors. (*SIR H. JENNER FUST*).—*In the Goods of FERNIE* (1849), 6 Notes of Cases, 657; 12 L. T. O. S. 559; 13 Jur. 216.

Public trustee.—*See Public Trustee Act, 1906 (c. 55).*

PART I. SECT. 1.

11. **Executor & administrator distinguished.**—There is no colonial statute defining the duties of administrators as such, but their distinct capacity has always been recognised by the Supreme Ct. & by the master. The English "administrator" corresponds to our "exor. dativo," our "administrator" to some extent corresponds to the English "trustee," &

the English "exor." corresponds to our "exor. testamentary."—*HIDDINGH v. DENYSSEN* (1885), 3 S. C. 424.—S. AF.

PART I. SECT. 2, SUB-SECT. 1.

a. **Alien.**—Probate will be granted to an alien exor. who comes within the jurisdiction & takes the oath of an exor.—*SMITHSON v. SMITHSON* (1915), 33 W. L. R. 230; 9

W. W. R. 501; 22 B. C. R. 326.—CAN.

b. **Alien enemy.**—An alien enemy, resident in Scotland, & duly registered under Alien's Restriction Act, 1914, & Order in Council, may be appointed an exor.-dativo.—*SCHULZE'S CASE*, [1917] S. C. 400.—SCOT.

c. **Corporation or company—Roman Catholic Bishop—Executor appointed by will—In personal capacity.**—*Re SWEENEY*, 21 C. L. T. 511.—CAN.

SUB-SECT. 2.—POOR PERSONS OR PERSONS OF DOUBTFUL CHARACTER.

5. **General rule—Jurisdiction of Court.**—EVANS v. TYLER, No. 3, *ante*.

6. — **Knowledge of testator.**—After a decree for administration, a residuary legatee filed a bill against the exors. & a co., in which testator was a large shareholder, & with which he had had extensive transactions, to recover the assets, relying on the fact that the exors. were shareholders & officers of the co., & had interest which conflicted with their duty. A demurrer of the co. was allowed, it not being shown that the exors. intended to neglect the performance of the duties of their office.

If a testator, when he makes his will, is aware of the circumstances & position of his exors. & trustees, the ct. will not lightly interfere with their discretion; & although the circumstance of an exor. being an insolvent may be a reason for appointing a receiver, yet, if testator was aware of his insolvency, the ct. will not, on that ground alone, take the property out of his hands.—STANTON v. CARRON Co. (1854), 18 Beav. 146; 2 Eq. Rep. 466; 23 L. J. Ch. 299; 22 L. T. O. S. 299; 18 Jur. 137; 2 W. R. 176; 52 E. R. 58.

Annotation:—**Mentd.** Yeatman v. Yeatman (1877), 7 Ch. D. 210

—*See, also*, Nos. 8, 215, *post*.

7. **Poor person.**—The spiritual ct. cannot refuse to grant the probate of a will to an exor. because indigent or insolvent or compel him to give security.—R. v. RAINES (1698), Carth. 457; 1 Ld. Raym. 361; 12 Mod. Rep. 205; 1 Salk. 299; 90 E. R. 864.

Annotation:—**Mentd.** R. v. Litchfield (Bp.) (1734), Ridg. temp. H. 73.

8. — **Knowledge of testator.**—(1) It is no ingredient to take the assets out of the hands of an exor., that he is not of an affluent fortune, as long as testator himself has placed this confidence in him without regarding his circumstances.

(2) The ct. will not make an order that a receiver shall be appointed of testator's personal estate by reason that the will is litigated & that the exor. is not of sufficient ability.—HATHORNTHWAITE v. RUSSEL (1740), 2 Atk. 126; Barn. Ch. 334; 26 E. R. 480, L. C.

—*See, also*, No. 210, *post*.

9. **Bankrupt—Knowledge of testator.**—LANGLEY v. HAWK, No. 215, *post*.

Bankruptcy of executor.—*See* Sect. 9, *post*.

SECT. 3.—MODE OF APPOINTMENT.

SUB-SECT. 1.—NOMINATION.

A. *In General.*

10. **For general & limited purposes—By same will.**—The same will may contain the appointment of one exor. for general. & of another for limited, purposes.—LYNCH v. BELLEW & FALLON (1820), 8 Phillim. 424.

Annotation:—**Refd.** In the Goods of Stockton (1857), 30 L. T. O. S. 175.

11. **Sentence nominating executor unfinished.**—Testator, in his will, after ordering a certain arrangement to be made to the satisfaction of his exors., continued, "I further appoint J. O'H., & G. B., of the W." & there stopped:—**Held**: these persons were not entitled to probate as exors.—In the Goods of BONHAM (1862), 8 Jur. N. S. 596.

12. —**Testator by his will said, "I appoint P. & W.," but did not state in what capacity he appointed them.** He also bequeathed legacies to "each of my exors.," & gave to his "said exors." the residue of his property, with certain directions as to it:—**Held**: by the words of the will P. & W. were appointed exors. & probate granted to them accordingly.—In the Goods of BRADLEY (1883), 8 P. D. 215; 52 L. J. P. 101; 47 J. P. 825; 32 W. R. 324.

13. **Appointment following signature.**—The appointment of the exors. in a will, being made in a clause after the signature of testator, administration, with the will annexed, granted to the residuary legatee, the clause appointing the exors. not being part of the will.—In the Goods of HOWELL (1839), 2 Curt. 342; 163 E. R. 433.

Annotation:—**Refd.** In the Goods of Topham (1849), 14 L. T. O. S. 381.

14. — **In testimonium clause.**—A part of a *testimonium* clause, in which mention was made of exors., stood under the signature of testator:—**Held**: not to contain an appointment of exors., but to be descriptive only of the attesting witnesses, & administration with the will annexed, together with the words under testator's signature, was granted to a legatee.—In the Goods of COTTON (1848), 1 Rob. Eccl. 658; 6 Notes of Cases, 307; 163 E. R. 1169.

15. —**Administration with the will annexed granted to a residuary legatee for life, as, though the will contained sundry directions to exors., their names were specified only under testator's signature.**—In the Goods of AMISS (1849), 2 Rob. Eccl. 116; 7 Notes of Cases, 274; 163 E. R. 1262.

Annotation:—**Mentd.** Charlton v. Hindmarsh (1859), 1 Sw. & Tr. 433.

16. — **Reference to executors in body of will.**—A will contained a reference to exors. "hereinafter named," but did not appoint exors. A clause appointing exors. was written immediately underneath testator's signature:—**Held**: the reference in the will was not such a reference to the clause appointing exors. as a document in existence at the time of the execution as to incorporate it, or to justify the ct. in receiving parol evidence that it was written before the will was signed.—In the Goods of DALLOW (1860), L. R. 1 P. & D. 189; 35 L. J. P. & M. 81; 14 L. T. 573; 12 Jur. N. S. 492; 14 W. R. 902.

17. — **Opposite names of attesting witnesses.**—Testatrix executed a will containing these words: "I leave the sum of one sovereign each to the exor. & witness of my will for their trouble to see that everything is justly divided," but not naming any exor. Beneath the signature of testatrix, & opposite the names of the attesting witnesses, were the words "executors & witnesses":—**Held**: there was no appointment of exors.—In the Goods of WOODS (1868), L. R. 1 P. & D. 556; 37 L. J. P. & M. 23; 17 L. T. 583; 32 J. P. 168; 16 W. R. 407.

18. **Appointment below signature.**—The words "John Greata, exor.," were written before a will was signed, but not above the signature:—**Held**: they did not form part of the will.—In the Goods of GREATA (1856), Dea. & Sw. 266; 28 L. T. O. S. 107; 2 Jur. N. S. 1172; 5 W. R. 42; 164 E. R. 572.

19. **Appointment written across printed form.**—The appointment of exors., written across a

PART I. SECT. 2, SUB-SECT. 2.

[d. *Poor person*—& *old*.]—It is no

ground for the ct. passing over the interest.—WATSON v. WATSON (1866), surviving exor. that he is old, & in 15 L. T. 133.—IR. embarrassed circumstances, & without

Sect. 3.—Mode of appointment: Sub-sect. 1, A., B.,

will, drawn on a printed form, included in the probate.—*In the Goods of RYTON* (1847), 5 Notes of Cases, 406.

20. Express appointment cancelled—Unattested substitution.]—A., by his will, appointed B. & C. trustees & guardians of his children, & exors. of his will. He subsequently erased the name of B. wherever it appeared, & substituted that of D. All the alterations were duly executed, except in the clause appointing guardians & exors., which was not attested. The ct. held that an exor. is either expressly nominated, or is so according to the tenor, & declined to look at the construction of the instrument for the purpose of determining whether D. was appointed exor., & decreed probate of the will without the unattested alterations.—*In the Goods of GAUSSEN* (1867), 17 L. T. 354; 32 J. P. 104; 16 W. R. 212.

21. —Reference in margin to executors.]—A reference in a marginal note to certain persons as exors., whose express appointment as exors. has been cancelled, but who are left trustees of the will, may have the effect of appointing them exors., & not only according to the tenor.—*In the Goods of NUSSEY* (1898), 78 L. T. 169.

B. Identity of Person nominated.

22. Mother & son described "as whole & sole executrix"—Probate granted to both.]—C. by will left the rest of his property, etc., "unto my wife B. C. & my son M. C., as whole & sole extrix." :—*Held*: the widow & son were both entitled to take probate.—*In the Goods of COURT* (1862), 2 Sw. & Tr. 485; 31 L. J. P. M. & A. 61; 6 L. T. 658; 26 J. P. 217; 8 Jur. N. S. 142; 10 W. R. 809; 164 E. R. 1085.

23. "Any two of my sons."—B., by his will, left all his property to his three sons therein named, & appointed "A. as my exor., with any two of my sons." A. proved the will at the Cape of Good Hope alone, & two of testator's sons now asked for probate of an authentic copy, reserving power to A. :—*Held*: the appointment of "any two of my sons" was void for uncertainty.—*In the Goods of BAYLIS* (1862), 2 Sw. & Tr. 618; 31 L. J. P. M. & A. 119; 7 L. T. 251; 26 J. P. 599; 8 Jur. N. S. 546; 164 E. R. 1135.
Annotation:—*Folded. In the Goods of Blackwell* (1877), 2 P. D. 72.

24. "Either one of my three sisters"—Only one surviving testator.]—Testator, by his will, appointed one of his sisters sole extrix. He had three sisters living at that time, but two died in his lifetime :—*Held*: the appointment was void from uncertainty.—*In the Goods of BLACKWELL* (1877), 2 P. D. 72; 46 L. J. P. 20; 36 L. T. 413; 41 J. P. 392; 25 W. R. 305.

25. "My grand-daughter"—Three grand-daughters surviving testator.]—Where testatrix appointed as extrix. & legatee a person described in

the will as "my grand-daughter," evidence was admitted for the purpose of explaining the latent ambiguity which arose from the fact that, at the date of the will & at the date of the death, testatrix had three grand-daughters, & the will was thereupon pronounced for, & probate was granted to the one whom the ct. found, from the extrinsic evidence to be the person intended by testatrix.—*In the Estate of HUBBUCK*, [1905] P. 129; 74 L. J. P. 58; 92 L. T. 665; 54 W. R. 16; 21 T. L. R. 333.

26. Misdescription of executor—More than one answering description.—Whether extrinsic evidence admissible.]—Testatrix appointed an exor. by the description of "Lord Sackville," & "Lord G. Sackville." It appeared that there were only two persons to whom the description could apply, viz., "Charles, Lord Sackville, Duke of Dorset," & the "Hon. George Germain" :—*Held*: in the circumstances, the former was the party intended. The question is, who is meant by Lord George Sackville? . . . The first point is, whether parol evidence is admissible . . . the general rule is this "*ambiguitas verborum latens verificatione suppletur*" (SIR H. JENNER FUST).

When it is ascertained that one of two persons can alone be meant, the ct. has only to consider which of the two was the person whom testatrix meant to appoint (SIR H. JENNER FUST).—*DORSET (DUKE) v. HAWARDEN (LORD)* (1842), 3 Curt. 80; 1 Notes of Cases, 412; 6 Jur. 350; 163 E. R. 661.

27. — — — — —.]—Testator appointed his nephew J. G. exor. of his will. His wife's nephew of that name had resided with him for years, & managed his business. There was also living a nephew, a brother's son, of the same name. Both claimed probate of the will :—*Held*: parol evidence was admissible to show the relation & circumstances in which the respective parties stood to testator, & the sense in which he habitually used the word nephew when speaking of his wife's nephew. The evidence showing that the wife's nephew was the person meant, probate of the will was decreed to him accordingly.—*GRANT v. GRANT* (1869), L. R. 2 P. & D. 8; 39 L. J. P. & M. 17; 21 L. T. 645; 34 J. P. 23; 18 W. R. 230; *subsequent proceedings* (1870), L. R. 5 O. P. 727, Ex. Ch.

Annotations:—*Consd. In the Goods of Ashton*, [1892] P. 83. *Held. In the Goods of O'Reilly* (1873), 43 L. J. P. 5.

28. — — — — —.]—Testator by his will appointed four exors., one of whom was described as "my nephew G. A." It appeared that there were two persons named G. A.—one an illegitimate son of testator's sister, the other the legitimate son of testator's brother. Testator also nominated as another of his exors. "my nephew E. A.," & it appeared that E. A. was his illegitimate grand-nephew, the son of his illegitimate nephew. He further described as "my niece" a person who was his illegitimate niece :—*Held*: the language of

PART I. SECT. 3, SUB-SECT. 1.—B.

e. Misdescription of executor—More than one answering description.]—Testator at the time of his death was living with Jane B. as his wife. His real wife was Hannah Jane B., with whom he had not lived for some years; she was living with C. Testator first devised certain lands to "my wife, Jane B., her heirs, etc.," & with no intervening reference to any wife, he said "as to all my residue, etc. I devise the same to my wife & hereby appoint her extrix. of this my will" :—*Held*: Jane B. was entitled to pro-

bate as extrix.—*BROWN v. BROWN* (1866), 5 N. S. W. S. C. R. 216.—AUS.

1. — Person answering description—Appointment not ambiguous.—Whether extrinsic evidence admissible.]—Testator appointed as one of his exors. his brother-in-law, Edmund O'K. He had no brother-in-law of that name, but he had a brother-in-law named Edward O'R. :—*Held*: evidence of the circumstances, habits, & position of testator's family was admissible to prove that Edward O'R. was the person to whom the name & description in the will could be applied,

& probate should be granted to him.—*In the Goods of TWOHILL* (1879), 3 L. R. Ir. 21.—IR.

g. — — — — —.]—Testatrix appointed as her exor. J. J., described as a grocer & storekeeper of M. There was no grocer or storekeeper of that name at M. nor had any person of that name ever been in business there. The brother of the testatrix, J. J. S. resided at M., & carried on business there as a grocer & storekeeper :—*Held*: the exor. was sufficiently identified by the will, & entitled to

PART I.—THE OFFICE OF EXECUTOR OR ADMINISTRATOR.

the will showed that testator applied the description of nephew & niece to legitimate & illegitimate relatives indiscriminately; & the ct. was therefore entitled to admit extrinsic evidence for the purpose of showing that the illegitimate & not the legitimate nephew was intended by the will.—*In the Goods of ASHTON*, [1892] P. 83; 61 L. J. P. 85; 67 L. T. 325.

Annotation.—*Expld. Re Parker, Parker v. Osborne*, [1897] 2 Ch. 208.

29. — Person answering description — Appointment not ambiguous—Whether extrinsic evidence admissible.—Testator appointed as one of his exors. "Francis Courtenay Thorpe, of H., gentleman." There was living a youth of twelve years of age to whom the name & description applied. The ct. refused to admit evidence to show that testator intended the father of the youth, whose name was Francis Corbet Thorpe.—*In the Goods of PEELE* (1870), L. R. 2 P. & D. 46; 39 L. J. P. & M. 36; 22 L. T. 417; 34 J. P. 392.
Annotation.—*Consd. Re Woolverton Mortgaged Estates* (1877), 47 L. J. Ch. 127.

30. — No person answering description exactly.—The exor. & universal legatee, being by mistake described in the will in the wrong name. Probate granted to him in his proper name, upon consent of the parties interested.—*In the Goods of SHUTTLEWORTH* (1838), 1 Curt. 911; 163 E. R. 315.
Annotations.—*Follid. In the Goods of Baskett* (1898), 78 L. T. 843. *Reid. In the Goods of Collins* (1849), 7 Notes of Cases, 278.

31. ——Testator, intending, as suggested, to appoint Philip B., a farmer, with whom he was intimate, an exor., by mistake caused him to be named Edmund in his will. Philip had a brother named Edmund, who had no acquaintance with testator, & was not a farmer. On proxy of consent from Edmund probate was decreed to Philip B.—*In the Goods of BAULY* (1853), 2 Rob. Eccl. 643; 163 E. R. 1442.

32. ——Where testator gave instructions that William George, of 4, Finsbury Square, watchmaker, should be his exor., & on the death of testator, it appeared that neither he nor his family knew any one of that name, & that no such person could be found or heard of at that address, the ct. granted letters of administration, with the will annexed, to one of the residuary legatees, there being no appointment of an exor. willing & competent to take probate.—*In the Goods of SAWTELL* (1862), 2 Sw. & Tr. 448; 31 L. J. P. M. & A. 65; 6 L. T. 395; 26 J. P. 264; 10 W. R. 782; 164 E. R. 1070.

33. — Whether extrinsic evidence admissible.—Testator nominated Joseph W. to be exor., but on affidavit that the person he intended to name was John Gibbon W. the ct. granted probate to him.—*In the Goods of GASKILL* (1875), 33 L. T. 578; 40 J. P. 72.

34. ——Testator appointed William McC. of Canonbury, an exor. The only persons at all answering the description were Thomas McC. & William Abraham McC.:—*Held*: parol evidence was admissible to prove which person was intended by testator.—*In the Goods of BRAKE* (1881), 6 P. D. 217; 50 L. J. P. 48; 45 L. T. 191; 29 W. R. 744.

Annotation.—*Follid. In the Goods of Chappell*, [1894] P. 98.

probate.—*Re PARSONS* (1908), 27 N. Z. L. R. 958.—N.Z.

h. Holder of office — Official of company for time being.—A testator cannot legally constitute a shifting executorship. Where testator appointed "the manager for the time being" of a co. his exor., intending thereby the manager of the co.

from time to time, the ct. refused probate to the person who at the death of testator was manager of the co.—*Re WERE'S WILL* (1886), 12 V. L. R. 271.—AUS.

k. ——The appointment of the secretary for the time being of a board of exors. & trust co. as exor. is a good & valid appointment.—*VAN*

35. ——Where testator appointed, as one of his exors. & trustees, "Robert Taylor, of Warmley Hill, in the parish of B., bootmaker," & there was no Robert Taylor living at Warmley Hill in the parish of B., but there was a James Alfred Taylor, bootmaker, living there, & it appeared that Robert Britton Taylor, his brother, also a bootmaker, lived at Hanham, in the same parish:—*Held*: extrinsic evidence might be received to show that "James Alfred Taylor, of Warmley Hill" was a friend of testator, & testator had little acquaintance with "Robert Britton Taylor of Hanham"; & the ct. having considered such evidence, ordered probate to issue to James Alfred Taylor of Warmley Hill. *Scmble*: evidence of declarations by testator which tended to show that he intended James Alfred Taylor, & not Robert Britton Taylor to be his exor. was inadmissible.—*In the Goods of CHAPPELL*, [1894] P. 98; 63 L. J. P. 95; 70 L. T. 245; 6 R. 576.

36. Holder of office — Office abolished.—Testator appointed the Archbishop of Tuam for the time being, an exor. of his will, the archiepiscopal jurisdiction of Tuam having been abolished by Church Temporalities Act, 1833 (c. 37), probate granted to the Bishop of Tuam as exor.—*In the Goods of HAYNES* (1842), 3 Curt. 75; 1 Notes of Cases, 402; 163 E. R. 660; *sub nom. In the Goods of DALES*, 6 Jur. 223.

37. — Subsequently ceasing to hold office.—The treasurer for the time being of a charity was appointed exor. of a will. The person who filled that office at the death of testator had ceased to do so at the time he applied for the probate:—*Held*: he was entitled to the grant.—*In the Goods of THOMPSON* (1852), 19 L. T. O. S. 96; 16 Jur. 342.

Admission of extrinsic evidence—Misdescription of executor—Person answering description.—*See* No. 29, *ante*.

No person answering description exactly.—*See* Nos. 33–35, *ante*.

More than one answering description.—*See* Nos. 26–28, *ante*.

Description not completed—Partial blank.—*See* No. 25, *ante*.

In construction of wills.—*See, generally, WILLS.*

Ascertainment of objects of charitable trust.—*See* CHARITIES, Vol. VIII., pp. 303, 304.

In construction of non-testamentary instruments.—*See* DEEDS, Vol. XVII., pp. 302 *et seq.*

C. Direction to nominate Executor.

38. General rule.—A person dying in Scotland having by his will directed that the legatees should appoint two persons to execute his testamentary bequests, probate granted to the nominees as exors.—*In the Goods of ORINGAN* (1828), 1 Hag. Eccl. 548; 162 E. R. 673.

39. Nomination by surviving executor.—Testatrix appointed A. & B. exors. of her will, & in case of the death of either of them, empowered the survivor to appoint another, so that there should continue to be two exors. Upon the death of A., B. appointed C. exor., to act with him. C.

DEEMTER v. THE MASTER (1914), C. P. D. 9.—S. AF.

PART I. SECT. 3, SUB-SECT. 1.—C.

391. Nomination by surviving executor.—Testator named seven exors., & directed that if any should die or renounce, the remaining exors. should appoint others, so that the same

Sect. 3.—Mode of appointment: Sub-sect. 1, C.; sub-sect. 2, A. (a), (b) & (c).]

did not take probate during the lifetime of B.:—**Held:** probate might pass to C., & he might appoint another exor. to act with him.—*In the Goods of DEICHMAN* (1842), 3 Curt. 123; 1 Notes of Cases, 514; 163 E. R. 676.

40. Nomination by executors & wife of testator.—Testator by a will dated in 1844 bequeathed his estate in trust to J. & G., who were nominated exors., with directions conjointly with testator's wife to appoint a third person as trustee & exor.:—**Held:** though there was no probability of agreement between J. & G. & testator's wife in the choice of such third person, the appointment of J. & G. as exors. was not thereby void, & upon the construction of the will, J. & G. must take probate before nominating such third person.—*JACKSON & GILL v. PAULET* (1851), 2 Rob. Eccl. 344; 163 E. R. 1340.

41. Third party nominating himself.—A. B. made her will, concluding "I must beg C. D. to appoint some one to see this my will executed." The ct. granted probate to C. D. on his appointment of himself being filed in the Registry.—*In the Goods of RYDER* (1861), 2 Sw. & Tr. 127; 31 L. J. P. M. & A. 215; 3 L. T. 756; 7 Jur. N. S. 196; 164 E. R. 941.

SUB-SECT. 2.—APPOINTMENT BY IMPLICATION.

A. What constitutes Person Executor according to Tenor of Will.

(a) *Person appointed to pay Debts, etc.*

42. General rule—Simple directions to pay debts, etc.—Directing certain persons to pay debts, funeral expenses, & expenses of probate is an appointment of such persons exors.—*In the Goods of PRY* (1827), 1 Hag. Ecc. 80; 162 E. R. 514. **Annotation:**—**Fold.** *In the Goods of Wilkinson* (1892), 67 L. T. 328.

43. ———.—A. executed a testamentary paper, called a codicil or appendix to her last will, in the possession of the exor. B., of London, of which will a copy was kept at Jerusalem. B. never had any will of A. in his possession, but such a will had been executed in his office, was in the possession of the exor. C. of London, & a copy of it was found amongst the papers of deceased at Jerusalem, on her death. In the codicil deceased ordered certain personal ornaments to be transmitted "to the exor. B. in England, to whom the proceeds of the sale" of her property at Jerusalem "are to be likewise remitted, & with the amount B. is hereby directed to pay the sum of £50 due to C., & to pay the residue equally

between" deceased's two unmarried sisters:—**Held:** B. was exor. according to the tenor of the codicil.—*In the Goods of COOPER* (1862), 8 Jur. N. S. 394.

44. ———.—In order to constitute one an exor. according to the tenor of a will it must appear, on a reasonable construction thereof, that testator intended that he should collect his assets, pay his debts & personal expenses & discharge the legacies contained in such will.—*In the Goods of ADAMSON* (1875), L. R. 3 P. & D. 253.

Annotation:—**Consd.** *In the Goods of Brown* (1910), 54 Sol. Jo. 478.

45. ———.—Testator gave to B. & W. all his real & personal estate to apply the same, "after payment of debts," to the payment of legacies. The ct. granted probate to B. & W. as exors. according to the tenor.—*In the Goods of BELL* (1878), 4 P. D. 85; 40 L. T. 659.

46. ———.—Where deceased had on the day before his death executed a document which purported to be a deed of gift, but which bore neither seal nor stamp, & contained (*inter alia*) a direction to the widow to receive "all moneys forthcoming, including sick & funeral moneys, my said wife to pay all dues & demands," & a number of specific gifts of bank shares, moneys, etc., to various relatives:—**Held:** in spite of declarations made by deceased of his intention to dispose of his property *inter vivos*, & not to make a will, the document, although ambiguous was testamentary, & the ct. accordingly granted administration "with the will annexed" to the widow as "extrix. according to the tenor."—*FIELDING v. WALSHAW*, *In the Goods of WALSHAW* (1879), 48 L. J. P. 27; 40 L. T. 103; 43 J. P. 463; 27 W. R. 492.

47. ———.—A simple direction to a certain person to pay debts of testatrix, without any bequest to him & without specifically appointing him as trustee, may be enough to constitute him exor. according to the tenor.

Testatrix, after bequeathing certain pecuniary legacies, desired G. to pay all her just debts, & then bequeathed to her niece M. all her furniture & effects & all money she possessed:—**Held:** G. was thereby constituted exor. according to the tenor.—*In the Goods of COOK*, [1902] P. 114; 71 L. J. P. 49; 86 L. T. 537; 46 Sol. Jo. 318.

48. Exception to rule—Where executor appointed.—*In the Goods of STOCKTON*, No. 104, *post*.

49. ——— Direction to pay out of particular fund.—A direction to a person to pay debts or funeral expenses, not out of the general estate, but out of a particular fund, will not constitute him exor., according to the tenor.

number should always exist:—**Held:** testator could delegate this power of appointment to his exors.—*WRIGHT v. STACKHOUSE* (1863), 10 N. B. R. (5 All.) 450.—**CAN.**

1. Nomination by a corporation.—Testator may delegate to a corp. the power to select & appoint exors. of his will.—*Re HADDEN'S WILL* (1879), 5 V. L. R. 91.—**AUS.**

m. ———.—*Re MACGREGOR'S WILL* (1901), 1 S. L. N. S. W. 50; 18 N. S. W. N. 17.—**AUS.**

n. Nomination by brothers & sisters of testator.—Testator appointed his two brothers exors. & trustees, providing that in the event of the death or inability or refusal to act of either, the surviving brothers or sisters should have a power of appointment. Probate was obtained, but one of the exors. died. Testator's surviving

brothers & sisters appointed pltf. as exor. & trustee:—**Held:** pltf. had been properly appointed.—*BRADLEY v. SAUNDERS* (1906), Cout. 380.—**CAN.**

PART I. SECT. 3, SUB-SECT. 2.—A. (a).

42 i. General rule—Simple directions to pay debts, etc.—A will directing payment of debts, & making a person universal legatee does not make such person exor. according to the tenor.—*Re PHILLIPS* (1876), 2 V. L. R. 29.—**AUS.**

42 ii. ———.—Where A., although not expressly appointed an exor., was directed to receive & pay testator's debts & to get in & distribute his personal estate:—**Held:** A. must be taken to have been appointed under the will an exor. by implication.—*Re MONOHUR MOOKERJEE* (1880), L. L. R. 5 Calc. 756; 6 C. L. R. 228.—**IND.**

42 iii. ———.—Where testator names a person to discharge any duties under the will, without appointing him exor., the rule is that, unless it can be gathered from the will that testator intended such person to pay the debts & legacies under the will, such person cannot be held to be exor.—*MITHIBAI v. CANJI KHERAJ* (1901), L. L. R. 26 Bom. 571.—**IND.**

42 iv. ———.—Testator gave all his property to his wife, with authority to collect all moneys lying to his credit, & control over whatever matters might require special attention, but he failed to name any person as exor.:—**Held:** the wife was extrix. according to the tenor, & entitled to probate.—*In the Goods of BROWN* (1912), 31 N. Z. L. R. 272.—**N.Z.**

o. ——— Subject to contingency mentioned in will.—A bequest

Semble: when testator, in his lifetime, hands over to a person a sum of money, & directs him, out of it, to pay the expenses consequent on his sickness & in case of death, his funeral expenses, such money does not pass under the will.—*In the Goods of TOOMY* (1864), 3 Sw. & Tr. 562; 34 L. J. P. M. & A. 3; 28 J. P. 824; 13 W. R. 106; 164 E. R. 1393.

Direction to legatee.—See No. 51, *post*.

Direction to residuary legatee.—See No. 50, *post*.

Direction to trustees.—See Part I., Sect. 3, subsect. 2, A. (c), *post*.

(b) Legatee.

50. Residuary legatee—Direction to pay debts—& funeral & testamentary expenses.—A. appointed his wife extrix. during widowhood; C. & D. residuary legatees in trust "to pay debts, funeral & testamentary expenses," etc., The widow alone proved, & died without having married again, leaving B. exor. of her will:—*Held*: C. & D. were exors. according to the tenor, & entitled to probate of A.'s will.—*In the Goods of COLLETT* (1857), Dea. & Sw. 274; 28 L. T. O. S. 276; 3 Jur. N. S. 72; 5 W. R. 251; 104 E. R. 574.
Annotation:—*Distd.* *In the Goods of PUNCHARD* (1872), L. R. 2 P. & D. 369.

51. Legatee—Mere direction to pay funeral expenses—Out of legacy.—A mere direction to a legatee to pay the funeral expenses out of his legacy will not make him an exor. according to the tenor of the will.—*In the Goods of SMITH* (1864), 3 Sw. & Tr. 561; 34 L. J. P. M. & A. 15; 10 Jur. N. S. 1084; 13 W. R. 277; 104 E. R. 1393.

52. Universal devise & legatee—Effect of Land Transfer Act, 1897 (c. 65).—(1) The practice of the ct. in cases where some one is not named as exor. in a will & no duties are indicated in the will as would constitute him exor. thereof according to the tenor, but who has such an interest that in spite of not being named as exor. he might be looked to, to act as such, is to grant to such person letters of administration with the will annexed, & not probate. This practice is applicable in the case of the will dealing with real estate of a person dying after the commencement of the above Act.

(2) An administrator can bring an action in respect of a trespass against the real estate in the interval between the death of testator & the grant of the letters of administration, & he can, if necessary, before the grant obtain the appointment of a receiver to prevent a wrong being done to the

estate.—*In the Goods of PRYSE*, [1904] P. 301; 73 L. J. P. 84; 90 L. T. 747; 48 Sol. Jo. 474, C. A.
Annotation:—*As to* (2) *Reid*. *Hewson v. Shelley*, [1913] 2 Ch. 384.

53. ———. ———. *In the Estate of MACKENZIE*, No. 63, *post*.

(c) Trustees.

54. General rule—No trust & no duty as trustee.—Is it not, where A. is called a trustee, but there is no trust, & no duty to perform as a trustee, that A. may be taken as exor. according to the tenor; but where there is a trust, & it seems to me that in the present case there is a trust, then A. is not exor. according to the tenor? (SIR J. DODSON).—*In the Goods of BRAY* (1852), 16 Jur. 802.

55. ———. **Necessity for directions to administer estate.**—Where the whole personal property is left to a trustee on trust for a specific purpose, & no exor. is named in the will, such trustee is not entitled to probate as exor. according to the tenor.

Semble: to constitute an exor. according to the tenor, there must be words importing a general power to receive & pay what is due to & from the estate.—*In the Goods of JONES* (1861), 2 Sw. & Tr. 155; 31 L. J. P. M. & A. 199; 4 L. T. 477; 104 E. R. 952.

Annotations:—*Distd.* *In the Goods of Baylis* (1865), L. R. 1 P. & D. 21. *Foll.* *In the Goods of Morgan* (1866), L. R. 1 P. & D. 214. *Consd.* *In the Goods of Fraser* (1870), L. R. 2 P. & D. 183. *Foll.* *In the Goods of PUNCHARD* (1872), 41 L. J. P. & M. 25.

56. ———. ———. **Deceased duly executed a will, in which was a clause as follows**: "I give & bequeath to B. & C. administrators & assigns & to be disposed of by them as trustees all funeral expenses & others to be paid, & afterwards the residue of my personal estate to be paid to," etc.:—*Held*: B. & C. were not exors. according to the tenor of the said will.—*In the Goods of HEATON* (1861), 7 Jur. N. S. 832.

57. ———. **Deeds of gift to trustees—Not to take effect until after death.**—Deceased executed three deeds of gift, conveying all his property to trustees for the benefit of his three children, but directing that the conveyances were not to take effect until his decease. Probate was granted of the three deeds, as together containing the will of the deceased, to the trustees, as legatees in trust.—*In the Goods of MORGAN* (1866), L. R. 1 P. & D. 214; 35 L. J. P. & M. 98; 14 L. T. 894; 30 J. P. 679; 14 W. R. 1022.

Annotation:—*Reid*. *Foundling Hospital Governors & Grdms. v. Crane*, [1911] 2 K. B. 367.

of testator's whole property to his wife, authorising her to receive & pay his debts, but on her marrying again, testator's whole property to go over to his children, entitles the wife to probate as extrix. according to the tenor, during viduity.—*Re ZEIS's WILL* (1877), 3 V. L. R. 100.—AUS.

D. ———. ———. *In the Will of ADDINSDALE* (1884), 10 V. L. R. 27.—AUS.

q. **Direction to pay debts not indispensable.**—A direction to pay testator's debts is not indispensable to the appointment of an exor. according to the tenor.—*In the Goods of M'KANE* (1887), 21 L. R. Ir. 1.—IR.

PART I. SECT. 3, SUB SECT. 2.—A. (b).

r. **Residuary legatee—Direction to pay debts.**—Testator bequeathed some personal property to his widow, & appointed trustees of a farm to hold for her for life; he bequeathed all the rest of his property to his widow absolutely & directed that debts were

to be paid out of the portion bequeathed to her:—*Held*: the widow was entitled to probate as extrix. to the tenor.—*Re CLUXTON'S WILL* (1877), 3 V. L. R. 55.—AUS.

s. ———. ———. **Legacies.**—Testator directed his exors. to pay his debts & funeral expenses; & devised the residue to his son D., & directed D. to pay to each of his daughters \$500. No exors. were named:—*Held*: to a disposition of personal estate exors. need not be expressly named, but may appear by implication, & D. was exor. according to the tenor.—*YOUNG v. PURVIS* (1886), 11 O. R. 597.—CAN.

t. **Legatee—Direction to pay debts & legacies.**—Direction to a legatee to pay debts & legacies held merely to make the property given to her the proper fund for their payment, & not to make her extrix. according to the tenor.—*In the Goods of MURPHY* (1868), 18 L. T. 63.—IR.

u. **Universal devise & legatee.**—The appointment of a person as

universal legatee does not, of itself, make him exor. according to the tenor.—*Re CLARK* (1876), 2 V. L. R. 16.—AUS.

PART I. SECT. 3, SUB-SECT. 2.—A. (c).

54 i. **General rule—No trust & no duty as trustee.**—A testator devised all his property to two beneficiaries & appointed it. as his sole trustee. No duty was assigned to the trustee, & no bequest made to him of any property:—*Held*: the trustee was not an exor. according to the tenor of the will.—*Re BRODERICK* (1913), 32 N. Z. L. R. 1193.—N.Z.

55 i. ———. **Necessity for directions to administer estate.**—Where property is left by will to trustees, they will not be entitled to probate as exors. according to the tenor, unless it appears from the will that they have to discharge such duties as exors. have to perform.—*APPACOOTY MUDALI v. MUTTU KUMARAPPA MUDALI* (1906), 1 L. R. 30 Mad. 191.—IND.

Sect. 3.—Mode of appointment: Sub-sect. 2, A. (c.)]

58. — — — — —]—C., by her will, gave all her property of whatsoever description to her son, when he attained the age of twenty-one, & then concluded, "I appoint C. & K. of, etc., trustees":—*Held*: the trustees were not exors., & granted administration, with the will annexed, to the guardian of the minor.—*In the Goods of COZENS* (1867), 16 L. T. 208; 15 W. R. 532.

59. — — — — —]—No direction to collect debts, etc.]—A married woman making a will in the exercise of a power directed the trustees of her marriage settlement to distribute her property in certain proportions among her relations. She appointed no exors. & no residuary legatee, & gave no directions as to the collection of the debts, & getting in of the estate, although she gave her trustees all the necessary powers of sale & mtge.:—*Held*: the trustees were not exors. according to the tenor.—*In the Goods of FRASER* (1870), L. R. 2 P. & D. 183; 40 L. J. P. & M. 9; 24 L. T. 72; 19 W. R. 333; *sub nom.* *In the Goods of TAYLOR*, 35 J. P. 24.

60. — — — — —]—Unless the ct. can gather from the words of the will that a person named trustee therein is required to pay the debts of deceased, & generally to administer his estate, it will not grant probate to him as exor. according to the tenor thereof.—*In the Goods of PUNCHARD* (1872), L. R. 2 P. & D. 369; 41 L. J. P. & M. 25; 26 L. T. 526; 36 J. P. 296; 20 W. R. 446.

Annotations:—*Apld.* *In the Goods of Lowry* (1874), L. R. 3 P. & D. 157. *Distd.* *In the Goods of Way*, [1901] P. 345.

]—Testatrix named as her universal legatee & sole extrix. her daughter, a minor aged eight years. She also nominated two trustees. The sole next of kin of the minor were in Australia.

The ct. declined to regard the two trustees as exors., according to the tenor, but granted administration, with the will annexed to them, under the Court of Probate Act, 1857 (c. 77), s. 73.—*In the Goods of STEWART* (1875), L. R. 3 P. & D. 244; 44 L. J. P. & M. 37; 23 W. R. 683; *sub nom.* *In the Goods of STUART*, 33 L. T. 72; 39 J. P. 679.

62. — — — — —]—Testator by his will appointed his brother-in-law & son trustees thereof. He devised & bequeathed to his trustees all his real & personal property, upon trust, to pay to a certain lady a certain amount due to her from testator, this being the only debt owing by testator, with the exception of his doctor's bill. The trustees were then directed to pay one legacy of £50, & to invest the residue, & out of the income to be derived therefrom to pay to the housekeeper of testator's son, for her life, the annual sum of £30, to be increased to £40, a year in the event of her ceasing to be his housekeeper. Subject to the foregoing directions, testator gave the residue of his property to his son, but directed that, in the event of the son not disposing of it by deed or will, it was to go to the son's children. This gift to the son amounted to an absolute gift. The trustees moved the ct. to grant probate of the will to them as exors. according to the tenor:—*Held*: they were not exors. according to the tenor, & probate must be refused.—*In the Goods of ARMSTRONG* (1889), 59 L. J. P. 23; 62 L. T. 184; 54 J. P. 200.

63. — — — — —]—No direction to pay debts.]—

65 l. *Direction to do executory acts*
—*To get in estate & pay debts.*—
Testator, after giving some specific legacies, bequeathed the residue to three trustees upon trust to sell, &

pay the costs & expenses of the sale, his funeral expenses & debts, & some pecuniary legacies, & gave directions as to the money remaining in their

Testatrix by her will left all she possessed to two persons, P. & L., or the survivor of them, in trust to pay the whole income arising from her estate to her husband during his life, & at his death to realise the estate & divide the proceeds equally amongst her four children:—*Held*: in the absence of a direction to pay debts, the trustees were not exors., according to the tenor; but, as in their capacity of universal legatees & devisees in trust, their interest was paramount to that of the husband, the proper form of order to make would be to grant administration, with the will annexed, to them, P. & L., as universal legatees & devisees in trust.—*In the Estate of MACKENZIE*, [1909] P. 305; 79 L. J. P. 4; 26 T. L. R. 39.

64. — — — — —]—The ct. will not find that trustees named in a will are exors. according to the tenor, unless there is some direction in the document that they are to do some act of an executory character.—*In the Goods of BROWN* (1910), 54 Sol. Jo. 478.

65. *Direction to do executory acts*—*To get in estate and pay debts.*—By an instrument not under seal, but executed & attested as a will, although not described as such by deceased, she gave all her personal estate to B. & D., upon trusts after her decease, to get in & stand possessed of the same, & subject to her just debts to pay, etc.:—*Held*: such paper was entitled to probate as a will, of which B. & D. were to take probate as exors. according to the tenor.—*In the Goods of MONTGOMERY* (1846), 5 Notes of Cases, 99; 8 L. T. O. S. 294; 10 Jur. 1063.

Annotation.—*Distd.* *In the Goods of Punchard* (1872), L. R. 2 P. & D. 369.

66. — — — — —]—*Misuse of printed form.*—Where a will had been written on a printed form, misunderstood by the writer, who inserted the dispositive part after the conclusion of the will, according to the printed form, the ct. admitted the paper.

The form begins "This is the last will & testament of me," etc.; then it directs the payment of debts, etc. by his "exors. hereinafter named"; it then bequeaths all his estate & effects to the two persons who were to be trustees, directing them to collect & convert into money all his real & personal estate, "upon trust to pay," & then are blanks to be filled up; but all this part, beginning "upon trust," is struck out, & there is in the left-hand margin an asterisk by way of reference to something appearing elsewhere. It then goes on to nominate exors., the blank being filled up with the names of the two persons before mentioned; & it concludes, "In witness whereof, I, the said A. S., have to this my last will & testament set my hand the 21st May, 1847." That would be the conclusion of the will; & then follows the attestation-clause, but the blanks in it are not filled up. On the next, or third side, is a disposition of the property, signed by testator & attested by two witnesses. Let administration with will annexed pass of all the first side of the will down to the mark of reference, excluding all that follows on the printed form after the mark of reference, & including what is on the third side. The persons named in the first part of the will are not exors. according to the tenor; administration with will annexed must be taken by the residuary legatees in trust (SIR H. JENNER FUST).—*In the Goods of SAYER* (1847), 5 Notes of Cases, 515.

hands:—*Held*: the trustees were not exors. according to the tenor.—*In the Goods of LOVS* (1881), 7 L. R. Ir. 178.—IR.

67. — To convert testator's property into money & divide proceeds.]—Testator by the first clause of his will directed his debts & funeral & testamentary expenses to be paid, & then gave all his personal estate to certain persons on trust to convert into money, get in & receive it in such manner as they should deem expedient, & to divide the proceeds amongst his children, with the exception of some furniture which he gave to one of his daughters:—*Held*: the trustees were exors. according to the tenor.—*In the Goods of BAYLIS* (1865), L. R. 1 P. & D. 21; 35 L. J. P. & M. 15; 13 L. T. 446; 11 Jur. N. S. 1028.

Annotations:—Distd. In the Goods of Punchard (1872), L. R. 2 P. & D. 369. *Held. In the Goods of Fraser* (1870), 40 L. J. P. & M. 9.

68. — —.]—Testator in his will left his property, after the payment of his debts & funeral expenses, to certain persons, & constituted & appointed A. & B. to be his trustees, with full power to dispose of all his property, & convert the same into money, to be deposited in Govt. funds for the purpose above stated:—*Held*: A. & B. were exors. according to the tenor of the will.—*In the Goods of CHAPPELL* (1808), 37 L. J. P. & M. 32; 17 L. T. 618; 32 J. P. 231; 16 W. R. 488.

69. — To dispose of testator's effects as trustees thought fit.]—A. appointed B. & C. trustees to dispose of his effects as they thought fit, & to receive his life assurance for the benefit of his two sons:—*Held*: B. & C. were exors. according to the tenor.—*In the Goods of GALE* (1868), 18 L. T. 696; 32 J. P. 631; 16 W. R. 942.

70. — To get in & distribute estate.]—Testator made a will by which he appointed three trustees & exors. He subsequently wrote out & executed a holograph codicil, expressed to be made "in consequence of the death" of one of the trustees. He thereby appointed B. trustee in place of deceased trustee; made certain alterations in the division of his property; directed the trustees to get in the whole of his property, to make certain investments, to pay the dividends arising from such investments to certain persons & in specified proportions; to pay legacies to two persons; & after paying funeral & other expenses, to distribute the residue & remainder of his property as directed by the will. By a second codicil, testator explained one of the bequests under the first codicil, & confirmed his will:—*Held*: B. in conjunction with the two surviving trustees & exors., was entitled to a grant of probate of the will & codicils, as exor. according to the tenor, & probate decreed to the three trustees named in the first codicil accordingly.—*In the Goods of LUSH* (1887), 13 P. D. 20; 57 L. J. P. 23; 58 L. T. 684; 52 J. P. 199; 36 W. R. 847.

Annotations:—Distd. In the Goods of Hartley (1895), 11 R. 592. *Apld. In the Goods of Wright* (1909), 25 T. L. R. 15.

71. — "To carry out this will"—& for due execution of will.]—Trustees nominated by testator "to carry out this will" & "for the due execution of this my will":—*Held*: entitled to probate as being exors. according to the tenor.—*In the Goods of RUSSELL, In the Goods of LAIRD,*

[1892] P. 380; 62 L. J. P. 15; 67 L. T. 504; 1 R. 456.

Annotation:—Distd. In the Goods of Hartley (1895), 11 R. 592.

72. — To pay funeral & other debts.]—Testatrix appointed A. & B. trustees of her will & expressed a wish that they should pay her funeral & other debts:—*Held*: A. & B. were thereby constituted exors. according to the tenor of the will, & were entitled to probate.—*In the Goods of WILKINSON*, [1892] P. 227; 61 L. J. P. 134; 67 L. T. 328.

73. — Advancement & maintenance of children.]—Testator by his will, which was drawn for him by a friend, & executed nearly two years before his death, directed all his just debts "to be paid by my exors. hereinafter named." The word "exor." did not occur again in the will. The will also contained a direction that his younger children should be sent to a boarding school "where the trustees shall think fit." Testator then appointed his wife & two of his sons "trustees," & directed that the expense of maintaining & educating the younger children should be paid out of the estates bequeathed to them, & he also bequeathed certain leasehold houses to his two sons as remuneration for their services as trustees, but no trust property was vested in the trustees by the will. There was evidence that testator intended his wife & the two sons named to act as his exors., & that he had intended to execute a more formal document, but had died without carrying his intention into effect. The ct. made a grant of probate to the trustees named, as exors. according to the tenor of the will.—*In the Goods of KIRBY*, [1902] P. 188; 71 L. J. P. 116; 87 L. T. 141.

74. Omission of appointment as executors—Appointment as trustees.]—Persons named as trustees in a will were held, under the circumstances, to be exors. according to the tenor.—*In the Goods of WELLS* (1848), 10 L. T. O. S. 503.

75. Duties only those of trustee.]—*In the Goods of BRAY*, No. 54, ante.

76. — Specific trust.]—*In the Goods of JONES*, No. 55, ante.

77. — —.]—Deceased, in her will, appointed H. her sole trustee, & directed that he should be paid as an attorney the same as if he had not been a trustee. The only duties assigned to him were those of a trustee:—*Held*: he was not an exor. according to the tenor of the will.—*In the Goods of LOWRY* (1874), L. R. 3 P. & D. 157; 43 L. J. P. & M. 34; 30 L. T. 695; 38 J. P. 631; 22 W. R. 352.

78. Trustees also appointed executors—Appointment as executors subsequently revoked.]—Testator duly executed his will, by which he gave the usual directions as to the payment of debts, etc., & appointed two exors. The same two persons were also appointed trustees, & they were directed to hold the property upon certain trusts for the benefit of testator's wife & the only son of the marriage. The wife predeceased testator, & the son became absolutely entitled to the whole of the property. After testator's death his will

67 l. — To convert testator's property into money & divide proceeds.]—Testator directed his debts to be paid, & gave all his property to his widow for life, or until she should marry again, & after her re-marriage to trustees for conversion & investment after payment of his debts:—*Held*: they were entitled to probate as exors. according to the tenor.—*Re PALLETT'S WILL* (1878), 4 V. L. R. 33.—*AUS.*

74 l. Omission of appointment as executors—Appointment as trustees.]—The will appointed trustees, but no exors. Probate granted to the trustees as exors. according to the tenor.—*Re WRIGHT'S WILL*, 4 J. R. N. S. 13.—*N.Z.*

74 ll. — —.]—A devise & bequest of all testator's real & personal estate to two persons, upon trust, no mention being made of exors., is suf-

ficient to constitute the trustees exors. according to the tenor.—*Re LEVI'S WILL*, 3 J. R. N. S. 12.—*N.Z.*

e. Of personality—Deceased intestate as to realty.]—Testator left his personality to K. on certain trusts, but died intestate as to his realty:—*Held*: K. could not obtain probate as exor. according to the tenor.—*Re MARTIN'S WILL* (1909), 9 S. R. N. S. W. 576.—*AUS.*

Sect. 3.—*Mode of appointment: Sub-sect. 2, A.*

was found in a mutilated condition, the part relating to the appointment of exors. & to a legacy to one of them, C., being cut out. There was evidence of some dispute having arisen between C. & testator, & of deceased having told a friend that he had "cut that rascal C. out of the will":—*Held*: the mutilation of the will revoked the appointment of exors. the trustees were bare trustees merely, & not exors. according to the tenor, & the son was entitled to a grant of administration, with the will annexed.—*In the Goods of MALEY* (1887), 12 P. D. 134; 56 L. J. P. 112; 57 L. T. 500; 51 J. P. 423; 35 W. R. 764.

79. — *Chain of representation.*—Testatrix, by her will, appointed two persons to be her exors. & trustees, conferred upon the surviving trustee or trustees power to appoint new trustees, & directed that every trustee appointed under her will should, by force of his or her appointment to be such trustee, become & be an exor. under her will. The persons named in the will renounced, & letters of administration with the will annexed were granted in 1852 to two persons, who died respectively in 1855 & 1870, without having administered the estate. In 1856 the Ct. of Ch. appointed as trustees of the will two other persons, one of whom died in 1869. The survivor of these two trustees died in 1884, leaving a will by which he appointed his wife his sole extrix., & she, in Feb. 1895, under the Conveyancing Act, 1881 (c. 41), appointed two persons to be trustees of the will of testatrix:—*Held*: these trustees became exors. by force of the special clause in the will.—*In the Goods of SHAW* (1895), 73 L. T. 192.

80. *Expressions "trustees" & "executors" used indifferently.*—Testator in his will did not specifically appoint any exor. but nominated four persons to act as his trustees, & bequeathed to them his residuary estate with power to receive any sums due to the residue, & to give a discharge for same. The will contained directions to "my exors." as to the payment of his debts & as to the manner in which they were to deal with the residue & other portions of the estate; & generally it appeared that testator had used the terms trustees & exors. indifferently as referring to the same persons:—*Held*: the trustees were exors. according to the tenor, & entitled to probate.—*In the Goods of LEVEN & MELVILLE (EARL)* (1889), 15 P. D. 22; 59 L. J. P. 35.

Annotation:—*Held*. *In the Goods of Kirby*, [1902] P. 188.

81. *Substituted appointment—"Trustees" for "executors in trust."*—The appointment of exors. according to the tenor revoked by a codicil, & others substituted by implication.

The question is, what is the effect of the codicil. By the will L. & W. are expressly named exors. in trust. They would therefore be exors. in trust as well of the real as the personal estate. By the codicil testator declares that he had appointed them trustees, & I must conclude that he appointed them trustees in general terms, & looking at the terms of the appointment in the codicil, I can only conclude that O. & M. were substituted for them, & that they stand in the same position, that is, exors. according to the tenor. Under these circumstances the appointment of W. as exor. is revoked, M. is substituted for him, & he is therefore entitled to the probate of the will & codicil as the surviving exor.; but at the same time I think W. should renounce (SIR H. JENNER FUST).—*In the Goods of TREFFRY* (1850), 7 Notes of Cases, 382; 15 L. T. O. S. 71; 14 Jur. 402.

82. — *"Trustee" for "trustee & executor."*—Testatrix by her will appointed A. trustee, with power to convert the residue of her estate into money, & after payment of her debts & personal expenses, to dispose of the property in accordance with the directions given in such will & she also appointed him exor. By a codicil she revoked that part of her will which gave the property in trust to A., & in lieu of him appointed her nephews B. & C.; & providing C. should not be in England his brother D. to act in his capacity. She also revoked the appointment of A. as exor., & in his place appointed B. & C. B. renounced probate of the will of deceased; C. at the time of her death was not in England:—*Held*: D. was an exor. according to the tenor of the will, but power must be reserved to make a grant to C. in case he should return to this country.—*In the Goods of GOODWORTH* (1868), 37 L. J. P. & M. 49.

83. — *—*.—*In the Goods of LUSH*, No. 70, ante.

84. — *By codicil.*—Where testator appointed trustees & exors. of his will & by codicil cancelled the appointment of trust & appointed other persons in their stead; the trustees & exors. appointed by will having renounced or being unable to act, the ct. refused to grant probate as exors. according to the tenor, to the persons substituted by the codicil, but made a grant to them of administration with the will annexed.—*In the Goods of HARTLEY* (1895), 11 R. 592.

85. — *—*.—By his will testator appointed his wife, his brother, & B. extrix. & exors. By his codicil testator substituted the name of his son for that of B. as trustee, & struck out the name of B. from all participation in the will. On a motion for probate to the exors. & to the son as exor. according to the tenor, the ct. granted probate as prayed.—*In the Goods of WRIGHT* (1908), 25 T. L. R. 15.

(d) *Addressee of Testamentary Instrument.*

86. *Will in form of letter.*—Part of a letter, duly signed & attested, admitted to probate as the will of deceased; the person to whom the letter was addressed held to be legatee & exor. according to the tenor, though he was not named therein.—*In the Goods of WEDGE* (1842), 2 Notes of Cases, 14.

Annotation:—*Folld*. *In the Goods of Taylor* (1845), 4 Notes of Cases, 290.

87. — *—*.—Where a testatrix executed her will in the form of a letter, superscribed "A. B.," & containing the words, "I hereby appoint you my exor. to carry this my last will into effect," without naming any person; the ct. upon affidavit granted probate to the party named in the superscription.—*In the Goods of TAYLOR* (1845), 4 Notes of Cases, 290; 9 Jur. 978.

88. — *—*.—B. produced a sealed envelope, on which was written, "I confirm the contents written in the inclosed document in the presence of," etc. This was signed by her, & attested by two witnesses. On her death, two days subsequently, the envelope, still sealed with the same seal, was found on her table directed to A., her nephew; on being opened, it was found to contain a testamentary disposition in the form of a letter addressed to her nephew. The ct. admitted parol evidence of the identity of the inclosure so found after death with the document referred to by the executed memorandum, & granted probate of the envelope & contents to A., as exor., according to the tenor.—*In the Goods of ALMOSNINO* (1859), 1

Sw. & Tr. 508; 29 L. J. P. & M. 46; 2 L. T. 191; 23 J. P. 328; 6 Jur. N. S. 302; 164 E. R. 835.

Annotations.—*Reid*. Van Straubensee v. Monck (1862), 3 Sw. & Tr. 6; *Re* Nicholls, Hunter v. Nicholls, [1921] 2 Ch. 11.

89. —[.]—Testatrix inclosed in an envelope addressed by her "Miss Eliza Adams" a duly executed testamentary paper in the form of a letter, which, after stating the nature of her property & giving directions as to its disposition after her death, concluded thus: "I know of nothing else, my dear Eliza, to trouble you with, & trust that this will not involve you in much." The real name of the person for whom the paper was intended by the testatrix was Eliza Mary Adams:—*Held*: that she was entitled to probate as extrix., according to the tenor.—*In the Goods of MANLY* (1862), 3 Sw. & Tr. 56; 31 L. J. P. M. & A. 198; 7 L. T. 220; 27 J. P. 9; 8 Jur. N. S. 493; 164 E. R. 1193.

Annotation.—*Reid*. *In the Goods of Taylor* (1870), 35 J. P. 24.

90. —[.]—A nurse, employed under contract by the War Office on hospital-ships, wrote a letter giving the addressee full liberty to deal with her affairs & giving directions as to the disposal of her property. The letter was written during an interval of leave on shore in this country, but after the writer had received orders to re-embark:—*Held*: the letter, which was unattested, was privileged as a soldier's will within the meaning of the Wills Act, 1837 (c. 26), s. 11, & the person to whom it was addressed was exor. according to tenor, & as such, entitled to probate of the document.—*In the Estate of STANLEY*, [1916] P. 192; 85 L. J. P. 222; 114 L. T. 1182; 32 T. L. R. 643; 60 Sol. Jo. 604.

91. Codicil—Given to third party—Executors of will predeceasing testator.—A., by will, disposed of the whole of his personal & of certain real property & appointed exors. He subsequently executed another testamentary paper, in which was the clause "If my wife survives me, in two years after my wife's death my second cousin B. & next of kin, to take possession of all my real & personal property, & to pay all my just debts according to my will. . . . I give B. this written document as I am afraid my exors. will not put my will into ct."; The exors. died in the lifetime of deceased:—*Held*: as the paper was testamentary & duly executed, although not to operate until some time after the death of testator, it was entitled to probate, & B. was exor. according to the tenor thereof, but he must take probate of the will as well as of that paper.—*In the Goods of NEWNS* (1861), 7 Jur. N. S. 688.

92. Will in envelope indorsed "A., C. executors"—Effect of reference in codicil to A "one of my executors."—Deceased left a will executed in duplicate, in which no exor. was named; one copy was found inclosed in an envelope, which was indorsed A., C., exors. He also left a codicil, which commenced, "I have left my will in the custody of A., one of my exors."—*Held*: A. was exor. according to the tenor of the codicil.—*In the Goods of COCKER* (1851), 8 Jur. N. S. 394, n.

(e) *Person requested to Assist or Act.*

93. Person asked to assist executor.—*POWELL v. STRATFORD* (1803), cited 3 Phillim. 118; 161 E. R. 1275.

Annotations.—*Reid*. Grant v. Lealie (1819), 3 Phillim. 116; *In the Goods of Brown* (1877), 46 L. J. P. 31.

94. —[.]—(1) "I request L. to assist my daughter in the execution of my will":—*Held*: not to be an appointment of L. as exor. according to the tenor.

(2) The daughter sole extrix. & residuary legatee being incapable of acting, administration decreed to L. for her use & benefit on consent of all persons interested.—*In the Goods of STEVENSON* (1852), 19 L. T. O. S. 351; 16 Jur. 714.

Annotation.—*Consd.* *In the Goods of Brown* (1877), 2 P. D. 110.

95. —[.]—Testatrix executed a will which contained a clause to the effect, "I appoint my sister A. my extrix. only requesting that my nephews C. & E. will kindly act for & with this dear sister":—*Held*: C. & E. were exors. according to the tenor of the will.—*In the Goods of BROWN* (1877), 2 P. D. 110; 46 L. J. P. 31; 38 L. T. 519; 41 J. P. 601; 25 W. R. 431.

96. Person requested to "act."—Testatrix nominated no exor., but the will contained these words: "W., who holds the policy of my life assurance will, I am sure, act for me in this, & I beg him to pay himself, if he needs it, for his trouble":—*Held*: W. was exor. according to the tenor.—*In the Goods of TRACY* (1875), 31 L. T. 801; 39 J. P. 153; 23 W. R. 385.

97. Person requested to "carry out wishes."—Testatrix, by her will, desired two persons whom she named to "carry out these my wishes," & for their trouble they were each to take a legacy of nineteen guineas. "After these & all other claims" had been met, they were to deal with the residue in manner set forth in the will:—*Held*: they were exors. according to the tenor, & it lay upon the person asking that the exors. should give security to show a reason why this should be done.—*In the Goods of ALLAM* (1892), 66 L. T. 382.

98. —Foreign will].—Testatrix died in the republic of Hayti domiciled there, leaving a will duly executed according to Haytian law. The will appointed no exor. or universal legatee, but contained the following clause: "B., of Port au Prince, & W. of Liverpool, shall carry out my last wishes." The only next of kin who was primarily entitled to the grant was in Hayti. Persons entitled to half the estate were in England. W. had managed the English affairs of testatrix for twenty years, & had, at the time of her death, in his possession a sum of £1,260 belonging to her estate. The ct. made a grant to W. of administration with the will annexed under the Court of Probate Act, 1857 (c. 77), s. 73, without citing the next of kin.—*In the Goods of MOFFATT*, [1900] P. 152; 69 L. J. P. 98.

(f) *Other Persons.*

99. Persons given entire charge of property.—*BRIGHTMAN v. KEIGHLEY* (1585), Cro. Eliz. 43; 78 E. R. 307.

Annotation.—*Mentd.* Pennington v. Healey (1833), 1 Cr. & M. 402.

PART I. SECT. 3, SUB-SECT. 2.—A. (a).

d. *Person appointed to "see that wishes are carried out."*—A will contained the following provision: "I appoint the Public Trustee to see that the wishes herein expressed be carried out."—*Held*: the Public Trustee was not the exor. according to the tenor, having been appointed not to carry out

the wishes of testatrix, but to see that they were carried out.—*Re BRANSON* (1911), 31 N. Z. L. R. 79.—N.Z.

PART I. SECT. 3, SUB-SECT. 2.—A. (b).

99 i. *Persons given entire charge of property.*—A bequest of property to several persons, one of whom is to have the entire control & management of it for himself & the others, is sufficient

to constitute him exor. according to the tenor.—*Re KEANE'S WILL* (1877), 3 V. L. R. 49.—AUS.

99 ii. —[.]—A bequest of all testator's property to his wife & family "to be managed by A. & B." constitutes A. & B. exors. according to the tenor.—*Re STEPHEN'S WILL* (1878), 4 V. L. R. 36.—AUS.

99 iii. —[.]—A testator appointed

Sect. 3.—Mode of appointment: Sub-sect. 2, A. (f) & B. Sect. 4: Sub-sect. 1, A., B. & C.]

100. —.]—Testator made a will in which were these words "This is to cancel all former wills & to leave all in the hands of my mother & wife jointly or separately & they are in no way to be interfered with." No exors. were named.

The ct. granted probate to the mother & wife as exors. according to the tenor.—*In the Goods of GLASSON* (1874), 22 W. R. 845.

101. Appointment conditional—On death of named person.]—*NAYLOR v. STAINSBY* (1754), 2 Lee, 54; 161 E. R. 261.

102. Limited executor of will—Implied general appointment in codicil.]—A person appointed a limited exor. in a will may be appointed general exor. in a codicil by implication & without express words.—*In the Goods of AIRD* (1828), 1 Hag. Ecc. 337; 162 E. R. 605.

103. Person appointed to "administer."—Testator, by his will, appointed E. "to hold & administer in trust all my estate well known to E."—*Held*: as this person had duties to perform, the word "administer" was, without any express instruction to pay debts, sufficient to constitute him exor. according to the tenor.—*In the Goods of WAY*, [1901] P. 345; 71 L. J. P. 13; 85 L. T. 643; 17 T. L. R. 758.

B. Where Another Executor nominated.

104. Presumption against executor according to tenor.]—Where there is a direct appointment of exors., the presumption is against the intention of testator that any other person should be joined in the probate:—*Held*: the clause desiring "debts, funeral & testamentary expenses be paid by A., who holds £250 of my money, the interest of same I allow for my board & lodging," did not entitle A. to be joined in the probate as extrix. according to the tenor. In such questions, the intention of testator must clearly appear & the ct. will not look beyond the four corners of the will.—*In the Goods of STOCKTON* (1857), 30 L. T. O. S. 175.

105. Executor according to tenor entitled to grant jointly with nominated executors.]—*COLLARD v. SMITH* (1799), cited 3 Phillim. 116; 161 E. R. 1274.

Annotation:—*Reid. Grant v. Leslie* (1819), 3 Phillim. 116.

106. —.]—An exor. according to the tenor, entitled to be joined in the probate with the surviving exor. of a wife.—*GRANT v. LESLIE* (1819), 3 Phillim. 116; 161 E. R. 1274.

107. —.]—*In the Goods of LUSH*, No. 70, *ante*.

108. Nominated executor unable to act—Incapacity.]—*In the Goods of STEVENSON*, No. 94, *ante*.

109. — Not within jurisdiction—Reservation of rights.]—*In the Goods of GOODWORTH*, No. 82, *ante*.

SECT. 4.—APPOINTMENT FOR PARTICULAR OR LIMITED PURPOSE.

SUB-SECT. 1.—APPOINTMENT LIMITED TO PARTICULAR PROPERTY.

As to deaths occurring after Dec. 31, 1925, see Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 155.

two persons to "manage my firm & all other affairs on my death. They shall supervise my firm & manage it."—*Held*: such persons had thereby been given the powers of exors. testamentary.—*Re NURMAMAD* (1905), 26 N. L. R. 242.—S. AF.

e. Persons appointed to distribute & apportion.]—A bequest & devise of all testator's estate to persons named

to be distributed & apportioned, as by the will directed, constitutes them exors. according to the tenor.—*Re HOLLINGS' WILL* (1878), 4 V. L. R. 46.—AUS.

f. Persons appointed guardians of infants.]—Testatrix directed her exors. to pay her debts, etc. She did not name exors., but appointed A. & B. guardians to her infant children:—

A. Property in Particular Place.

110. General rule.]—A man makes A. & B. his exors., & wills that B. shall not meddle during the life of A. & good; for he does not restrain his entire power; for he may make one exor. of his goods in C. & another exor. of his goods in D. & so he may divide the time *ut supra*.—ANON. (1540), Bro. N. C. 40; 73 E. R. 882.

111. Executor limited to county.]—ANON. (1658), 2 Sid. 114; 82 E. R. 1286.

112. Appointment of executor "in Lisbon"—Independent appointment of others as executors.]

—The words "I appoint for my exor. in the city of Lisbon, whither I am about to proceed, my cousin A., & I also appoint him guardian of all my sons & daughters, both by my first & second marriage. Independently of my aforesaid cousin, I appoint as exor. C. & E."—*Held*: an appointment of A. as exor. generally, & not merely as regarded the property of Lisbon.—*In the Goods of VEIGA* (1846), 4 Notes of Cases, 698; 8 L. T. O. S. 50.

113. Appointment of executors "in Portugal" & executors "in England."—L., who died domiciled in Portugal, made a will, containing an appointment, substitutional, of four exors. "in Portugal," & another appointment, also substitutional, of four exors. "in England." Pltf., who was named as an exor. in both appointments, was resident in Portugal:—*Held*: the words "in Portugal" & "in England," were equivalent to "for Portugal" & "for England."—*VELHO v. LEITE* (1864), 3 Sw. & Tr. 456; 33 L. J. P. M. & A. 107; 164 E. R. 1352.

114. Appointment of executors of will executed in England—Later appointment of executors in India.]—W. made a will in England in 1861, & appointed B. & C. exors. thereof. In May, 1862, being in India, he made a codicil, & on June 9 executed a paper, whereby he appointed E. & F. "my exors. in this country":—*Held*: the context of the paper, giving testator's reasons for the appointment of E. & F. showed that he did not mean them to have any power over the property in England, & granted probate to B. & C., without reserving power to E. & F.—*In the Goods of WALLICH* (1864), 3 Sw. & Tr. 423; 33 L. J. P. M. & A. 87; 9 L. T. 809; 164 E. R. 1339.

115. Foreign will dealing only with property abroad—Intestacy as to English property.]—Deceased left a will expressly limited to her property abroad, which was proved by the exors. in the foreign ct.; but she died intestate as to her property in this country:—*Held*: the administration of the property in this country might be granted to her sole next of kin.—*In the Goods of MANN*, [1891] P. 293; 60 L. J. P. 95; 40 W. R. 144.

Annotation:—*Reid. In the Goods of Murray*, [1896] P. 65.

116. Executor of foreign will—Property in England.]—Probate was granted abroad to a substituted exor. in a foreigner's will:—*Held*: the same person was entitled to probate here as substituted exor.—*In the Goods of CACHEDA* (1849), 13 L. T. O. S. 264; 13 Jur. 415.

117. — — —.]—Testator, a domiciled Ger-

Held: A. & B. were exors. according to the tenor.—*Re BURNS' WILL* (1903), 4 S. R. N. S. W. 257.—AUS.

g. Appointment by the court.]—When a testator has omitted to appoint an exor. the ct. will appoint as exor. the person whom it would appear from the tenor of the will testator contemplated should be exor.—*In the Goods of COURJON* (1897), 1 L. R. 25 Calc. 65.—IND.

man subject, died in Germany, leaving a will in German form. In accordance with the laws of that country, & in pursuance of a request in the will, the local German ct. appointed German exors., who now applied for probate in this country in respect of the English assets of deceased.

The ct. made a grant of probate to the German exors., limited to testator's assets in this country.—*In the Goods of BRIESEMANN* (1895), 72 L. T. 268.

118 English & foreign wills—Property in England & abroad—Separate sets of executors.]—Deceased executed a will purporting to dispose of, & in fact disposing only of, property in Tasmania, & appointed thereby exors. resident in Tasmania. He subsequently executed another will disposing of his property in England, & thereby ratified & confirmed the will relating to the property in Tasmania. In this last will he appointed three exors. distinct from those named in the earlier will. The ct. ordered probate to issue of both papers as together containing the will of deceased.—*In the Goods of HARRIS* (1870), L. R. 2 P. & D. 83; 39 L. J. P. & M. 48; 22 L. T. 630; 34 J. P. 455; 18 W. R. 901.

Annotations:—Consd. In the Goods of Howden (1874), 43 L. J. P. & M. 26. *Folld. In the Goods of Western* (1898), 78 L. T. 49. *Refd. In the Goods of Crawford* (1890), 15 P. D. 212; *In the Goods of Murray*, [1896] P. 65.

119. ———.]—Testator left the following testamentary papers: (1) Will, dated June 3, 1875, relating to property in Argentina, & made in the form there prevailing; (2) A settlement or testamentary disposition, bearing date June 28, 1875, & comprising property in Scotland; (3) will dated Mar. 30, 1882, with two codicils dated respectively Apr. 16, 1884 & July 7, 1888, relating to property in England. Testator left an only child B. whom he appointed sole exor. of the Argentine & Scotch documents; but H. & F. were, together with B., appointed exors. of the English documents. The Argentine will was executed in the way usual in that country. The original was not forthcoming, but an authenticated copy was produced & probate was sought of the copy, together with the other testamentary papers. The ct. accordingly made a general grant to the son, B., of all the documents, & a grant to his co-exors. limited to the three English documents.—*In the Goods of BRIDGES* (1891), 65 L. T. 764.

120. ———.]—The ct. has a discretion under the Non-contentious Rules, 1862, r. 30, to depart from the practice of refusing a limited grant to a person entitled to a general grant.

A domiciled foreigner left two wills, one executed according to the form of his domicile, dealing with foreign assets & English personalty & appointing a foreign exor., & the other executed according to English form, dealing with English realty only & appointing English exors. The ct. made separate grants, (a) to the English exors. limited to the real estate, & (b) a *caterorum* grant to the foreign exor. save & except the realty.—*In the Estate of VON BRENTANO* (or BRENTANO), [1911] P. 172; 80 L. J. P. 80; 105 L. T. 78; 27 T. L. R. 395.

121. ———.]—A domiciled German subject died in Germany, leaving a will in German form by which he requested the ct. of the district to appoint two persons to be his exors., & who were to have the rights & position of an unlimited general attorney of the heirs, & were to hold their powers irrevocable by the heirs. These exors., when appointed, were to get in the estate, pay debts, invest the balance, & perform other functions of trustees.

In a subsequent paragraph of his will, testator

declared that his estate in England was to be wound up by two English gentlemen, whose addresses in this country were given, & who were to realise all the property owned by testator in this country, & to hand over the proceeds to the trustees or testamentary exors. to be nominated by the German ct. To enable this to be done the two Englishmen were to have power to sell all movable & immovable property belonging to testator in England, to collect claims, pay debts, give receipts, & in general, to undertake for the heirs all necessary legal matters, with power to bind the heirs.

Held: upon construction of the will, according to the law of testator's domicile, these persons were not exors. according to the tenor; & they were only entitled to a limited grant of administration for the use & benefit of the testamentary exors. nominated by the German ct.—*In the Goods of BRIESEMANN*, [1894] P. 260; 63 L. J. P. 159; 71 L. T. 263; 6 R. 558.

Annotations:—Apld. In the Goods of Von Linden, [1896] P. 148; *In the Goods of Montyard*, [1903] P. 125.

——— **Of what probate granted.]—See** Part II., Sect. 2, *post*.

B. Property of Deceased Married Woman.

122. Effect of Married Women's Property Act, 1882 (c. 75).]—The limitation inserted before the Married Women's Property Act, 1882 (c. 75), in the probate of the will of a married woman ought no longer to be required, & the ct. will henceforth make a general grant.—*In the Goods of PRICE* (1887), 12 P. D. 137; 56 L. J. P. 72; 57 L. T. 497; 51 J. P. 615; 35 W. R. 590.

Annotations:—Consd. In the Goods of Williams (1892), 67 L. T. 502; *Re Atkinson*, Waller v. Atkinson (1899), 80 L. T. 505. *Refd. Re Lambert's Estate*, Stanton v. Lambert (1888), 39 Ch. D. 626.

123. Effect of Probate Rules (Non-contentious Rules), 1887, rr. 15, 18.]—Since the coming into operation of the above rules which provide that probate of the will of a married woman shall take the form of ordinary grants of probate without any exception or limitation, a husband who obtains probate of his wife's will in general form is not deemed to have assented to the will as a disposition of property which she had no right to dispose of by will without his assent.—*Re ATKINSON*, WALLER v. ATKINSON, [1899] 2 Ch. 1; 68 L. J. Ch. 404; 80 L. T. 505; 47 W. R. 469; 43 Sol. Jo. 455, C. A.

Annotations:—Folld. Re Nathan, Herring v. Spyer (1907), 51 Sol. Jo. 428. *Refd. Elliot v. North*, [1901] 1 Ch. 424.

124. Practice before Married Women's Property Act, 1882 (c. 75).]—*In the Goods of COOPER* (1855), Dea. & Sw. 9; *In the Goods of SMITH* (1858), 1 Sw. & Tr. 125; *In the Goods of WOLASTON* (1863), 32 L. J. P. M. & A. 171; PAGLAR v. TONGUE (1866), L. R. 1 P. & D. 158; *In the Goods of DE PRADEL* (1867), L. R. 1 P. & D. 454; *In the Goods of CROFTS* (1869), L. R. 2 P. & D. 18; NOBLE v. PHELPS (1871), L. R. 2 P. & D. 276; ASKEW v. ROUTH (1874), L. R. 17 Eq. 426; *In the Goods of THARP* (1878), 3 P. D. 76, C. A.

C. Trust Property.

125. Will disposing of trust property only—Revocation of former wills.]—A clause in a will revoking all prior wills is equivalent to a bequest to the persons who would be entitled to the personal estate of testator in case he had died intestate; therefore, though the will in terms disposes only of property held by testator in trust, the grant of probate to the exor. should be general, & not limited to the trust property.—

Sect. 4.—Appointment for particular or limited purpose: Sub-sect. 1, C. & D.; sub-sect. 2. Sect. 5: Sub-sect. 1, A.]

In the Goods of LANCASTER (1859), 1 Sw. & Tr. 464; 20 L. J. P. & M. 19; 1 L. T. 75; 24 J. P. 56; 8 W. R. 134; 164 E. R. 815.

126. — Death of executor in lifetime of testator—Limited grant to executor of executor.]—A. made his will, having no property of his own, but being surviving trustee of a fund consisting of £1,105 5s. stock, solely for the purpose of enabling B., to whom the reversion in the trust fund had been assigned, to receive the same. By the will he appointed B., his exor., administrator & assigns, his sole exor. B. died in A.'s lifetime, having made a will whereof C. one of the exors., had taken probate. The ct. being satisfied that A. knew & approved of the contents of his will when he executed it, granted probate of it to C. limited to the trust fund.—*Re AXFORD (1860), 1 Sw. & Tr. 540; 2 L. T. 86; 8 W. R. 340; 164 E. R. 851.*

127. Will disposing of trust property & testator's own property—Appointment of general & special executors.]—The Conveyancing Act, 1881 (c. 41), s. 31 does not enable a sole surviving trustee of a will to appoint by his will, in continuation to himself, trustees of the will of the original testator.

The sole surviving trustee of a will by his will appointed general exors., & also purported to appoint special exors., for the purpose of executing, in continuation to himself, the trusts of the will of the original testator. The general exors. obtained a grant of probate of the will of the trustee to themselves as general exors., without any reservation of power to the special exors. to come in & prove, & proceeded by deed to appoint two persons to be trustees of the will of the original testator. Subsequently probate of the will of the trustee, limited to the trust estates of the original testator, was granted to the persons named as special exors.:—*Held*: the will of the trustee did not operate as an exercise of the power of appointing new trustees conferred by the Conveyancing Act, 1881 (c. 41), s. 31; but as the general exors. were, at the time when the deed of appointment was executed, in possession of a general grant of probate, which was the only probate then in existence, they were personal representatives of a last surviving trustee within the meaning of the sect., & therefore the deed was a valid appointment of trustees.—*Re PARKER'S TRUSTS, [1894] 1 Ch. 707; 63 L. J. Ch. 316; 70 L. T. 165.*

See Conveyancing Act, 1881 (c. 41), s. 30; Law of Property Act, 1925 (c. 20), Sched. VII.; Administration of Estates Act, 1925 (c. 23), ss. 1, 3 (1), ii.

D. Other Cases.

128. Appointment of separate executors of distinct parts of property.]—Testator may appoint separate exors. of distinct parts of his property.—*ROSE v. BARTLETT (1633), Cro. Car. 292; 79 E. R. 856.*

Annotations:—Mentd. Addis v. Clement (1728), 2 P. Wms. 456; Gibbs v. Davis (1730), Mos. 269; Streetfield v. Streetfield (1736), Cas. temp. Talb. 176; Knotsford v. Gardiner (1742), 3 Atk. 450; Chapman v. Hart (1749), 1 Ves. Sen. 371; Lowther v. Cavendish (1758), Amb. 356; Turner v. Husler (1780), 1 Bro. C. C. 78; Pistol d. Randal v. Riccardson (1784), 3 Doug. K. B. 361; Doe d. Davies & Williams v. Williams (1788), 1 Hy. Bl. 25; Lane v. Stanhope (1795), 6 Term Rep. 345; Thompson v. Lawley (1800), 2 Bos. & P. 303; Watkins v. Lea (1802), 6 Ves. 633; Biddulph v. Biddulph (1806), 12 Ves. 161; Hodgson v. Merest (1821), 9 Price, 556; Pittroy v. Howard (1828), 3 Russ. 225; Doe d. Clarke v. Ludlam (1831), 7 Bing. 275; Hobson v. Blackburn (1833), 1 My. & K. 571; Arkell v. Fletcher (1839), 10 Sim. 299; Parker v. Mar

chant (1843), 2 Y. & C. Ch. Cas. 279; Wilson v. Eden (1848), 11 Beav. 237; Wilson v. Eden (1850), 5 Exch. 752; Nelson v. Hopkins (1852), 21 L. J. Ch. 410; Swift v. Swift (1859), 1 De G. F. & J. 160; Gully v. Davis (1870), L. R. 10 Eq. 562; Butler v. Butler (1884), 28 Ch. D. 66; Re Holt, Holt v. Holt, [1921] 2 Ch. 17.

129. Will disposing of real estate only—Will made in execution of power.]—The exors. named in a will which disposes only of realty are generally entitled to probate. If, however, such a will be made in execution of a power, they are not entitled to probate, as, in that case, their authority is only co-extensive with the power given by the will, & they take nothing *jure representationis*.—*O'DWYER v. GEAR (1859), Sea. & Sm. 106; 1 Sw. & Tr. 465; 164 E. R. 815; sub nom. O'DWYER v. GEAR, In the Goods of PARKIN, 20 L. J. P. & M. 47; 1 L. T. 242; 5 Jur. N. S. 1366.*

Annotations:—Fold. In the Goods of Bardon (1867), L. R. 1 P. & D. 325; In the Goods of Tomlinson (1881), 6 P. D. 209. Distd. Brownrigg v. Pike (1882), 7 P. D. 61. Reifd. In the Goods of Jordan (1868), L. R. 1 P. & D. 555; In the Goods of Hornbuckle (1890), 15 P. D. 149.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 155.

130. Appointment "so far as respects any residuary estate & aggregate fund forming general estate."—Testator appointed each of his sons, when he came of age, to be an exor. of his will "so far as respects any residuary real & personal estate, & the aggregate fund forming my general estate":—*Held*: the sons, on coming of age, were entitled to probate, limited, as far as possible, in the words used by testator, due regard being had to the fact that such probate could not affect the real estate.—*In the Goods of BARNES (1861), 7 Jur. N. S. 195.*

131. Appointment "for all property not named in will."—Testator by his will bequeathed certain specific legacies, but did not dispose of the residue of his property. He left his daughter extrix. for all property whatsoever & wheresoever not named in his will, & nominated two other persons to be joint trustees. The ct. refused to grant probate of the will to the daughter as extrix., but made a grant of administration with the will annexed.—*In the Goods of WAKEHAM (1872), L. R. 2 P. & D. 395; 41 L. J. P. & M. 46; 27 L. T. 214; 36 J. P. 807; 20 W. R. 685.*

132. Will exercising power of appointment—Subsequent marriage of testator.]—Testator by his will bequeathed all the real & personal estate to which he might be entitled at the time of his death, or over which he had power of appointment to A. & appointed her his sole extrix. He subsequently married A. & died without making another will. The property over which he had power of appointment under the will of his mother if he had not exercised it would have been divided among his brother & sisters:—*Held*: so much of the will as was in execution of the power of appointment came within the exception of the Wills Act, 1837 (c. 26), s. 18, & was not revoked by marriage & administration with the will annexed might be granted to the widow, limited to the property over which testator had a power of appointment.—*In the Goods of RUSSELL (1890), 15 P. D. 111; 59 L. J. P. 80; 62 L. T. 644.*

133. Joint will of husband & wife—Effect of death of wife in husband's lifetime.]—Where a husband & wife made a joint will, the ct., upon the death of the wife, granted probate of so much of the instrument as became operative upon her death.—*In the Goods of PIAZZI-SMYTH, [1898] P. 7; 67 L. J. P. 4; 77 L. T. 375; 46 W. R. 426.*

134. Appointment for whole estate except business—Executrix appointed of business—Effect of death of & renunciation by executors.]—The

widow of testator, whom he had by his will appointed his sole ex-trix, so far as related to a business carried on by him, was, in consequence of the death or renunciation of the persons appointed exors. of the estate other than the business, as residuary legatee & devisee for life, entitled to administration with the will annexed in respect of the rest of the estate. The ct. granted probate of the will to the widow as the ex-trix, named therein only so far as related to the business, & directed that the grant should recite that she was also residuary legatee & devisee for life named in the will.—*In the Estate of FALKNER* (1915), 113 L. T. 927; 31 T. L. R. 525; 59 Sol. Jo. 599.

SUB-SECT. 2.—APPOINTMENT LIMITED TO TIME.

135. After death of co-executor—B. not to act during life of A.]—ANON. (1540), No. 110, *ante*.

136. Term of years—Successor permitted to administer without probate.]—ANON. (1675), No. 176, *post*.

137. —.]—The operation of Wills Act, 1861 (c. 114), s. 3, in spite of the expression "British subjects" in the title of the statute, is not limited to British subjects, & enables probate to be granted in this country of the will of an alien testator in spite of his or her marriage since the date of execution of the will, such marriage, according to the law of the domicile at the time, not effecting a revocation.

A Dutch subject domiciled in Holland made her will & afterwards married, which, by the law of the domicile, effected no revocation of her will. She subsequently became domiciled here, whilst retaining Dutch allegiance, & died here:—*Held*: (1) her will entitled to probate in England, in spite of the marriage subsequent to its execution but before the change of domicile.

(2) By the law of her foreign domicile the powers of the executor were limited in time. The ct., following that law, made a grant of probate here, limited in time.—*In the Estate of Groos*, [1904] P. 269; 73 L. J. P. 82; 91 L. T. 322.

Durante minoritate—Liability of executor on expiration of minority.]—*See* Nos. 1216, 1217, *post*.

138. During widowhood.]—Where a widow is left ex-trix, with a stipulation that in the event of her second marriage, she is to concur in the appointment of trustees for the management of the property, & she does marry again, but dies without the appointment of trustees:—*Held*: her executorship expired on her second marriage.—*BOND v. FALKNEY* (1757), 2 Lec. 371.

139. During incapacity of "A."—Testatrix appointed "A." her exor., "but in case he shall happen at the time of my decease to be abroad or from any other cause incapable of acting as such exor. then, & in such case, I appoint B. exor. to act only during such time as A. shall be resident abroad, or otherwise incapable of acting." A. died in the lifetime of testatrix. Probate granted

to B. as exor.—*In the Goods of WILMOT* (1852), 2 Rob. Eccl. 579; 20 L. T. O. S. 142; 16 Jur. 1026; 163 E. R. 1420.

SECT. 5.—APPOINTMENT OF DEBTOR.

SUB-SECT. 1.—AS EXECUTOR.

A. Effect of Appointment.

140. At law—Release of debt.]—(1) Administration granted by the archbishop, when there are *bona notabilia* only in one diocese, is not void, but voidable.

(2) If, after such administration granted, administration be granted by the Ordinary of the diocese in which the *bona notabilia* are, & then the first administration is repealed, the second administration stands good.

(3) In such case, administration of the effects of the obligee granted by the archbishop to the obligor does not extinguish the debt, but the second administrator may well sue: but if the obligee makes the obligor his exor., it is a release in law of the debt. So if a woman obligee marries the obligor, or one of the obligors, it is a release in law. But *feme ex-trix*, marrying the debtor is no release in law.—*NEDHAM'S CASE* (1610), 8 Co. Rep. 135 a; 77 E. R. 678.

Annotations:—*As to* (1) *Reid. Knolls v. Dobbins* (1623), Palm. 386; *Hudson v. Hudson* (1737), 1 Atk. 460; *Lysons v. Barrow* (1836), 2 Bing. N. C. 486. *As to* (2) *Reid. Shaw v. Storton* (1673), Freem. K. R. 104; *Blackborough v. Davis* (1701), 12 Mod. Rep. 615. *As to* (3) *Consd. Wangford v. Wangford* (1704), 11 Mod. Rep. 32. *Reid. Dorchester v. Webb* (1635), Cro. Car. 372; *Lockier v. Smith* (1662), 1 Sid. 79; *Cage v. Acton* (1690), 1 Ld. Raym. 515; *Seagram v. Knight* (1867), 2 Ch. App. 628. *Generally, Mentd. Middleton v. Crofts* (1736), 2 Atk. 650; *Ford v. Beech* (1848), 11 Q. B. 832.

141. — Duration of effect.]—*FRYER v. GILD-RIDGE* (1614), Hob. 10; 1 Brownl. 76; *Moore, K. B.* 855; 80 E. R. 160.

Annotations:—*Reid. Lockier v. Smith* (1662), 1 Sid. 79; *Cage v. Acton* (1690), 1 Ld. Raym. 515. *Mentd.* — *v. Du Rhone* (1729), Cas. temp. King, 76; *Lowe v. Pesket* (1855), 23 L. T. O. S. 146.

142. —.]—Obligee makes the obligor exor., the bond not discharged in equity, being for security of arrears of rent. The ct. declared that though the bond was discharged in law, yet in equity debt ought to account for the arrears of rent thereby secured.—*FIELD v. CLERK* (1603), 1 Rep. Ch. 242; 21 E. R. 561.

143. —.]—Obligee makes the obligor exor. in trust for his children, etc.: though this be in law an extinguishment of the debt; yet in equity it is not, but it shall be preserved in being for the benefit of the *cestui que trust*.—ANON. (1680), Freem. Ch. 52; 22 E. R. 1053, L. C.

144. —.]—A bond given to a *feme covert* is not discharged by her husband making the obligor his exor.—*CHECKLEY v. CHECKLEY* (1681), 2 Show. 247; 89 E. R. 919.

145. — Absence of assets.]—*WANGFORD v. WANGFORD*, No. 258, *post*.

146. — Appointment *durante minore etate*.]—Making a debtor exor. *durante minore etate* of

PART I. SECT. 4, SUB-SECT. 2.

h. Term of years—Probate granted to two executors—Death of one—Power of court to extend appointment of survivor.]—Testator appointed his wife sole ex-trix, during her life, & appointed his son & S. exors. for the five years next succeeding the death of his wife. The wife did not prove the will, & probate was granted during her lifetime to the two exors., power being reserved to grant the like probate & administration to the wife. The wife

died in 1904 without having proved, & S. died in 1909.—*Held*: the ct. had no power to extend the appointment of the other exor. for five years.—*RE A COURT* (1909), 28 N. Z. L. R. 873.—N. Z.

k. During widowhood—Or life of widow.]—Testator devised certain property to his exors., in trust, to hold for the separate use & benefit of his wife during her life or widowhood:—*Held*: the purposes of the trust did not

require the estate of the exors. to extend beyond the life of the widow.—*DOE v. DRISCOLL* (1858), 9 N. B. R. (4 All.) 176.—CAN.

l. Powers cease with the occurrence of some contemplated event.]—Where an exor. is appointed for a limited period or until the happening of some event, his power as exor. ceases with the occurrence of such contemplated event.—*COWSON v. CLARKSON* (1871), 3 Ch. Ch. 368.—CAN.

Sect. 5.—Appointment of debtor: Sub-sect. 1, A. & B.]

another person does not discharge the debt.—*CAWETH v. PHILIPS* (1700), 1 Ld. Raym. 605; 91 E. R. 1305.

147. —[—A. who had confessed a judgment to B. in trust for C., sells; B. makes A. exor., whereby cannot recover at law; equity will not assist against the purchaser.—*HARVEY v. WOODHOUSE* (1730), Cas. temp. King, 80; Fitz-G. 144; Kel. W. 3; 25 E. R. 233, L. C.

148. —[—A. being possessed of a bond for £1,400 deposits it in the hands of B., who signs a proper acknowledgment for the same. A. afterwards assigns this bond to B. & takes his promissory note for the value; but the note was never paid. A. by his will gives several legacies, & appoints B. & another exors.; but makes no disposition of the residue of his estate.—*Held*: the money due on this bond is part of the residue, & shall go to the exors. equally; & B.'s note is not such a debt as can be extinguished by his being made an exor.—*MATTHEW v. FITZ-SIMON* (1757), 4 Bro. Parl. Cas. 11; 2 E. R. 8, H. L.

149. —[—The testator's making of a bond debtor one of his executors does not extinguish the debt.

Where an obligee makes an obligor one of the exors., & takes no notice of the bond, but devises the residue of the estate to others, I am clear it is not an extinguishment of the debt, though at law it will be so, because a personal demand once suspended is not to be resumed (*LORD BATHURST, C.*).—*ERRINGTON v. EVANS* (1772), 2 Dick. 456; 21 E. R. 347, L. C.

150. —**Appointment of one of several obligors.**—[If the obligee in a joint & several bond make one of two obligors his exor., with others, the action on the bond is discharged as to both obligors.—*CHEETHAM v. WARD* (1797), 1 Bos. & P. 630; 126 E. R. 1102.

Annotations:—*Apld.* *Freakley v. Fox* (1829), 9 B. & C. 130. *Refd.* *Re Bourne, Davey v. Bourne*, [1906] 1 Ch. 697. *Mentd.* *Nicholson v. Revill* (1830), 4 Ad. & El. 675; *Kearsey v. Cole* (1846), 16 M. & W. 128; *Ford v. Beech* (1848), 11 Q. B. 852; *Evans v. Bremridge* (1855), 4 W. R. 161; *Re Wolmershausen, Wolmershausen v. Wolmershausen*, (1890), 62 L. T. 541; *Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth*, [1891] 1 Ch. 337.

151. —[—Where the payee & holder of a promissory note appoints the maker his exor. the debt is discharged, & no action can be maintained on the note, even by a person to whom the exor. has indorsed it.—*FREAKLEY v. FOX* (1829), 9 B. & C. 130; 4 Man. & Ry. K. B. 18; 7 L. J. O. S. K. B. 148; 109 E. R. 49.

Annotations:—*Consd.* *Re Bourne, Davey v. Bourne*, [1906] 1 Ch. 697. *Refd.* *Belshaw v. Bush* (1851), 11 C. B. 191. *Mentd.* *Bartrum v. Caddy* (1838), 9 Ad. & El. 275; *Ford v. Beech* (1848), 11 Q. B. 852; *Harmer v. Steele* (1849), 4 Exch. 1; *Glasscock v. Balls* (1889), 59 L. J. Q. B. 51.

152. —[—B. borrowed £1,100 from his step-mother, who lived in his house, paying £212 10s. a quarter for board; & it was agreed that the debt should be paid off by a deduction of £100 from each quarter's payment. Deductions of this amount were made for two quarters, but on the third quarter day the creditor refused to make any further deduction, & paid the full amount of £212 10s., & continued down to the time of her death, which took place more than four years afterwards, to pay to B. the like quarterly sum. B. was appointed sole exor. of his stepmother, & proved the will; & a suit for administration was instituted:—*Held*: the debt was gone, because the appointment of B. as exor. released the debt at law, & any claim in equity was rebutted by evidence of a continuing intention on the part of

testatrix to give, & because the intention of testatrix to give B. the sum of £900 was completed by nine quarterly payments of £212 10s. each.—*STRONG v. BIRD* (1874), L. R. 18 Eq. 315; 43 L. J. Ch. 814; 30 L. T. 745; 22 W. R. 788.

Annotations:—*Distd.* *Bottle v. Knockor* (1876), 46 L. J. Ch. 159. *Apld.* *Re Applebee Leveson v. Beales*, [1891] 3 Ch. 422. *Consd.* *Re Griffin, Griffin v. Griffin*, [1899] 1 Ch. 408. *Apld.* *Re Stewart, Stewart v. McLaughlin* [1908] 2 Ch. 251. *Consd.* *Re Innes, Innes v. Innes*, [1910] 1 Ch. 188. *Apld.* *Re Pink, Pink v. Pink*, [1912], 2 Ch. 528; *Re Goff, Featherstonehaugh v. Murphy* (1914), 111 L. T. 34. *Refd.* *Re Hyslop, Hyslop v. Chamberlain*, [1894] 3 Ch. 522; *Re Stoneham, Stoneham v. Stoneham*, [1919] 1 Ch. 149. *Mentd.* *Goddard v. O'Brien* (1882), De Colyar's County Court Cases, 110; *Re Flavell, Murray v. Flavell* (1883), 25 Ch. D. 89; *Sprange v. Lee*, [1908] 1 Ch. 424; *Vavasour v. Vavasour* (1909), 25 T. L. R. 250; *Carter v. Hungerford*, [1917] 1 Ch. 260; *Re Westerton, Public Trustee v. Gray*, [1919] 2 Ch. 104.

153. —**Will not proved by executor.**—[Testatrix by her will, dated in 1886, amongst other legacies bequeathed to pltf., a clergyman whose church she attended, two legacies of £100 each. She gave her residuary estate to deft., & appointed pltf. & deft. to be her exors. By a codicil, dated in 1887, she gave additional legacies, including one of £700, to pltf., & in other respects confirmed her will. She afterwards in her lifetime made payments in cash on account of the legacies to pltf., though at that time he was indebted to her in a greater amount. She died in 1888, & her will was proved by deft. alone, liberty being reserved to pltf. to do so. Deft. alleged that pltf. was indebted to testatrix's estate to an amount exceeding the value of his legacies, & on that ground refused to pay them. Pltf. admitted that testatrix had during her life made various payments to him & on his behalf; but alleged that such payments were intended by testatrix to be gifts. The ct. inferred from the evidence that deft. was a party to the making of the codicil in the form which it took, & was aware of the intention of testatrix that the legacies should be paid to pltf.:—*Held*: (1) the appointment of pltf. as exor. released the debt at law although he had not proved the will; (2) on the evidence, any claim in equity was rebutted by the presumption of the intention of testatrix to forgive the debt; (3) evidence of testatrix's intention to forgive the debt in her lifetime was admissible; (4) even if that were not so, that under the circumstances deft. could not as against pltf. set up the debts due from him to testatrix.—*Re APPLEBEE, LEVESON v. BEALES*, [1891] 3 Ch. 422; 60 L. J. Ch. 793; 65 L. T. 406; 40 W. R. 90.

Annotations:—*As to* (1) *Consd.* *Re Pink, Pink v. Pink*, [1912] 1 Ch. 498. *Refd.* *Re Griffin, Griffin v. Griffin*, [1899] 1 Ch. 408.

154. —[—Where testator wrote a letter offering a sum of £150 to her friend & making certain suggestions with regard to her giving an I. O. U. & paying interest thereon, & wound up the letter as follows: "I engage not to use the I. O. U. during your life; also not to call in the loan, but leave it with you as long as you want it & the interest is paid," & subsequently seemed offended when the friend offered to pay the capital & said, "I thought it would just fall into your hands when I died. The I. O. U. is in an envelope with my papers directed to you, & when I die all you have to do is to destroy it," & finally appointed the friend her exor.:—*Held*: there was a sufficient legal release of the debt by the appointment of the friend as exor. coupled with the continuing intention to release the debt.—*Re GOFF, FEATHERSTONEHAUGH v. MURPHY* (1914), 111 L. T. 34; 58 Sol. Jo. 535.

155. **In equity.**—[A debtor made exor., yet

he shall pay legacies.—*FLUD v. RUMCEY* (1609), *Yelv.* 160; 80 E. R. 107.

Annotations:—*Consd. Brown v. Selwin* (1734), *Cas. temp. Talb.* 240. *Reid. Wankford v. Wankford* (1704), 1 *Salk.* 299; *Fox v. Fox* (1737), *West temp. Hard.* 162.

156. —.]—If the creditor makes the debtor exor. & dies, by which the debt is extinct in the hands of the debtor, yet it shall be assets, for that this is extinct but by the will.—*HOLLIDAY v. BOAS* (1609), 1 *Roll. Abr.* 920.

Annotation:—*Reid. Wangford v. Wangford* (1704), 11 *Mod. Rep.* 38.

157. —.]—Debtor made exor., yet his debt to be assets & not extinct.—*ASKWITH v. CHAMBERLAIN* (1640), 1 *Rep. Ch.* 138; *Toth.* 53; 21 E. R. 530.

158. —.]—*FIELD v. CLERK*, No. 142, *ante*.

159. —.]—Bond conditioned to pay £1,100 given by one partner to the other on account of the partnership; the obligee devised all his personal estate & debts due to him, equally to be divided between *pltf.* & *deft.* & made *deft. exor.*: decreed that by his being made exor. this debt was not discharged.—*PHILLIPS v. PHILLIPS* (1679), *Cas. temp. Finch*, 410; 1 *Cas. in Ch.* 292; *Freem. Ch.* 11; 23 E. R. 223, L. C.

Annotations:—*Consd. Fox v. Fox* (1737), *West temp. Hard.* 162. *Mentd. Clough v. Bond* (1838), 3 *My. & Cr.* 490; *Re Gasquoine, Gasquoine v. Gasquoine*, [1894] 1 *Ch.* 470.

160. —.]—*ANON.* (1680), No. 143, *ante*.

161. —.]—*SELWIN v. BROWN*, No. 168, *post*.

162. —.]—A. mortgaged his estate to B. who paid no money but gave a bond for £130. A. afterwards made B. his exor. The debt not extinguished in equity.—*FOX v. FOX* (1737), 1 *Atk.* 463; 2 *Eq. Cas. Abr.* 502; *West temp. Hard.* 162; 26 E. R. 294, L. C.

163. —.]—Devise of real estate to be sold. The object being a provision for legacies, not an absolute conversion to all intents, a resulting trust for the heir-at-law as to the surplus; which was not affected by the appointment of residuary exor. Exor. a trustee in respect of a debt due by him to testator.—*BERRY v. USHER* (1805), 11 *Ves.* 87; 32 E. R. 1021.

Annotation:—*Reid. Willcock v. Love, Love v. Willcock* (1851), 16 *L. T. O. S.* 348.

164. —.]—Intention to forgive debt.]—*STRONG v. BIRD*, No. 152, *ante*.

165. —.]—*Re Goff, FEATHERSTONEHAUGH v. MURPHY*, No. 154, *ante*.

166. Debt assets in hands of executor from death.]—The probate of a will by an exor. has relation back to the death of testator; & therefore where an exor. fourteen years after the death of his testator, proved the will, it was held that a simple contract debt by him to testator became, by proof of the will, assets in his hands for the benefit of the estate.—*INGLE v. RICHARDS* (No. 2) (1860), 28 *Beav.* 366; 3 *L. T.* 46; 25 *J. P.* 323; 6 *Jur. N. S.* 1178; 8 *W. R.* 697; 54 E. R. 406.

167. —.]—By his will dated Aug. 5, 1919, testator devised his lands in Herts. unto & to the use of trustees upon trust for sale as therein mentioned & to hold the proceeds of sale upon trust to pay the costs of such sale & to discharge & repay all mtge. debts secured on the said estate, & then subject to certain other payments upon trust to pay the net proceeds of sale to his brother. By a codicil dated Sept. 7, 1920, testator, after making certain devises & bequests not material to be stated, confirmed his will. Part of the property in Herts. had been charged by testator's predecessor in favour of G. to secure a loan of £2,500 by a deposit of title deeds coupled with a memorandum undertaking to execute a legal mtge. when required to do so.

Testator had himself also charged another part of the estate to G. to secure a loan of £5,000 by deposit of title deeds & an agreement by which he agreed to repay the principal money & interest & also agreed to execute a legal mtge. when required to do so. By her will dated Nov. 11, 1919, G. who died without either of the equitable mtges. having been paid off, appointed testator & another her exors. & residuary legatees. The will was duly proved by both exors. on Aug. 27, 1920, & testator died on Sept. 18, 1920.

There was evidence that testator's share in the residue of G.'s estate would exceed the two principal sums but that the estate had not been fully administered at the death of testator. The title deeds deposited to secure the loan of £2,500 were after testator's death found amongst his papers. The other title deeds were in the hands of G.'s solrs. No interest had been paid on the mtges. since G.'s death, but it had been regularly paid by testator up to then:—*Held*: the result of testator being the mtgee.'s exor. was that he had to be treated as having in his hands on the mtgee.'s death the amount owing on the mtges. as part of her estate, but that on the evidence he must be treated as having intended to discharge them out of his share of the mtgee.'s estate. The charges were therefore no longer subsisting at the date of his death.—*Re GREG, FORDHAM v. GREG*, [1921] 2 *Ch.* 243; 91 *L. J. Ch.* 48; 125 *L. T.* 825.

B. Rebuttal of Liability for Debt.

168. Admissibility of evidence.—Of intention to forgive debt.]—No parol evidence is admissible to control or take away a plain & express devise; & therefore where a man is indebted to another by bond, & the obligee, makes him one of his exors. & residuary legatees, without saying anything about this bond debt, it shall constitute part of the residue of his estate; & no parol evidence, however clear & strong, shall be admitted to show testator's intention to discharge the party from the bond.—*SELWIN v. BROWN* (1735), 3 *Bro. Parl. Cas.* 607; 1 E. R. 1527, H. L.; *affg.* S. C. *sub nom.* *BROWN v. SELWIN* (1734), *Cas. temp. Talb.* 240, L. C.

Annotations:—*Consd. Re Applebee, Leveson v. Beales*, [1891] 3 *Ch.* 422. *Reid. Fox v. Fox* (1737), *West temp. Hard.* 162; *Lowfield v. Stoneham* (1746), 2 *Str.* 1261; *Blinkhorn v. Feat* (1750), 2 *Ves. Sen.* 27; *Lake v. Lake* (1751), *Amb.* 126; *Nourse v. Finch* (1793), 4 *Bro. C. C.* 239; *Cleunell v. Lewthwaite* (1795), 2 *Ves.* 644; *Re Stewart, Stewart v. McLaughlin*, [1908] 2 *Ch.* 251. *Mentd.* *Smith v. Baker* (1737), *West temp. Hard.* 98; *Francis v. Ditchfield* (1742), 2 *Coop. temp. Cott.* 531; *Ulrich v. Litchfield* (1742), 2 *Atk.* 372; *Mascal v. Mascal* (1749), 1 *Ves. Sen.* 323; *Robinson v. Gee* (1749), 1 *Ves. Sen.* 251; *Ellis v. Smith* (1754), 1 *Hov. Supp.* 4; *Itogers v. Earl* (1757), 1 *Dick.* 294; *Lansfield v. Banton v. Hodgson* (1773), *Loft.* 230; *Clinton v. Hooper* (1791), 1 *Ves.* 173; *Doe d. Small v. Allen* (1799), 8 *Term Rep.* 147.

169. —.]—*Re APPLEBEE, LEVESON v. BEALES*, No. 153, *ante*.

170. What evidence admissible—Unexecuted testamentary document.]—Testator in a letter of instruction to an exor. stated that a debt from the exor. was cancelled. The letter was not communicated to the exor. during the life of testator, nor properly executed as a will:—*Held*: the letter was inadmissible as evidence of the cancellation & the debt was payable.—*Re HYSLOP, HYSLOP v. CHAMBERLAIN*, [1894] 3 *Ch.* 522; 64 *L. J. Ch.* 168; 71 *L. T.* 373; 43 *W. R.* 6; 38 *Sol. Jo.* 663; 8 *R.* 680.

Annotation:—*Reid. Re Stewart, Stewart v. McLaughlin*, [1908] 2 *Ch.* 251.

Sect. 5.—Appointment of debtor: Sub-sect. 2. Sects. 6, 7 & 8.]

SUB-SECT. 2.—AS ADMINISTRATOR.

171. Effect of appointment—Whether debt extinguished.]—Administration committed to the debtor in execution does not extinguish the debt.—**BAILEY'S CASE** (1882), 2 Mod. Rep. 315; 86 E. R. 1096.

172. ———.]—**WANGFORD v. WANGFORD**, No. 258, *post*.

SECT. 6.—APPOINTMENT OF DONEE OF INCOMPLETE GIFT.

See GIFTS.

SECT. 7.—CONDITIONAL AND SUBSTITUTED APPOINTMENT.

173. In event of death of executor.]—ANON. (1540), No. 110, *ante*.

174. ——— Not restricted to death in testator's lifetime.]—Testator having appointed two exors. & provided that, on the death of either of them, two others should be substituted; on the death of the original exor., who had proved the will, & on a proxy of consent from the other, probate will be granted to one of the substituted exors., it appearing to have been testator's intentions that the substitution should take place on the death of either of the original exors., whether happening in testator's lifetime, or afterwards.—*In the Goods of LIGHTON* (1828), 1 Hag. Ecc. 235; 162 E. R. 569.

Annotation:—Apld. In the Goods of Johnson (1858), 1 Sw. & Tr. 17.

175. ———.]—A made a will, & appointed B., C., D., & E. exors.; & in case of the death of B., F. to be exor. in his place. B. C. D., & E. proved the will. B. & C. died. F. applied to have a double probate granted to him. D. & E. opposing such grant:—*Held*: F. was entitled to the grant, & the casualty was not restricted to the death of B. in A.'s lifetime.—*In the Goods of JOHNSON* (1858), 1 Sw. & Tr. 17; 27 L. J. P. & M. 9; 30 L. T. O. S. 295; 6 W. R. 275; 164 E. R. 609.

176. After executor has acted for specified term.]—B. is made exor. for ten years, & afterwards C. is to be exor.; B. proves the will, & then the ten years expire; the question was, whether C. ought to prove the will again, or whether he might administer without any probate:—*Held*: the probate of the will by B. should not determine the election of C., but he might be at liberty to take the executorship upon him, or refuse it; but if he pleased, he might administer without any further probate.—**ANON.** (1675), *Freem. Ch.* 313; 22 E. R. 1234.

Annotation:—Refd. Watkins v. Brent (1835), 5 L. J. Ch. 49.

177. If executor fails to act—Death of executor —During testator's lifetime.]—*In the Goods of WILMOT*, No. 139, *ante*.

178. ———.]—A will contained the following clause: "I appoint J. my exor., but should he decline or consider himself incapable of acting, then I appoint E. to be exor." J. died in the lifetime of testatrix:—*Held*: the intention of testator was that E. should be exor. if J. could not or would not act, & E., as substituted exor.,

was therefore entitled to probate.—*In the Goods of BETTS* (1861), 30 L. J. P. M. & A. 167; 25 J. P. 392.

179. ———.]—Testator appointed his wife sole extrix., & "in default of her" two others, B. & C. The wife took probate of her husband's will, & died, leaving a will, of which she appointed exors. The ct. held that B. & C. were the substituted exors. of the husband's will, & granted probate to them of his estate to the exclusion of the wife's exors.—*In the Goods of FOSTER* (1871), L. R. 2 P. & D. 304; 41 L. J. P. & M. 18; 25 L. T. 763; 36 J. P. 24; 20 W. R. 302.

180. ——— Executor renouncing.]—Deceased by her will appointed as exor. A., & failing him B. By her first codicil she appointed C. in the place of B., & by a second codicil she cancelled the appointment of A., & in his room appointed D. D. declined to act alone, & renounced his right to probate:—*Held*: C. was entitled to probate as the substituted exor. on the failure of D.—*In the Goods of COLQUHOUN* (1867), 37 L. J. P. & M. 1; 17 L. T. 123; 32 J. P. 56; 16 W. R. 88.

181. ———.]—Testatrix, by her will, appointed as her exors. & trustees three persons, C., T., & S., & if either of these should decline to act, she appointed "in their place B. or F. exors. & trustees then to act." After the death of testatrix, S. renounced probate, & nothing could be ascertained as to the whereabouts or existence of F. The ct. granted probate of the will to C., T., & B.—*In the Goods of BRADFORD* (1895), 72 L. T. 267.

182. In absence abroad of executor.]—*In the Goods of WILMOT*, No. 139, *ante*.

183. ———.]—Where testator by his will had appointed his son exor., but in the event of his going abroad or of his being & remaining abroad for upwards of two calendar months, then he appointed A. his exor., & the son went abroad without proving the will, & remained there, the ct. granted probate to A. reserving leave to the son to come in & prove.—*In the Goods of LANE* (1864), 4 New Rep. 253; 33 L. J. P. M. & A. 185.

184. ——— "On foreign duty."]—An appointment of A. as exor., & in case of his absence on foreign duty, of B. as extrix.:—*Held*: to be an appointment of B. as substituted extrix. in the event of A.'s absence from the country when the necessity for proving the will arose. A. was in England at the time of testator's death, but was absent on foreign service in Her Majesty's navy when the application for probate was made, & was likely to be absent for some years, & probate was granted to B.—*In the Goods of LANGFORD* (1867), L. R. 1 P. & D. 458; 37 L. J. P. & M. 20; 17 L. T. 415; 32 J. P. 104.

185. If executor should not prove within specified period—Executor acting but not proving within period.]—M. was appointed an exor. of a will, but if he declined to act, or became incapable of acting, or did not prove the will within three months of the death of testator, his appointment to be void. He had not taken probate within the three months, although he had intermeddled:—*Held*: he was not entitled to the executorship.—*In the Goods of DAY* (1850), 7 Notes of Cases, 553; 15 L. T. O. S. 188; 14 Jur. 490.

186. If & when executor returns to England.]—Testator appointed "my son" B., "now residing at Port Adelaide, in Australia, if & when he shall return to England," to be one of the exors. &

trustees of his will. Eight years after testator's death B. came to England on a visit for six months, remaining throughout domiciled in Australia:—*Held*: he had returned to England within the meaning of the will.—*Re ARBIB & CLASS'S CONTRACT*, [1891] 1 Ch. 601; 60 L. J. Ch. 263; 64 L. T. 217; 39 W. R. 305, C. A.

Annotation:—*Mentd.* *Re Spindler & Mear's Contract* (1901), 84 L. T. 295.

187. If executor pays debts he owes testator.]—In a will was this clause: "I will, that my friend T., shall pay to my other exor. all such debts as he owes me, before he shall meddle with anything of my will, or take any advantage of my will for the discharge of the same debts, for that I have made him one of my exors."—*Held*: T. could not administer, nor be exor. before he had paid the debts.—*STAPLETON & TRUELOCK'S CASE* (1555), 3 Leon. 2; 74 E. R. 502.

188. If executor permits another to enjoy lease.]—A. wills that if his wife suffer S. to enjoy Blackacre, which was part of his wife's jointure, for three years, then she should be his extrix., or otherwise S. to be his exor.:—*Held*: the wife was extrix. immediately before the expiration of the three years; & on disturbance of S. by the wife within the three years, the executorship should be determined, & transferred from the wife to S.—*FRANCES' CASE* (1527), 1 Dyer, 4 a, n.; 73 E. R. 9.

189. —.]—Devise of a lease to A. & if B. suffer him to enjoy it for three years she shall be extrix. but if she disturb him then C. shall be his exor. This is not a condition precedent & B. is immediately extrix.—*JENNINGS v. GOWER* (1591), Cro. Eliz. 219; 1 Leon. 229; 78 E. R. 475.

Annotation:—*Mentd.* *Wynne v. Wynne* (1840), 2 Man. & G. 8.

190. Proviso limiting power of co-executor—*Void*.]—If a man appoint A. & B. as his exors. with a proviso that B. do not administer; this proviso is void & they shall sue jointly.—*ANON.* (1527), 1 Dyer, 3 b; 72 E. R. 8.

Annotation:—*Mentd.* *Rose v. Bartlett* (1633), Cro. Car. 292.

SECT. 8.—REVOCATION OF APPOINTMENT.

191. Whether original appointment revoked—*By necessary implication—Construction of will & codicils*.]—*SHERARD & CLARKE v. SHERARD* (1815), 2 Phillim. 251; 161 E. R. 1135.

Annotation:—*Mentd.* *Oakeley v. Pasheller* (1836), 10 Bl. N. S. 548.

192. — *Omission to name in terms substituted party executor*.]—Testator, in making a substitution of an exor. & a residuary legatee in trust, omitted to name in terms the substituted party exor.:—*Held*: as, by the terms of substitution, it was testator's intention to place the party substituted in the same position as the party removed, the former was entitled to take probate as exor.—*In the Goods of PEPPER* (1843), 2 Notes of Cases, 467.

193. — *Residuary legatees misdescribed as "legatees executors."*]—Testatrix, having executed

her will, in which she appointed exors., wrote a codicil in which was a bequest to her daughter & son, appointed residuary legatees, not exors., in the will, as "legatees executors." The ct., with the consent of the parties, decreed probate to the exors. named in the will.—*In the Goods of WRIGHT* (1847), 5 Notes of Cases, 552.

194. — *Reference in codicil not as executor*.]

—Three exors. having been appointed to a will, a subsequent codicil appointed two of them joint trustees of the personal estate, describing one of them as "an executor to my will," not mentioning the third. The ct. held that his description was not a revocation of the original appointment of the third, & upon the death of the others granted probate to him.—*In the Goods of STEVENS* (1860), 24 J. P. 471.

195. — *Conflicting testamentary document—Subsequent will affecting part of estate only*.]

—In Feb. 1859, L. duly executed a testamentary paper, whereof he appointed W., E. & J. exors. In Oct. 1860, he made another testamentary paper, disposing in a different manner of his personal property, but not affecting realty, which was dealt with by the first paper; of the second paper he appointed W. & T., exors.:—*Held*: the second appointment of exors. was no revocation of the first appointment, & as the bare nomination of exors. entitles a paper to probate, leave should be reserved, on the second set of exors. taking probate of the two papers as together containing the last will & testament of deceased, to the first set of exors. to come in & prove.—*In the Goods of LEESE* (1862), 2 Sw. & Tr. 442; 31 L. J. P. M. & A. 169; 5 L. T. 848; 26 J. P. 232; 164 E. R. 1068.

Annotations:—*Fold.* *In the Goods of Andrew* (1873), 42 L. J. P. & M. 38. *Reld.* *In the Goods of Griffith* (1872), L. R. 2 P. & D. 457.

196. — —.]—Testator made two wills. By the first, which disposed of all his property, he appointed his wife extrix. By the second, which disposed of part of his property, & did not revoke the first, he appointed S. his exor.:—*Held*: the widow was entitled to probate of both instruments, leave being reserved to S. to come in & prove.—*In the Goods of ANDREW* (1873), 42 L. J. P. & M. 38; 28 L. T. 238; 37 J. P. 297; 21 W. R. 391.

197. — — *Subsequent will appointing "sole executor"*—*Will affecting part of estate only*.]—D., on Jan. 3, 1853, devised & bequeathed all his real & personal estate to P., & appointed him "sole executor of this my will."

In Mar. 1862, by a paper purporting to be his last will, he devised & bequeathed two houses as described, & their appurtenances, to G., & made G. "sole executor of this my will":—*Held*: the two exors. were jointly entitled to probate of both papers.—*GRAVES v. PRICE* (1863), 3 Sw. & Tr. 71; 32 L. J. P. M. & A. 113; 8 L. T. 610; 11 W. R. 809; 164 E. R. 1199.

Annotation:—*Fold.* *In the Goods of Andrew* (1873), 42 L. J. P. & M. 38.

198. — —.]—Where testator in his will appointed L. & B. exors., & in a codicil to the will named his wife "sole executrix of this my will":—*Held*: the appointment in the will of L. & B. as exors. was revoked.—*In the Goods of LOWE* (1864), 3 Sw. & Tr. 478; 4 New Rep. 351;

PART I. SECT. 8.

191. *Whether original appointment revoked—By necessary implication—Construction of will & codicils*.]—Testator by his will appointed A. & B. his exors. & trustees. In a codicil he

stated that, complications having arisen with his trustees owing to A. leaving the district & B. having withdrawn, testator desired to appoint M. to act in conjunction with the said A. as trustee in his estate:—*Held*: the appointment of B. as executor &

trustee had been revoked by the codicil.—*Re ANDERSON* (1905), 25 N. Z. L. R. 878.—N. Z.

n. — *Appointment as co-executor by deed of assumption—What amounts to revocation*.]—F. was assumed

Sect. 8.—Revocation of appointment. Sect. 9.]

1361. L. J. P. M. & A. 155; 28 J. P. 664; 164 E. R. 1361.

Annotation.—*Fold.* In the Goods of Baily (1869), L. R. 1 P. & D. 828.

199. ——— Will confirming previous will.]—Testator made a will & a codicil in 1856, in both of which he appointed his son W. & his daughter P., his exors. In a subsequent will, executed in 1860, confirming the two preceding papers, he appointed W. & another daughter, M. his "sole executors." The ct. held the use of the words "sole executors" in the last will implied the revocation of the appointment of exors. in the former will, & granted probate of the three papers as together forming the will of deceased to W. & M., the exors. named in the will of 1860.—*In the Goods of BAILY* (1869), L. R. 1 P. & D. 628; 20 L. T. 278; 33 J. P. 328; 17 W. R. 401.

200. ——— Codicil revoking bequest—Subsequent appointments "as one of my executors."—A codicil revoked all the bequests in a will, & appointed three persons, each "as one of my executors," but did not specifically revoke the appointment of exors. in the will. The ct. held that the appointment of exors. was not revoked, & granted probate of the will & codicils to the three exors. named in the codicil, reserving power to the exors. named in the will to come in.—*In the Goods of HOWARD* (1869), L. R. 1 P. & D. 636; 38 L. J. P. & M. 32; 20 L. T. 230; 33 J. P. 280.

201. ———]—Testator appointed his wife, his brother & two sisters exors. by his will, & his wife & a fresh exor. joint exors. by a codicil. All the exors., with the exception of the wife & one sister of testator, renounced. The wife took out probate & died while the estate was being administered. Upon an application alternatively to grant probate to the sister who had not renounced, or to allow the joint exor. appointed by the codicil to retract his renunciation & prove:—*Held*: the appointment of exors. by the codicil did not revoke that of those under the will, & the extrix. appointed by the will who had not renounced was entitled now to prove, but the exor. who had been appointed by the codicil & had renounced could not be allowed to withdraw the renunciation & prove.—*In the Goods of ELMSLEY* (1882), 48 L. T. 125.

Who may obtain probate—Where testamentary documents conflicting.]—*See, generally*, Part II., Sect. 4, sub-sect. 1, B., *post*.

Revocation of appointment of testamentary trustees.]—*See* WILLS.

Effect of revocation—On legacy to executor.]—*See* Part IV., Sect. 5, sub-sect. 11, *post*.

as co-executor by Mrs. S., executrix testamentary in her late husband's estate. Mrs. S. revoked the assumption of F. by obtaining an order that all papers belonging to the estate should be returned to her. On the death of Mrs. S., a question having arisen as to whether F. was still exor. by virtue of the assumption:—*Held*: F. had no rights under the deed of assumption.—*SCHIEPERS v. FOSTER* (1906), 23 S. C. 334.—S. AF.

PART I. SECT. 9.

203 I. When court will interfere—*General rule.*]—An exor. cannot be removed from his position where anything remains to be done appertaining to his office, even although the will provides for his continuance as a trustee thereunder after his duty as exor. have ceased, & he has acted as

trustee by investing part of the trust moneys.—*Re BUSH* (1890), 19 O. R. 1.—CAN.

o. ——— On summary application.]—The ct. will not upon a summary petition, or otherwise than in an action, remove a trustee or an exor. *in invitum*.—*Re DAVIS'S TRUST* (1896), 17 P. R. 187.—CAN.

p. Grounds for interference—*Conduct.*]—Breach of trust or neglect or disregard of duty by an exor. does not render him "unfit," so as to justify an application by summons for his removal.—*Re TURNER*, [1923] V. L. R. 189.—AUS.

q. ———.]—Where one of several persons beneficially interested under a will, without making proper inquiries into the conduct & dealings with the estate by the exors., instituted proceedings against them, & ground-

SECT. 9.—REMOVAL FROM OFFICE AND RESTRAINT OF REPRESENTATIVE FROM ACTING.

See, also, Part II., Sect. 6, sub-sect. 1, C., *post*.

202. Jurisdiction to remove—Court of Chancery—Under Judicial Trustees Act, 1896 (c. 35), s. 1 (1).]—A person interested in an estate is not entitled as of right to the appointment of a judicial trustee under the above Act, but the appointment is, under above sub-sect. a matter entirely within the discretion of the ct.

Thus where the reversioner under a will applied under the Act for the appointment of a judicial trustee to act either alone or jointly with testator's widow, who was sole extrix. & also tenant for life, there being no trustee appointed by the will, the ct. refused the application, as it was opposed to her wish & to testator's manifest intention, which was that she should have the sole control of his estate, there being, moreover, no ground of complaint against her; nor was the fact that appt. offered that the remuneration of the judicial trustee, when appointed, should come out of capital & not out of income held to justify the application.

Under above Act, sect. 1, sub-sect. 2, the administration of the property of a deceased person is a trust & the exor. is a trustee; so that, under sub-sect. 1, the ct. can, in a proper case, remove the exor. & appoint a judicial trustee in his place, to whom, under sub-sect. 4, it can give directions as to the administration of the trust.—*Re RATCLIFF*, [1898] 2 Ch. 352; 67 L. J. Ch. 562; 78 L. T. 834; 42 Sol. Jo. 654.

203. When court will interfere—*General rule.*]—*STANTON v. CARRON CO.*, No. 6, *ante*.

204. Grounds for interference—*Conduct—Suspicion of fraud.*]—*ANDREWS v. POWYS* (1723), 2 Bro. Parl. Cas. 504; 1 E. R. 1094; *sub nom.* *POWIS v. ANDREWS*, cited in 2 Atk. at p. 126; 3 Atk. at p. 566, H. L.; *subsequent proceedings*, *sub nom.* *ANDREWS v. POWIS* (1728), 1 Lee, 242.

Annotations.—*Dist.* *Hathornthwaite v. Russel* (1740), 2 Atk. 126. *Consd.* *Watkins v. Brent* (1835), 1 My. & C. Ex. 97. *Expld.* *Middleton v. Sherburne* (1841), 4 Y. & C. Ex. 358. *Refd.* *Smith v. Haytwell* (1747), 1 Amb. 66; *Knight v. Duplessis* (1749), 1 Ves. Sen. 324; *Ball v. Oliver* (1813), 2 Ves. & B. 96. *Mentd.* *Molineaux v. Bird* (1729), Mos. 235; *Villers v. Osborn* (1730), Mos. 308; *Phipps v. Steward* (1737), 1 Atk. 285; *Bennett v. Vade* (1742), 9 Mod. Rep. 312; *Barnesly v. Powell* (1749), 1 Ves. Sen. 284; *Gingell v. Horne* (1839), 9 Sim. 539; *Allen v. M'Pherson* (1847), 1 H. L. Cas. 191; *Newton v. Ricketts* (1847), 11 Jur. 662; *Jones v. Gregory* (1863), 2 De G. J. & Sm. 83.

205. ——— Failure to get in assets—*Infants deprived of maintenance.*]—It is a good ground for the appointment of a receiver, that an exor. & trustee has, by omitting to get in testator's personal estate, deprived infant legatees of the maintenance or means of advancement provided for them by the will.—*RICHARDS v. PERKINS*

lessly charged them with misconduct, the ct. being satisfied with the conduct of the exors., refused to take the further administration & winding up of the estate out of their hands.—*ROSEBATCH v. PARRY* (1879), 27 Gr. 193.—CAN.

r. ———.]—*GINGRAS v. BRILLON* (1880), 3 L. N. 183.—CAN.

s. ———.]—*DEVINE v. GRIFFIN* (1881), 4 L. N. 61; 25 L. C. J. 249.—CAN.

t. ———.]—*FRENCH v. MCGEE* (1886), M. L. R. 2 Q. B. 59; 9 L. N. 86.—CAN.

u. *Fraud.*]—An exor. during the course of an action against a debtor of the estate, came to an arrangement with the debtor whereunder, without the cognisance of his legal advisers, he recognised as valid a stale & unsupported counterclaim set up by this debtor:—*Held*: he had

(1838), 3 Y. & C. Ex. 299; 8 L. J. Ex. Eq. 57; 3 Jur. 168; 160 E. R. 716.

206. ——— Bad character.]—Creditor filed a bill against the debtor's exor., stating, first, that deft. was a person of bad character, of drunken habits & violent behaviour, & then adducing instances in support of that statement; & praying that the assets might be administered under the direction of the ct., & for an injunction & receiver:—*Held*: the general statement & the instances were relevant to the relief asked, & therefore were not scandalous.

A pltf. has a right to make his case as strong as he can, & when there is a question about the administration of assets, it is surely of importance to make out that the person who has the power over & sole management of them, is a person of violent conduct & drunken habits. His duty is to collect the assets & pay the debts; & where peaceful conduct is so indispensable, it is material for a pltf., who is seeking for an injunction & a receiver, to enter into instances of violent conduct, & it is obvious that the assets cannot be safe in the hands of a person who is in the habit of being drunk. Pltfs. have obtained an injunction on affidavits verifying the allegations in the bill; & when the cause comes on to be heard, the ct. must determine whether that injunction ought to be continued or not; & if those charges which have been deposed to on an interlocutory proceeding are proved at the hearing the ct. will continue the injunction & the receiver (*per Cur.*).—*EVERETT v. PRYTHGCH* (1841), 12 Sim. 363; 11 L. J. Ch. 6, 54; 6 Jur. 3; 59 E. R. 1171.

207. ——— Intention to abscond.]—*BOOVEY v. SUTCLIFFE* (1854), 2 Eq. Rep. 706.

208. ———]—*COLEBOURNE v. COLEBOURNE* (1876), 1 Ch. D. 690; 45 L. J. Ch. 749; 24 W. R. 235; 2 Ch. Pr. Cas. 197.

209. ——— Poverty.]—*HATHORNTHWAITHE v. RUSSEL*, No. 8, *ante*.

210. ———]—A receiver will not be appointed merely because an extrix. is poor.—*HOWARD v. PAPER* (1815), 1 Madd. 142; 56 E. R. 54.

211. ——— Insolvency — Appointment of receiver.]—In case of insolvency of the exor. the ct. will on petition appoint a receiver; & compel the exor. to allow his name to be used in bringing actions.—*UTTERSON v. MAIR* (1793), 2 Ves. 95; 4 Bro. C. C. 270; 30 E. R. 540, L. C.

Annotations.—*Reid*. *Bowen v. Phillips* (1896), 75 L. T. 628. *Mentd.* *Troughton v. Binkes* (1801), 6 Ves. 573; *Alsager v. Rowley* (1802), 6 Ves. 748.

212. ———]—Without saying a person known by testator to be a bkpt. & yet appointed an exor. by such testator, can be

been guilty of gross misconduct & must be removed from his office.—*ALIE'S ESTATE v. ARNOLD* (1908), 25 S. C. 302.—*S. AF.*

b. ——— Misconduct prior to appointment.]—The ct. has power under the common law to remove an exor. for misconduct committed prior to his appointment. If a testamentary exor. prove that testator knew of such misconduct the ct. will not remove the exor. for such misconduct, but such knowledge must be clearly proved by him.

Where an exor. had, prior to his appointment, misappropriated certain trust money the ct. removed him from office & ordered him to pay *de bonis propriis* the costs of the application for removal.—*BRONKHORST v. ERASMUS* (1907), T. S. 486.—*S. AF.*

c. ——— Mismanagement.]—Mismanagement by the exor. of an estate

is not a just cause for revoking the probate.—*ANNODA PROBAD CHATTERJEE v. KALLIKRISHNA CHATTERJEE* (1896), 1 L. R. 24 Cal. 95.—*IND.*

d. ——— Wrongfully refusing to sign accounts.]—An exor. may be removed from office for wrongfully refusing to sign the liquidation & distribution accounts prepared by a co-exor.—*Re DU PLESSIS' ESTATE* (1899), 16 S. C. 575.—*S. AF.*

e. ——— Conflict of interest with duty—Absence of incapacity or dishonesty.]—In an action for the removal of one of several exors., the existence of a law suit between such exor. & the estate he represents & the evidence of irregularities in his administration, but not exhibiting any incapacity or dishonesty, are not sufficient cause for his removal.—*MITCHELL v. MITCHELL* (1889), 16 S. C. 722.—*CAN.*

f. ——— Absence from colony —

controlled here by the appointment of a receiver, in this case testator did not advert to the circumstance of this person being a bkpt. A receiver must be appointed (*LORD ELGIN, C.*).—*GLADDON v. STONEMAN* (1808), 1 Madd. 143, n.; 56 E. R. 54.

Annotation.—*Mentd.* *Oldfield v. Cobbett* (1835), 4 L. J. Ch. 271.

213. ———]—The ct. will appoint a receiver of an intestate's personal estate when the administrator is sworn to be insolvent before his answer be come in, although the fact of his being abroad stated in pltf.'s affidavit be denied.—*SCOTT v. BECHER* (1817), 4 Price, 346; 146 E. R. 485.

214. ———]—Injunction to restrain deft. who was insolvent & exor. under a disputed will, from receiving testator's effects, & to stay trial of actions instituted by deft., granted before answer on the ground that irreparable mischief might ensue.—*MANSFIELD v. SHAW* (1818), 3 Madd. 100; 56 E. R. 447.

215. ———]—Exor. & trustee becoming a bkpt., a receiver appointed though testator knew, after he had made his will, that a commission had been issued.—*LANGLEY v. HAWK* (1820), 5 Madd. 46; 56 E. R. 812.

Annotation.—*Mentd.* *Oldfield v. Cobbett* (1835), 4 L. J. Ch. 271.

216. ———]—A receiver appointed before answer, upon affidavit of the embarrassed circumstances of an exor., & of expressions showing an intention of misapplying the assets.—*OLDFIELD v. COBBETT* (1835), 4 L. J. Ch. 271.

217. ———]—*STANTON v. CARRON* Co., No. 6, *ante*.

218. ———]—An action was commenced in the ct. for the administration of the estate of testator, against the administrator with the will annexed. The administrator, being interested in that capacity in the estate of another testator, commenced an action for the administration of his estate in another ct., & then became bkpt. Pltf. in the first suit moved in that suit that a receiver of the estate might be appointed, & that pltf. might be permitted to prosecute the second action in the name of the administrator:—*Held*: pltf. was entitled to the order asked for, & that it was properly made in the ct. to which the first action was attached.—*Re HOPKINS, DOWD v. HAWTIN* (1881), 19 Ch. D. 61; 30 W. R. 601, C. A.

219. ——— Co-executor willing to act.]—The ct. has jurisdiction to restrain an exor. who has become bkpt. since the death of testator from further acting as exor.; & if there is a co-exor. willing to continue to act, will not

When temporary.]—An application for the removal of one of two trustees appointed by a will, & the appointment of another in his place, refused where the only ground of the application was that the trustee had left the colony, & that it was uncertain when & whether he would return, it appearing that the trustee in question had left the colony without any intention of permanently residing abroad, & had had no opportunity of considering whether or not he would administer the trusts. Further, the ct. was not satisfied that any real loss or inconvenience would be caused to the estate by the temporary absence of one of the trustees.—*Re WATSON* (1899), 18 N. Z. L. R. 368.—*N.Z.*

g. ——— When permanent.]—An exor. in an estate situate in the Union had permanently removed from the Union, & his attorneys had been

order, directed to be paid to him; he died, leaving an extrix. & two exors.; the extrix. died, leaving an exor.; the Accountant-General refused to pay the legacy under a power of attorney from the surviving co-exors. of L. without a discharge from the exor. of the deceased extrix. On an application to the ct. an order was made to pay the legacy to the surviving exors.—*MOODIE v. BAINBRIDGE* (1821), 6 Madd. 107; 56 E. R. 1032.

232. ———.]—A. died in India. B., one of his exors., proved his will in India. B. died, & C. his exor. proved his will in England. C. is not the personal representative of A.—*TWYFORD v. TRAIL* (1834), 7 Sim. 92; 53 E. R. 771.

Annotations:—Foll. In the Goods of Gaynor (1869), L. R. 1 P. & D. 723. *Reid.* *Rendall v. Rendall* (1841), 1 Hare, 152; *Bond v. Graham* (1842), 11 L. J. Ch. 306.

233. ———.]—Motion, for probate to the exors. of an exor. who had proved the will of his testator, but who was not the surviving exor., rejected.—*In the Goods of SMITH* (1842), 3 Curt. 31; 6 Jur. 41; 163 E. R. 644.

234. ———.]—*ROBSON v. JEFFERSON* (1850), 15 L. T. O. S. 325; 14 Jur. 845.

235. ———.]—On the death of an exor., without having either renounced or taken probate, the exor. of the survivor of two acting exors. becomes the personal representative of the original deceased.—*In the Goods of LORIMER* (1862), 2 Sw. & Tr. 471; 31 L. J. P. M. & A. 189; 6 L. T. 612; 10 W. R. 809; 164 E. R. 1079.

236. ———.]—Where co-executor has renounced.]—*HARRISON v. HARRISON*, No. 366, *post*.

237. ———.]—*VENABLES v. EAST INDIA CO.*, No. 355, *post*.

238. ———.]—Of co-administrators.]—Administration granted to two, one dies, it survives to the other, but if a letter of attorney is made to two, & one dies, the authority ceases.—*ADAMS v. BUCKLAND* (1705), 2 Vern. 714; 23 E. R. 929.

Annotation:—Reid. *Hudson v. Hudson* (1737), *West temp. Hard.* 155.

239. ———.]—Though a guardian be not in all respects to be compared to an exor., in regard the latter may continue his executorship, by appointing an exor. by his will, yet the case of a guardianship devised to two is strictly like the case of an administration granted to two, especially where the debts amount to as much as the assets, for in that case as well as in the case of two guardians, an administrator cannot assign his administratorship, it will not go to his exors. or administrators but to the surviving administrator (*LORD MACCESFIELD, C.*).—*EYRE v. SHAFTSBURY* (COUNTS) (1725), 2 P. Wms. 103; 24 E. R. 659; *sub nom.* *SHAFTSBURY (EARL) v. SHAFTSBURY*, *Gilb. Ch.* 172, L. C.

Annotations:—Reid. *Mansell v. Mansell* (1757), *Wilm.* 36; *Bell v. Holby* (1873), L. R. 15 Eq. 178. *Mentd.* *Raymond's Case* (1734), *Cas. temp. Talb.* 58; *A.-G. v. Downing* (1767), *Wilm.* 1; *R. v. Green* (1781), 3 Doug. K. B. 36; *De Manneville v. De Manneville* (1804), 10 Ves. 52; *Re* (1831), 2 State Tr. N. S. 911; *A.-G. v. Oxford* (1846), 11 Jur. 137; *A.-G. v. Magdalen College, Oxford* (1854), 18 Beav. 223.

240. Power to prove reserved to surviving executor—Failure of survivor to appear to citation—

*Devolution of office—On executor of executor.]—A. died in 1832, leaving a will, whereof he appointed B., C. & D. exors. & B. residuary legatee. C. alone proved the will, power being reserved to grant probate to the other exors. In 1847 B. died leaving a will appointing E. sole extrix., who duly proved B.'s will. In 1855 C. died intestate, leaving part of the personal estate of A. unadministered. D., the surviving exor. of A., not having appeared to a citation, calling on him to accept or refuse probate of the will of A., administration with the will of A. annexed was granted to the attorney of E., then abroad, as the personal representative of the residuary legatee of A. the chain of exorship. having been broken.—*COLLISON v. MAWE* (1859), 28 L. J. P. & M. 90.*

241. ———.]—On executor of acting executor.]—Where an exor., to whom power has been reserved, survives his acting co-exor. & does not appear to a citation, the grant will go as if his name had never appeared in the will, & the exors., if any, of the acting exor. will be the representative of original testator.—*In the Goods of NODDINGS* (1860), 2 Sw. & Tr. 15; 3 L. T. 178; 9 W. R. 40; 104 E. R. 896.

Annotation:—Foll. In the Goods of Reid, [1896] P. 129.

242. ———.]—Probate of a will was granted to one of two exors., power being reserved to make the like grant to the other exor. The acting exor. died, not having fully administered; at the date of his death the other exor. had not been heard of for fourteen years. The daughter & sole next of kin of the testator, with the assent of the exors. of the acting exor., moved for a grant to herself of letters of administration *de bonis non*:—*Held*: the grant could not be made, as, upon the non-appearance to a citation of the exor. to whom power to prove had been reserved, the chain of exorship. would be continued in the exors. of the acting exor. without any fresh grant from the ct. Leave given to effect service of the citation on the absent exor. by advertisement.—*In the Goods of REID*, [1896] P. 129; 65 L. J. P. 60; 74 L. T. 462.

B. Of Sole or Last Surviving Executor.

(a) Where Executor appointed.

See, now, Administration of Estates Act, 1925 (c. 23), s. 7.

243. Devolution of office on executor of executor.]—*OFFREVILLE v. TYREZBYNZ* (1302), Y. B. (Rolls Series) 30 & 31, Edw. 1, 239.

244. ———.]—Where one of two exors., refuses to act, & the acting one dies, his exors. shall have an action for the debt of first testator.—*ANON.* (1558), 2 Dyer, 160 b.; 73 E. R. 349.

Annotations:—Consd. *Harrison v. Harrison* (1846), 1 Rob. Eccl. 406. *Reid.* *Wankford v. Wankford* (1704), 1 Salk. 299.

245. ———.]—Devise that the exors. shall take the profits of lands to pay debts, etc., till the full age of the heir; both die during the minority; the

there is a right to the devolution of land to the exor. of a sole or surviving exor.—*Re LAND TITLES ACT, WHITMAN'S CASE*, [1919] 1 W. W. R. 600.—*CAN.*

*n. — Contrary rule in Cape Colony.]—An exor. does not succeed to his principal's capacity as exor.: in this respect the law of Cape Colony differs from English law.—*RIDGWAY v. GAMMIE* (1885), 5 Q. D. C. 76.—*S. AF.**

PART I. SECT. 10, SUB-SECT. 1.—*B. (a).*

243i. Devolution of office on executor of executor.]—*Ex p. MANNING* (1905), 5 S. R. N. S. W. 453.—*AUS.*

243ii. ———.]—An attorney under power, who has sealed an exemplification of an English probate, is in the same position in all respects as if an original grant of probate had been made to him, & his office of executor will devolve on his own executor.—*Re*

WATMOUGH, [1913] V. L. R. 435.—

243iii. ———.]—*MADDOCK v. VICTORIA REGISTRAR OF TITLES, MILLER v. VICTORIA REGISTRAR OF TITLES*, [1915] V. L. R. 152; 19 C. L. R. 681.—*AUS.*

243iv. ———.]—*DRUMMOND v. PROBATES REGISTRAR* (1918), 25 C. L. R. 318.—*AUS.*

243v. ———.]—Under the *Torrens system of Land Titles in Saskatchewan*,

Sect. 10.—Devolution of the representative office:
Sub-sect. 1, B. (a), (b) & C.]

exor. of the surviving exor. shall take.—**STILE v. TOMSON** (1561), 2 Dyer, 210 a; 73 E. R. 464.

Annotations:—*Reid*, Hargthorpe v. Milforth (1594), Cro. Eliz. 318. *Mentd.* Smith v. Havens (1591), Cro. Eliz. 252; Travers v. Bulkeley (1750), 1 Ves. Sen. 384.

246. —.]—**BRANSBY v. GRANTHAM** (1577), 2 Plowd. 525; 75 E. R. 776.

Annotation:—*Consd.* Farr v. Newman (1792), 4 Term Rep. 621.

247. —.]—**ANON.** (1604), Noy, 3; 74 E. R. 975.

248. —.]—**SLINGSBY v. LAMBERT** (1615), Cro. Jac. 394; 79 E. R. 337; *sub nom.* LAMBERT & SLINGSBY'S CASE, Godb. 262.

249. —.]—**Administration cum testamento annexo granted.—In preference to testator's widow.**—The extrix. of an exor. entitled to an administration *cum testamento annexo*, in preference to the widow of the original testator.—**THOMAS v. BAKER** (1753), 1 Lec, 341; 161 E. R. 126.

250. —.]—**B.**, a married woman, made a will, merely executing a power given her by the marriage settlement, but she appointed C. extrix. generally. The Ecclesiastical Ct. granted probate of this will in the general form. B. was the sole extrix. of her late husband A. The general probate of the will of B. will transmit to C. the representation of A. without an administration *de bonis non*.—**BARR v. CARTER** (1797), 2 Cox, Eq. Cas. 429; 30 E. R. 199.

251. —.]—**Executor's will proved abroad.**—An exor. having gone to New South Wales after taking out probate, administration was granted to the grandson of testator, who was a legatee under the will, limited to the purpose of carrying on a Chancery suit. Information was received of the death of the exor., previous to the date of the administration, leaving a will, which had been proved in Australia, & the administration was therefore revoked. The ct. refused to make a limited grant of administration to the legatee until the exors. of the exor. in Australia had been cited.—*In the Goods of FLEMING* (1860), 24 J. P. 231; 6 Jur. N. S. 486.

252. —.]—**A married woman who was surviving legal personal representative of testator, in exercise of a power reserved to her by her marriage settlement, made her will, & appointed her husband sole exor. The husband proved the will, & also obtained letters of administration to all other his wife's personal estate. He also applied for supplemental letters of administration, to enable him to continue the chain of representation to testator; but they were refused by the Ct. of Probate. The Ct. made an order, appointing the husband trustee of the trust funds which were standing in the testator's name, & vesting in him the right to transfer them.**—*Re HERBERT'S WILL* (1860), 8 W. R. 272.

253. —.]—**Testatrix left a will, which was signed by her exor. as well as by two attesting witnesses. The exor. was also residuary legatee:—Held: by signing as exor., the residuary legatee did not forfeit his interest, & probate was granted to his representative.**—*In the Goods of PURSS-GLOVE* (1872), 26 L. T. 405.

254. —.]—**Necessity for probate of testator's will.—Death of first executor before probate.**—An exor. dies before probate; his exor. is not exor. to first testator; yet if the residue was bequeathed to his testator, he shall have administration, with the will annexed; else such person shall, to whom it is bequeathed, or in default thereof the next of

kin to first testator.—**ISTED v. STANLEY** (1580), 3 Dyer, 372a; 73 E. R. 834.

Annotations:—*Folld.* Day v. Chatfield (1683), 1 Vern. 200. *Reid.* Heden v. Wolfe (1621), Palm. 153; Smith v. Tracy (1677), 3 Keb. 776; Wangford v. Wangford (1704), 11 Mod. Rep. 38.

255. —.]—**—.]—(1) To a declaration stating that A. administered the goods as exor. of B. if deft. plead that A. died & made C. his exor., who took upon him the burden of the will, a replication that A. did not prove the will of B. & that C. refused to be administrator *de bonis non* is not a departure from the declaration for it only shows how A. was exor., viz. by administering the goods.**

(2) If A. makes B. his exor. who proves the will & B. makes C. his exor. & dies; C. may accept the executorship to B. & refuse the executorship to A.—**HAYTON v. WOLFE** (1621), Cro. Jac. 614; 79 E. R. 524; *sub nom.* HEDEN v. WOLFE, Palm. 153.

Annotation:—*Generally.* *Reid.* Wangford v. Wangford (1704), 11 Mod. Rep. 38.

256. —.]—**—.]—DENNE v. BORROUGH** (1628), Het. 105, 113; 124 E. R. 378, 384.

257. —.]—**—.]—If an exor. dies before probate of the will, his exor. cannot prove it; but administration *cum testamento*, etc., must be granted to the residuary legatee, if any, or to the next of kin.**—**DAY v. CHATFIELD** (1683), 1 Vern. 200; 23 E. R. 412.

258. —.]—**—.]—(1) Where an obligee makes the obligor his exor., who administers but never proves, the bond debt is extinguished; unless there be a defect of assets for payment of creditors.**

(2) Probate is not necessary to make a complete exor., except where he must make *profert* of it.

(3) The exor. of an exor. is not exor. to the first testator, unless the first exor. have proved.

(4) Exor. of an exor. may prove as to his testator & renounce as to the first testator (**HOLT, C.J.**).—**WANGFORD v. WANGFORD** (1704), 1 Freem. K. B. 520; 11 Mod. Rep. 38; 89 E. R. 390; *sub nom.* WANKFORD v. WANKFORD, 1 Salk. 299; 3 Salk. 162; Holt, K. B. 311.

Annotations:—*As to (1)* *Apld.* Freakley v. Fox (1829), 9 B. & C. 130; Hudson v. Hudson (1737), 1 Atk. 460; Pringle v. Crooks (1839), 3 Y. & C. Ex. 660; Tomlin v. Tomlin (1841), 1 Hare, 236; Harrison v. Harrison (1846), 1 Rob. Eccl. 406; Venables v. East India Co. (1848), 2 Exch. 633; Lowe v. Pesket (1855), 25 L. T. O. S. 146; Seagram v. Knight (1867), 2 Ch. App. 628; Re Bourne, Davey v. Bourne, [1906] 1 Ch. 697. *As to (2)* *Folld.* Brazier v. Hudson (1836), 8 Sim. 67. *Generally.* *Reid.* Ryalls v. Bramall (1848), 1 Exch. 734; Hewson v. Shelley, [1913] 2 Ch. 384. *Mentd.* Thrustout v. Coppin (1771), 2 Wm. Bl. 801; Doe d. Garmons v. Knight (1826), 8 Dow. & Ry. K. B. 348; Doe d. Wood v. Tees (1826), 8 Dow. & Ry. K. B. 72; Ford v. Beech (1848), 11 Q. B. 852; Belshaw v. Bush (1851), 11 C. B. 191.

259. —.]—**In England.**—Deceased died intestate, leaving her husband surviving her, who did not take administration to her estate. The will of the husband was proved in the Prerogative Ct. of Armagh, Ireland, but no grant was made in this country. The will of the sole exor. of the husband was also proved in Ireland, but was resealed in London:—*Held:* the exor. under the last mentioned will did not represent the husband in England so as to be entitled to obtain administration of the goods of the deceased.—*In the Goods of GAYNOR* (1860), L. R. 1 P. & D. 723; 38 L. J. P. & M. 79; 21 L. T. 367; 33 J. P. 762; 17 W. R. 1062.

260. —.]—**Grant to attorney sufficient.**—A chain of representation is not broken by a surviving exor., who afterwards died, leaving exors. having taken a grant of administration with will annexed *de bonis non* by his attorneys alone, & not having himself proved the will. Such ad-

ministration refused to one of the residuary legatees substituted.

Semble: My impression is, that a will proved by the attorney of an exor. is the same thing as if actually proved by himself (SIR H. JENNER FUST).—*In the Goods of BAYARD* (1849), 1 Rob. Eccl. 768; 7 Notes of Cases, 117; 13 L. T. O. S. 448; 13 Jur. 664; 163 E. R. 1208.

Annotation:—*Foldi. In the Goods of Murguia* (1884), 9 P. D. 236.

261. ———.]—*In the Goods of Fox* (1833), 13 Jur. 664, n.

262. ———.]—*In the Goods of MILLS* (1833), 13 Jur. 664, n.

263. ———.]—A grant to the attorney of an exor. does not break the chain of representation. L., as attorney for the exor., obtained a grant of letters of administration with the will annexed of a testatrix. The exor. died leaving part of the property unadministered:—*Held*: the exor.'s representative was entitled to deal with the property left unadministered of the testatrix & no further grant was necessary.—*In the Goods of MURGUIA* (1884), 9 P. D. 236; 53 L. J. P. 47; 43 J. P. 711; *sub nom. In the Goods of MARQUIA*, 2 W. R. 799.

264. ———.]—B., testatrix, by her will appointed her friend S. to be her sole exor., but, in case the said S. should predecease her, or should die before having fully performed his functions as exor., then she appointed her son, A. to be sole exor. of her will. S. survived the testatrix, & took probate of her will, but died in 1873, before having completed his functions as exor., leaving a will, which was duly proved by his exors., A. survived testatrix, but predeceased S.:—*Held*: the chain of representation to B.'s estate was not broken, & her legal personal representatives were the exors. of her deceased exor. S., who were entitled to administration with the will annexed, in respect of the unadministered portion of her estate.—*In the Goods of BOND* (1894), 70 L. T. 813; 58 J. P. 529.

265. Devolution of office on administrator of executor—*Administrator durante minore ætate*.]—An administrator *durante minore ætate* cannot bring an action for, or meddle with the goods of the person to whom the infant's testator was exor.—*LIMMER v. EVERY* (1591), Cro. Eliz. 211; 78 E. R. 467; *sub nom. LIMMER & EVORIES CASE*, 4 Leon. 58.

266. ———.]—The administrator, *durante minoritate* of the exor. of an exor., is the representative of first testator.—*ANON.* (1675), Freem. K. B. 288; 89 E. R. 208.

(b) Where no Executor appointed.

See, now, Administration of Estates Act, 1925 (c. 23), s. 7 (3).

267. Devolution of office on trustees—*Extent of powers*.]—One by will gives annuities, & directs the residue of her estate to be disposed of in charity, to such persons, & in such manner, as her exors. or survivor shall think fit. On the death of them, new trustees were appointed to sustain the annuities; but they could not dispose of the residue, it being a trust confined to the exors. personally.—*HIBBARD v. LAMB* (1756), Amb. 309; 27 E. R. 209.

Annotation:—*Reid. A.-G. v. Gaskell* (1831), 9 L. J. O. S. Ch. 188.

PART I. SECT. 10, SUB-SECT. 1.—C.

274 i. Devolution of office on executor of administrator.]—The real estate of an intestate which has vested in his administrator does not on the death of

that administrator testate vest in his exor.—*MADDOCK v. VICTORIA REGISTRAR OF TITLES*, MILLER v. VICTORIA REGISTRAR OF TITLES, [1915] V. L. R. 152; 19 C. L. R. 681.—*AUS.*

268. ———.]—B. made C. his exor. & trustee, with power to appoint by deed or will other persons as co-trustees or succeeding trustees. B. died, C. did not take probate, but by will, referring to B.'s will, appointed E. & F. to be succeeding trustees in respect of B.'s will, after his C.'s death. F. proved C.'s will, & was called upon, as exor. substituted according to the tenor, to take probate of B.'s will:—*Held*: in the language of the two wills the distinction between trustee & exor. was so marked, that F. could not be called upon to take probate of B.'s will.—*MOSS v. BARDSWELL* (1860), 3 Sw. & Tr. 187; 20 L. J. P. M. & A. 117; 2 L. T. 300; 24 J. P. 550; 6 Jur. N. S. 589; 8 W. R. 503; 164 E. R. 1245.

269. Devolution of office on administrator of executor.]—*OXFORD v. GOLDINGTON* (1623), Win. 64; 124 E. R. 55.

270. ———.]—*BASTARD v. JUTSHAM* (1739), Barnes, 444; 94 E. R. 996.

271. ———.]—Prohibition for suing the administrator of an exor. for a legacy given by his testator [granted].—*TUCKER v. TOWELL* (1735), Lee temp. Hard. 185; 95 E. R. 119.

272. ———.]—Where a bill was filed against an exor., seeking performance of the trusts of his testator's will & administration of his estate, & the exor. by his answer admitted a surplus of testator's estate to be in his possession, & then died before the cause came to a hearing:—*Held*: the suit could not be revived against the administrator of the exor., but there must be a representative of original testator before the ct.—*BARBER v. WALKER* (1867), 15 W. R. 728, L. J.

273. ———.]—Where a solr. has acted professionally for a testator & for his exor. or administrator, & papers belonging to the estate have come into his possession, & after the death of the exor. or administrator, an administrator *de bonis non* has been appointed, the administrator *de bonis non* is not entitled to reclaim from the solr. the papers in his possession without first paying the costs due to him, not only in respect of work done for testator, but also in respect of work done for the exor. or administrator.

There is a privity of estate between an exor. or administrator & a subsequent administrator *de bonis non*, & the liabilities of the estate pass, with the benefits of it, to the administrator *de bonis non*.—*Re WATSON* (1884), 53 L. J. Ch. 305; 50 L. T. 205; 32 W. R. 477.

—Administration *de bonis non*.]—*See* Part II., Sect. 6, sub-sect. 2, *post*.

C. Of Sole or Last Surviving Administrator.

See, now, Administration of Estates Act, 1925 (c. 23), s. 7.

274. Devolution of office on executor of administrator.]—Debt lies not against the exors. of the obligor's administrator; because there is no privity between the exors. & the obligor; but administration *de bonis non*, of the obligor should have been taken out.—*TRIVETT v. JEFFERIES* (1734), Cunn. 101; 94 E. R. 1088.

275. ———.]—A term aliened by an administrator shall go to his exor., & not to the administrator *de bonis non*.—*BUTLER v. BERNARD* (1674), 1 Cas. in Ch. 224; Freem. Ch. 139; 22 E. R. 772.

Annotation:—*Consd. Skeffington v. Budd* (1842), 9 Cl. & Fin. 219.

274 ii. ———.]—The authority of an administrator cannot be transmitted to his exor.—*LARENCE v. LARENCE* (1911), 17 W. L. R. 197; 21 Man. L. R. 145.—*CAN.*

Sect. 10.—Devolution of the representative office: Sub-sect. 1, C. & D.; sub-sects. 2 & 3. Sect. 11: Sub-sect. 1.]

276. —. —.]—*LOCKIER v. SMITH* (1662), 1 Sid. 79; 82 E. R. 981.

277. Non-devolution of office on administrator of administrator.]—*THORN v. S.* (1601), Gouldsb. 182; 75 E. R. 1079.

278. —. —.]—*WARREN v. —* (1678), 2 Cas. in Ch. 247; 22 E. R. 928.

D. Breaking Chain of Representation.

See, now, Administration of Estates Act, 1925 (c. 23), s. 7 (3).

279. General executor of limited executor.]—A married woman, by virtue of an indenture of assignment given to her, made her will & appointed exors. & her granddaughter one of her residuary legatees. A limited probate was granted to the exors., & the last surviving exor. died leaving goods unadministered; he made his will of which probate was taken by his exors. The granddaughter, as one of the residuary legatees, prayed a limited administration of the unadministered goods of her grandmother.

It appears the chain of exors. has been continued. I cannot, therefore, let in a residuary legatee, till the exors. of the exor. shall have been before the ct. & disposed of; notwithstanding the original probate was limited (*SIR HERBERT JENNER FUST*).—*In the Goods of BEER* (1851), 2 Rob. Eccl. 349; 16 L. T. O. S. 512; 15 Jur. 160; 163 E. R. 1341.

280. Limited executor of general executor.]—A married woman extrix. & having separate property over which she had & exercised an appointing & disposing power can continue the chain of exorship.—*BIRKETT v. VANDERCOM* (1831), 3 Hag. Ecc. 750; 162 E. R. 1331.

281. —. —.]—A limited probate taken out of the will of a *feme covert* will not continue the chain of representation under the general probate of the will of the original testator, but the ct. will make a supplemental grant limited to the property which the *feme covert* had as extrix.—*In the Goods of BAYNE* (1858), 1 Sw. & Tr. 132; 31 L. T. O. S. 172; 6 W. R. 815; 164 E. R. 661.

Annotations:—Folld. In the Goods of Martin (1862), 3 Sw. & Tr. 1. *Held. In the Goods of Russell* (1890), 62 L. T. 614.

282. —. —.]—The chain of exorship. is not continued by the appointment of an exor. by a married woman in a will made under a power.—*In the Goods of HUGHES* (1860), 4 Sw. & Tr. 209; 29 L. J. P. M. & A. 165; 24 J. P. 604; 164 E. R. 1496.

Annotation:—Consd. In the Goods of Bridger (1878), 4 P. D. 76.

283. —. —.]—A. died, leaving a will, whereby he appointed his wife sole extrix. & universal legatee, she proved A.'s will, & afterwards married B., & during her coverture made a will in execution of a power vested in her, & appointed B. sole exor. Upon her death, B. took limited probate of her will, & also administration of the rest of her effects:—*Held: B.*, as representing the whole of his wife's personal estate, was entitled to administration of the unadministered effects of A.—*In the Goods of MARTIN* (1862), 3 Sw. & Tr. 1; 32 L. J. P. M. & A. 5; 7 L. T. 756; 27 J. P. 137; 8 Jur. N. S. 1134; 11 W. R. 191; 164 E. R. 1171.

Annotations:—Folld. In the Goods of Richards (1866), L. R. 1 P. & D. 156. *Consd. In the Goods of Bridger* (1878), 4 P. D. 77.

284. —. —.]—A. died leaving a will in which he named B. his wife his sole extrix. & residuary legatee. She proved the will & afterwards married, & having during her second coverture

made a will under a power appointing C., her daughter by her first husband, her sole extrix. & residuary legatee, died leaving her second husband C. her surviving. Upon her death, C. took limited probate of her will & afterwards on the renunciation & with the consent of B.'s second husband, who had assigned to her all his interest in the residue of his wife's estate, administration of the rest of her personal estate:—*Held: C.*, as administratrix of the rest of the personal estate of B., was entitled to administration of the unadministered personal effects of A.—*In the Goods of RICHARDS* (1866), L. R. 1 P. & D. 156; 35 L. J. P. & M. 44; 13 L. T. 757.

Annotation:—Consd. In the Goods of Bridger (1878), 4 P. D. 77.

285. —. —.]—B. died in 1864, leaving a will of which he appointed his wife with others extrix. She proved the will & survived the other exors. She afterwards married S. & during coverture with him made a will under certain powers vested in her, & appointed her husband S., sole exor. On her death in 1876 letters of administration with her will annexed were granted to S., who was the sole person entitled to the personal estate over which she had no disposing power:—*Held: a further grant was required as to the unadministered effects of B. & such grant was made (with the consent of S.) to F.*, the natural & lawful daughter of B., & one of the residuary legatees under his will.—*In the Goods of BRIDGER* (1878), 4 P. D. 77; 47 L. J. P. 46; 39 L. T. 123; 42 J. P. 520; *sub nom. In the Goods of BRIGGS*, 26 W. R. 535.

Modern practice as regards wills made by married women, *see* No. 122, *ante*.

Administrator of executor, *see* Nos. 269–273, *ante*.

286. Grant taken by attorney of executor.]—*Re HIND* (1824), 7 Notes of Cases, 118, n.

287. —. —.]—*In the Goods of BAYARD*, No. 260, *ante*.

288. —. —.]—*In the Goods of MURGUIA*, No. 263, *ante*.

289. Grant obtained in country other than England.—Probate granted in Ireland.—Re-sealed in England.]—*In the Goods of GAYNOR*, No. 259, *ante*.

290. Alternative appointment of executors.—Appointment of A. in event of death of B. before estate fully administered.—Death of A. before B.—Death of B. before estate fully administered.]—*In the Goods of BOND*, No. 264, *ante*.

SUB-SECT. 2.—BY ASSIGNMENT.

291. Transfer of leasehold by executor—Office of executor not assigned.]—(1) Where leaseholds were devised to three trustees & exors., & one of them having died, the two surviving trustees & exors., one of whom had never acted as exor., under an order of the ct. assigned the leasehold in trust for themselves & a newly appointed trustee:—*Held: by such assignment the leaseholds vested in them quid trustees & not quid exors.*, & they were not entitled to an indemnity upon assigning them to the person entitled under the will.

(2) Where an exor. fairly represents everything to the ct. a decree directing him to deal with the property must operate as an indemnity to him.—*SMITH v. SMITH* (1861), 1 Drew. & Sm. 384; 4 L. T. 44; 25 J. P. 516; 7 Jur. N. S. 652; 9 W. R. 406; 62 E. R. 426.

Annotations:—As to (1) Consd. Re King, Mellor v. South Australian Land Mortgage & Agency Co., [1907] 1 Ch. 73. *As to (2) Folld. Dodson v. Sammel* (1861), 30 L. J. Ch. 799. *Generally, Mentd. Lys v. Lys* (1869), 17 W. R. 394.

— **Power of representative to alienate generally.**—See Part V., Sect. 2, sub-sect. 2; Sect. 7, sub-sect. 2, B., *post*.

Transfer of estate to public trustee.—See Public Trustee Act, 1906 (c. 55), s. 6 (2).

Transfer of estate to judicial trustee.—See Judicial Trustees Act, 1896 (c. 35), s. 1.

SUB-SECT. 3.—ON REMOVAL OR RETIREMENT.

292. Power of court to appoint trustee—To discharge duties of executor.—Trustee Act, 1850 (c. 60).—Where testator had, by his will left all his property to his wife for life & appointed her his sole extrix. & had also left legacies of considerable amount to be paid after her death but had not constituted any persons trustees thereof:—*Held*: upon petition intituled in an administration action commenced for the purpose & in above Act upon the retirement of the widow the ct. had jurisdiction under above Act to appoint in her place a trustee or trustees to perform the duties incident to the office of an exor.—*Re MOORE, MCALPINE v. MOORE* (1882), 21 Ch. D. 778; 30 W. R. 839.

Annotations:—*N.F. Re Willey*, [1890] W. N. 1. *Expld.* *Eaton v. Daines*, [1894] W. N. 32. *Reid. Re Ponder, Ponder v. Ponder*, [1921] 2 Ch. 59.

293. ———— *Re WILLEY*, [1890] W. N. 1, C. A.

Annotations:—*Consd.* *Eaton v. Daines*, [1894] W. N. 32. *Reid. Re Ponder, Ponder v. Ponder*, [1921] 2 Ch. 59. *Mentd.* *A.-G. v. Eyres*, [1909] 1 K. B. 723.

294. ———— *EATON v. DAINES*, [1894] W. N. 32.

Annotation:—*Reid. Re Ponder, Ponder v. Ponder*, [1921] 2 Ch. 59.

— *See, generally*, TRUSTS & TRUSTEES.

SECT. 11.—ACCEPTANCE OF OFFICE.

SUB-SECT. 1.—WHAT CONSTITUTES ACCEPTANCE.

295. Applying for probate.—A creditor of a deceased debtor cannot sue a person named as exor. in the will of the deceased unless he has either administered or obtained a grant of probate, & a sale in execution of a judgment against such person does not bind the deceased's estate:—*Held*: an order for Probate without an actual grant thereof did not prove the will, & an application for probate did not show an exor.'s acceptance of the trusts.—*MOHAMIDU MOHIDEEN HADJIAR v. PITCHHEY*, [1894] A. C. 437; 63 L. J. P. C. 90; 71 L. T. 99; 6 R. 510, P. C.

296. Probate.—Where personal property is bequeathed to the exors., as trustees, the probate of the will is an acceptance of the trusts.—*MUCKLOW v. FULLER* (1821), Jac. 198; 37 E. R. 824, L. C.

Annotations:—*Consd.* *Stiles v. Guy* (1849), 1 H. & Tw. 523. *Reid. Bayley v. Rees* (1845), 1 Holt, Eq. 80; *Re Lord & Fullerton* (1895), 65 L. J. Ch. 184. *Mentd.* *Paddon v. Richardson* (1855), 7 De G. M. & G. 563.

297. Intermeddling with estate of testator.—An exor. intermeddling with the effects of testator

to such an extent as would constitute a person exor. *de son tort* may be compelled to take probate; the exor. in this case having satisfactorily explained his conduct, the ct. refused to compel him to take probate.—*RAYNER v. GREEN* (1839), 2 Curt. 248; 163 E. R. 401.

298. ———— **Taking goods of testator for safe custody only.**—(1) An exor. takes goods of testator for safe custody only: *qu.*, whether this act will preclude him from afterwards refusing before the ordinary?

(2) When an exor. has administered he can no longer refuse, but is liable to creditors, although administration be granted to another.

(3) Where a person named exor. takes testator's goods generally it shall be intended to be an administration.

(4) Where the goods of deceased happens to be in the house of the exor., such possession does not amount to an administration; *secus*, where he takes them into his possession.—*PARSONS v. MAYESDEN* (1076), 1 Freem. K. B. 151; 80 E. R. 109; *sub nom.* *PARTEN & BASEDEN'S CASE*, 1 Mod. Rep. 213.

Annotations:—*As to* (2) *Reid. Wangford v. Wangford* (1704), 11 Mod. Rep. 38; *Curtis v. Vernon* (1790), 3 Term Rep. 587; *Howson v. Shelley*, [1913] 2 Ch. 384. *As to* (3) *Reid. Morgan v. Thomas* (1853), 8 Exch. 302.

299. ———— **Discharging debt due to testator.**—The renunciation of an exor. rejected, it being proved that the exor. intermeddled with the estate. He had clearly acted as exor. in discharging the debt due from F. [to testator's estate] & had thereby determined the option he originally had, of taking on him the executorship or not (*per* CUR.).—*PYTT v. FENDALL* (1751), 1 Lee, 553; 161 E. R. 204.

300. ———— **Assisting co-executor.**—Exor. who has not proved, not considered as acting, by assisting a co-exor. who had proved in writing letters to collect debts. Nor by writing directly to a debtor of testator, & requiring payment.—*ORR v. NEWTON* (1791), 2 Cox, Eq. Cas. 274; 30 E. R. 127, P. C.

Annotations:—*Reid. Lowry v. Fulton* (1839), 9 Sim. 104; *Re Chapman, Cocks v. Chapman*, [1896] 2 Ch. 703.

301. ———— **Forwarding account.**—A co-exor., who proved, but never acted, cannot be charged by receiving a bill by the post on account of the estate, & sending it immediately to the acting exor.—*BALCHEN v. SCOTT* (1795), 2 Ves. 678; 30 E. R. 838, L. C.

Annotation:—*Reid. Chambers v. Minchin* (1802), 7 Ves. 186.

302. ———— **Taking possession of assets as agent.**—If one of two persons named trustees & exors. disclaims & renounces, & afterwards possesses himself of assets as the agent of the other, who has accepted the trust & proved the will, he does not thereby become accountable as a trustee & exor., & ought not to be made a party to a suit for the administration of the estate.—*DOVE v. EVERARD* (1830), 1 Russ. & M. 231; Tam. 376; 39 E. R. 89.

Annotations:—*N.F. Bartlett v. Wood* (1860), 2 L. T. 144. *Reid. A.-G. v. Chesterfield* (1854), 18 Beav. 596.

the probate to A.—*Re FITZPATRICK'S WILL* (1878), 4 V. L. R. 45.—*AUS.*

PART I. SECT. 11, SUB-SECT. 1.
p. Admitting fact of executorship—By confessing judgment.—In effect, ment, claiming through a sheriff's sale under an execution against exors. obtained on their confession:—*Held*: no objection that they had not proved the will, for by confessing judgment they accepted the office.—*MANDEVILLE v. NICHOLL* (1859), 16 U. C. R. 609.—*CAN.*

PART I. SECT. 10, SUB-SECT. 3.

2921. Power of court to appoint trustee—To discharge duties of executor—Trustee Act, 1898.—The ct. has jurisdiction under Trustee Act, 1898, to appoint & make the usual order vesting the estate in a new trustee, in the place of a trustee under a will, who is also exor., but is desirous of retiring, where no part of the estate is vested in the retiring trustee as exor. *virtute officii* although portions of the realty are under mortgage, &

although the estate of testator is subject to a contingent liability on a guarantee.—*MARTIN v. MARTIN* (1903), 5 R. N. S. W. 156; 20 N. S. W. W. N. 62.—*AUS.*

o. Probate to executor on re-marriage of widow without revoking her grant.—Where probate had been granted to A. during widowhood, saving the right of B. to come in & prove on her death or re-marriage; on the re-marriage of A., probate granted to B., no order being made to revoke

*Sect. 11.—Acceptance of office: Sub-sects. 1, 2 & 3.
Sect. 12: Sub-sect. 1.]*

303. — Liability as trustee.]—By the will of a testatrix, certain freehold & leasehold house property was directed to be sold. The will was proved by one of the two exors. alone, power being reserved to the other to come in & prove. The latter (being also a trustee) was an auctioneer by trade; & after the property had been advertised for sale by himself, as auctioneer, he executed a deed of disclaimer, whereby he renounced & disclaimed all the devises & bequests made to him by the will, & also the nomination & appointment of himself as exor. He then acted in the capacity of auctioneer at the sale. He had not proved the will, but, on the other hand, he had not renounced probate. Upon a bill by an infant interested in the proceeds of the sale against the exors. & trustees, seeking to charge them with wilful neglect & default, the disclaiming trustee applied to have the bill dismissed against him with costs. He had not been required to answer, & had not answered. The application was refused, on the ground that, being a trustee, he was bound to account for trust property come to his hands. The circumstance of a trustee disclaiming, & then acting as an agent for profit in dealing with the trust funds, is always a matter of suspicion.—*BARTLETT v. WOOD* (1860), 2 L. T. 144; *on appeal* (1861), 30 L. J. Ch. 614, L. C. Annotations:—*Mentd. Croghan v. Allen* (1882), 22 Ch. D. 101; *Re Cope, D'Aguilar v. Cope* (1885), 1 T. L. R. 611; *Plumb v. Craker* (1885), 16 Q. B. D. 40; *Re Ormston, Goldring v. Lancaster* (1887), 58 L. T. 74; *Power v. Parker* (1887), 4 T. L. R. 143.

304. ——A trustee & exor. under a will, not having formally disclaimed, or renounced, is not chargeable as a trustee merely because he assists the extrix. in the disposition of the property, where by his conduct he clearly shows his intention not to act.—*STACEY v. ELPH* (1833), 1 My. & K. 195; 2 L. J. Ch. 50; 39 E. R. 655.

305. — Requesting payment from debtors.]—*ORR v. NEWTON*, No. 300, *ante*.

306. ——(1) Exors. appointed by a will did not obtain probate of the will for seven years after testator's death, when probate was granted to one of them alone. The exors. could not obtain payment of the money due upon a policy of insurance on testator's life until the will had been proved, but the money was then paid in full, with interest at the rate of 1 per cent. *per annum*. Meanwhile, the executors had had to pay out of the estate interest at the rate of 5 per cent. *per annum* upon a debt of testator, which was secured by a mtge. of the policy:—*Held*: the exors. could not be ordered to account on the footing of wilful default by reason of this loss of interest.

(2) Some years before the will had been proved the exors. endeavoured to induce the insurance co. to pay the policy money to the mtgees. on account of their debt, & signed a letter addressed to the co. authorising them to do so:—*Held*: by so doing the exor. who did not prove the will had accepted the office of exor. & could not afterwards renounce probate, & he was liable to account as an exor. for what he had received on behalf of testator's estate.—*Re STEVENS, COOKE v. STEVENS*, [1898] 1 Ch. 162; 67 L. J. Ch. 118; 77 L. T. 508; 46 W. R. 177; 14 T. L. R. 111; 42 Sol. Jo. 113, C. A.

Annotation:—*As to* (2) *Reid. Kelsey v. Kelsey* (1922), 91 L. J. Ch. 382.

307. — Performing acts of necessity.—Giving directions for funeral.]—An exor., who died before probate, was held entitled to a legacy given for his

care & loss of time in the execution of the trusts of the will by having concurred with the other exors. in directions for the funeral & in paying some small sums on that occasion.

If there was no exor., giving directions for the funeral will not make a man exor. (*KENYON, M.R.*).—*HARRISON v. ROWLEY* (1798), 4 Ves. 212; 31 E. R. 110.

Annotation:—*Reid. Lewis v. Matthews* (1869), L. R. 8 Eq. 277.

308. ——(1) Any acts, which show an intention to take upon them the executorship, prevent exors. renouncing: therefore the insertion of an advertisement calling upon persons to send in their accounts & to pay money due to testator's estate to A. & B. "his exors. in trust held to make them compellable to take probate & to subject them personally to the costs occasioned by their resistance; the estate being small & left for two & a half years without representation.

(2) If a person named exor. intermeddles, however slightly, he cannot afterwards refuse to take probate, & if not named exor. he becomes *so de son tort*; but acts of necessity do not bind, & even if as exor. has shown himself willing to accept, he may by the ct. be dismissed in aid of justice.—*LONG & FEAVER v. SYMES & HANNAM* (1832), 3 Hag. Ecc. 771; 162 E. R. 1339.

Annotations:—*As to* (2) *Reid. Harrison v. Harrison* (1840), 4 Notes of Cases, 434; *In the Goods of Coates* (1898), 78 L. T. 820.

309. — Joining in probate & mortgage deed.]—S. by her will bequeathed £1,600 to W. & J., upon trust to invest the same in the funds or upon real securities; & as to £1,000 part thereof, to pay the interest thereof to C. during his life, with remainder to his children; & as to the remaining £600 to P. absolutely. W. never acted, except to prove the will, & join in a mtge. to D., who had given a bond for £1,000 on the testatrix's life. J. became bkpt. Upon a bill filed by C. on behalf of himself & other legatees, against the trustees for an account:—*Held*: W. having joined in proving the will, & in the mtge. deed, had rendered himself liable for the default of his co-exor. & trustee.—*BAYLEY v. REES* (1845), 1 Holt, Eq. 80; 71 E. R. 678.

310. — Issuing advertisements.]—*LONG & FEAVER v. SYMES & HANNAM*, No. 308, *ante*.

311. ——A person appointed exor. under a will issued advertisements to creditors, but did not take out probate.

A creditor having brought an administration action against him in order to protect the assets, & having moved for a receiver pending probate, now moved against deft., who refused to take out probate, for the costs of the motion for a receiver:—*Held*: deft. had by his advertisements placed himself under the obligation to take out probate, & he must pay pltf. his costs.—*Re MACRAE, FOSTER v. DAVIES* (1883), 48 L. T. 410; 31 W. R. 411.

312. — Investigating papers of testator.]—A. owed C. a large sum of money upon two promissory notes. C. appointed A. & B. exors. of her will, who, upon her death, proceeded to obtain probate of the same. Before it was obtained A. died; having previously, however, investigated the private papers of testatrix, & obtained, in his character of exor., from B. her book of accounts:—*Held*: such acts were sufficient to show that A. had accepted the office of exor., although he died before probate; & where a question arose in chambers as to whether he was under such circumstances, indebted to testatrix, the proper course was to adjourn it into ct. under Ord. 20,

Oct. 16, 1852.—*CLARK v. PHILLIPS, BAYLES v. PHILLIPS* (1854), 2 W. R. 331.

313. Admitting fact of executorship.]—A party appointed exor., but who did not take out probate, wrote to a creditor of testator, in reply to an inquiry, admitting the fact of his being exor. :—*Held*: this was evidence of his having accepted the office & he was properly made a party to a suit for administration.—*VICKERS v. BELL* (1864), 4 De G. J. & Sm. 274; 3 New Rep. 624; 10 L. T. 77; 10 Jur. N. S. 376; 12 W. R. 589; 46 E. R. 924, L. J.

Annotations:—*Consd. Rayner v. Koehler* (1872), L. R. 14 Eq. 262; *Re Lovett, Ambler v. Lindsay* (1876), 3 Ch. D. 198. *Reid. Coote v. Whittington* (1873), L. R. 16 Eq. 534.

SUB-SECT. 2.—ENFORCEMENT OF ACCEPTANCE BY ORDER OF COURT.

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 159.

314. After intermeddling with estate of testator—Disobedience of citation—Peremptory order—Attachment.]—The exors. appointed in the will of a deceased intermeddled in the estate, but did not take probate of the will. Having been cited to do so, & not having obeyed the citation within the time limited by it, an attachment was applied for against them. The ct. refused to order an attachment in the first instance, but directed that a peremptory order should be served upon them to take probate within ten days.—*MORDAUNT v. CLARKE* (1868), L. R. 1 P. & D. 592; 38 L. J. P. & M. 45; 19 L. T. 610; 33 J. P. 135.

Annotation:—*Reid. In the Goods of Coates* (1898), 78 L. T. 820.

315. ———.]—An intermeddling exor. is bound to prove, & where, after he has been cited, he has still failed to prove, a peremptory order will be made against him, upon motion, calling upon him to take probate within a certain time.—*In the Goods of LISTER* (1894), 70 L. T. 812; 58 J. P. 481.

316. ——— Order on application of legatee—Although undesirable person to fill office.]—If an exor. have intermeddled with an estate, he may be compelled on the application of a legatee to take up probate, though from his conduct he appears an undesirable person to fill the office of exor.—*In the Goods of COATES* (1898), 78 L. T. 820.

317. Disobedience of order—Attachment.]—An exor., cited by a creditor to take probate of a will, & assigned to do so, cannot be pronounced in contempt for non-compliance.—*WATSON v. TOMKINS* (1812), 1 Notes of Cases, 312.

318. ——— Effect of non-indorsement of order—R. S. C., Ord. 41, r. 5.]—Preliminary objection upheld as to non-indorsement of the order upon which the motion was founded, in a case where it was sought to attach an exor. for non-obedience to that order, which directed him to take probate within a certain time.—*In the Goods of BRISTOW* (1891), 66 L. T. 60.

See, generally, CONTEMPT OF COURT, Vol. XVI., pp. 59–61.

SUB-SECT. 3.—EFFECT OF ACCEPTANCE.

319. Liability to give security—Bond to perform will or pay legacies—Effect of breach of trust or impoverishment.]—Exors. not in equity compelled to put in bond to perform the will or

answer legacies, unless it appear they have either broken the trust in them reposed by testator or be decayed since his death, for at his death it seemed he trusted them without bond.—*BROWNE v. PURTON* (1590), Toth. 86; 21 E. R. 131.

320. Liability to account.]—If an exor. administer part of the assets, he shall be charged with the receipts, though he renounced the executorship, & paid the money to the other exor., who proved the will.—*READ v. TRUELOVE* (1762), Amb. 417; 27 E. R. 278.

Annotation:—*Reid. Re Stevens, Cooke v. Stevens*, [1898] 1 Ch. 162.

321. Solicitor executor.]—A solr. was appointed exor., & was to be “at liberty to charge for his professional services”:—*Held* he was only entitled to charge for services strictly professional & not for matters which an exor. ought to have done without the intervention of a solr., such as for attendances to pay premiums on policies, attending at the bank to make transfers, attendances as proctors, auctioneers, legatees & creditors.—*HARBIN v. DARBY* (No. 1) (1860), 28 Beav. 325; 29 L. J. (Ch. 622; 2 L. T. 531; 25 J. P. 84; 6 Jur. N. S. 906; 8 W. R. 512; 54 E. R. 391.

Annotation:—*Mentd. Pain v. Bowden* (1896), 45 W. R. 48.

— **Allowances.]**—*See* Part V., Sect. 6, sub-sect. 2, *post*.

Acceptance of trusts imposed by will.]—*See* TRUSTS & TRUSTEES.

SECT. 12.—REFUSAL OR RENUNCIATION OF OFFICE.

See, now, Administration of Estates Act, 1925 (c. 23), ss. 5, 6; Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 159.

SUB-SECT. 1.—IN GENERAL.

322. Renunciation as to part—Validity.]—*PAULE v. MOODIE* (1619), 2 Roll. Rep. 132; 81 E. R. 706.

After acceptance.]—*See* Part I., Sect. 12, sub-sect. 2, *post*.

323. Refusal except on payment of money by cestui que trust—Validity of transaction.]—Two persons exors. & trustees under a will, would not prove the will, nor suffer the *cestui que trust* to take out letters of administration *cum testamento annexo*, till he had executed a deed, by which he was to pay a hundred pounds to one exor., & two hundred pounds to the other, within six months after they shall have exhibited an inventory:—*Held*: the deed was unduly obtained, & an allowance should be made for the sum of £100 & £200 to plffs.—*AYLIFFE v. MURRAY* (1740), 2 Atk. 58; 26 E. R. 433, L. C.

324. Who may renounce—Executor of executor—Will of original testator.]—*HAYTON v. WOLFE*, No. 255, *ante*.

325. ———.]—*WANGFORD v. WANGFORD*, No. 258, *ante*.

326. ———.]—An application by exor. of an exor. to be permitted to renounce the execution of the former will & take probate of the latter rejected.—*In the Goods of PERRY* (1840), 2 Curt. 655; 163 E. R. 540.

Annotation:—*Reid. In the Goods of Griffin* (1868), 18 L. T. 420.

327. ———.]—*Semble*: an exor. may prove the will of his testator, & at the same time renounce the probate of the will of testator, of

PART I. SECT. 12, SUB-SECT. 1.

324 I. Who may renounce—Executor of executor—Will of original testator.]—An exor. of an exor., who has accepted

the executorship of the latter testator, cannot renounce the executorship of the former.—*In the Will of PIRIE* (1884), 10 V. L. R. 43.—*AUS.*

324 II. ———.]—Exors. can-

not renounce the executorship of the estate of a person of whom their testator was exor.—*In the Goods of DELACOUR* (1874), 9 I. R. Eq. 86.—

Sect. 12.—Refusal or renunciation of office: Sub-sects. 1, 2 & 3.]

which will his testator had been the sole exor.—*BARKER v. RAILTON* (1842), 11 L. J. Ch. 372; 6 Jur. 549.

328. ————.]—An exor. of an exor. who has accepted the executorship of the latter testator cannot renounce the executorship of the former.—*BROOKE v. HAYMES* (1868), L. R. 6 Eq. 25.

SUB-SECT. 2.—TIME FOR RENUNCIATION.

329. After intermeddling with estate.]—(1) When many are named exors., & some of them refuse, & some prove the will, they who refuse may afterwards at their pleasure administer, although the refusal is before the ordinary; but if all refuse before the ordinary, & the ordinary commits administration to another, they cannot afterwards administer.

(2) In debt against an exor., he may plead, that testator made him & another exor., who has administered, & is alive, without saying that the will is proved; for after the exors. have administered, & so have once taken upon them the charge of the executorship, they cannot afterwards refuse.—*HENSLOW'S CASE* (1600), 9 Co. Rep. 36 b; 77 E. R. 784.

Annotations:—As to (1) *Consd. Harrison v. Harrison* (1846), 1 Rob. Ecol. 406. *Reid. Hayton v. Wolfe* (1821), Cro. Jac. 614; *Pawlet v. Freak* (1858), Hard. 111; *House & Downs v. Petre* (1700), 1 Salk. 311; *Strickland v. Strickland* (1841), 12 Sim. 253; *Creswick v. Woodhead* (1842), 4 Man. & G. 811. As to (2) *Reid. Venables v. East India Co.* (1848), 2 Exch. 633; *Pomberton v. Chapman* (1857), 7 E. & B. 210. *Generally. Mentd. London Orphan's Case* (1593), 5 Co. Rep. 73 b; *Boeswel's Case* (1606), 6 Co. Rep. 48 b; *Johns v. Rowe* (1628), Cro. Car. 106; *Offley v. Best* (1606), 1 Lev. 185; *Grandison v. Dover* (1682), 3 Mod. Rep. 24; *Percival v. Crispin* (1682), T. Jo. 204; *Manning v. Napp* (1692), 1 Salk. 37; *Masters v. Lewis* (1694), 1 Ld. Raym. 56; *R. v. Rahms* (1697), 12 Mod. Rep. 136; *Warner v. Green* (1701), 12 Mod. Rep. 589; *Green v. Waller* (1703), 2 Ld. Raym. 891; *R. v. London* (1704), 6 Mod. Rep. 304; *Wankford v. Wankford* (1704), 1 Salk. 299; *Marriot v. Marriot* (1725), 1 Stra. 666; *Daly v. Mahon* (1838), 4 Bing. N. C. 235; *Cooper v. Denison* (1843), 13 Sim. 290; *Scott v. Wedlake* (1845), 7 Q. B. 766; *Re Goodman's Trusts* (1881), 17 Ch. D. 266; *Smart v. Tranter* (1888), 40 Ch. D. 165; *Hewson v. Shelley*, [1914] 2 Ch. 13.

330. ————.]—*PARSONS v. MAYESDEN*, No. 298, *post*.

331. ————.]—*PYTT v. FENDALL*, No. 299, *ante*.

332. ————.]—*LONG & FEAVER v. SYMES & HANNAM*, No. 308, *ante*.

333. ————.]—Where an exor., after intermeddling with an estate, filed a formal renunciation, & afterwards wished to be joined in the probate, the ct. declared the renunciation invalid, & directed it to be cancelled.

Qu. : whether the ct. has lost the power which it had under the old practice of allowing the retraction of a renunciation, in consequence of Court of Probate Act, 1857 (c. 77), s. 79.—*In the Goods of BADENACH* (1864), 3 Sw. & Tr. 465; 33 L. J. P. M. & A. 179; 11 L. T. 275; 28 J. P. 711; 10 Jur. N. S. 521; 164 E. R. 1355.

Annotation:—*Consd. In the Goods of Stiles*, [1898] P. 12.

PART I. SECT. 12, SUB-SECT. 2.

329.1. After intermeddling with estate.]

—There is no absolute rule that an exor. who has intermeddled with the assets of a testator will not be allowed to renounce in a proper case; thus, where an exor. had only intermeddled so far as was necessary to protect the assets, & desired to renounce on the ground of his relationship with the next of kin, who were opposing the will & the parties interested under the

will, consented, the ct. gave liberty to renounce.—*In the Goods of FITZPATRICK* (1892), 29 L. R. Ir. 328.—*IR.*

q. After acceptance.]—Parties named exors., whose duties in respect to the management of the estate did not commence until after the death of B. & M., proved the will, & shortly afterwards, & before the death of either of these parties, filed a bill to be relieved from the executorship. The ct. in the circumstances, refused

334. After oath of office taken.]—*ANON.* (1679), 1 Vent. 335; 86 E. R. 216.

Annotation:—*Reid. Jackson & Wallington v. Whitehead* (1821), 3 Phillim. 577.

335. ————.]—An exor., who had taken the oath of office & given an appearance; a suit touching the validity of the will allowed to be dismissed in order that he may renounce probate, & become a witness in the cause.—*JACKSON & WALLINGTON v. WHITEHEAD* (1821), 3 Phillim. 577; 161 E. R. 1420.

Annotations:—*Reid. Harrison v. Harrison* (1846), 4 Notes of Cases, 434; *In the Goods of Gibson* (1866), 14 L. T. 23; *In the Goods of Coates* (1898), 78 L. T. 820.

336. After probate taken.]—A partner in a house of agency in India, where a deposit is made in trust for a particular purpose, is made one of the exors. of him who made the deposit, & proves the will. Power of attorney sent from the exors. in Europe to the house of agency for them to act under, but held that, as the partner named exor. had proved the will, the house could only act under his authority, & he himself could not renounce the executorship & act in another character.

Graham was a partner in a house of agency where a deposit was placed in special trust. He was made exor. under the will of him who made the deposit. He proved the will & charged the expense against testator's estate; & was not then at liberty to renounce that character & act under another. He could do no act in regard to the estate for which he was not answerable as exor., & it was quite impossible to discharge him (LORD ELDON, C.).—*GRAHAM v. KEBLE* (1813), 2 Dow, 17; 3 E. R. 772, H. L.; *subsequent proceedings* (1820), 2 Bli. 126, H. L.

Annotation:—*Mentd. Fergusson v. Fyfe* (1841), 8 Cl. & Fin. 121.

337. ————.]—An exor. cannot renounce after he has taken probate. An exor. under the will of testator domiciled in Portugal accepted the executorship in that country, & also obtained probate in England. Becoming afterwards, through age & infirmity, incapable of acting, a competent Portuguese tribunal permitted him to renounce the executorship & appointed A. to act as exor. in his stead. Upon application for a grant to A. of administration *de bonis non* with the will annexed:—*Held*: the renunciation of the exor., though sanctioned by the law of Portugal, could not be recognised in this country, & A. therefore was not entitled to the grant prayed.—*In the Goods of VEIGA* (1862), 3 Sw. & Tr. 13; 32 L. J. P. M. & A. 9; 7 L. T. 644; 27 J. P. 41; 11 W. R. 84; 164 E. R. 1176; *sub nom. In the Goods of VEGA*, 1 New Rep. 34.

SUB-SECT. 3.—MODE OF RENUNCIATION.

338. By deed.—Disclaimer after sale of property by co-executors.]—A power in a will in the following form, viz.: "I direct that the said A., B. & C., the exors. of this my will, or the survivors or survivor of them, or the exors. or administrators of such survivor, shall sell my copyhold messuages":—*Held*: a disclaimer, executed by C. some time

to make any order to relieve them, they having deliberately accepted the office.—*HELLEM v. SEEVERS* (1876), 24 Gr. 230.—*CAN.*

r. ———.]—An administrator who has accepted letters of administration cannot resign, renounce, or in any way relieve himself of the duties of an administrator without the order of the Ct. of Probate.—*KATLBACH v. MADER* (1902), 35 N. S. R. 219.—*CAN.*

after a sale, reciting that he had, from testator's decease, declined to act, & had never acted in the executorship of the trusts of the will was a refusal *ab initio*, there being nothing to impeach the *bona fides* of the transaction.—*PEPPERCORN v. WAYMAN* (1852), 5 De G. & Sm. 230; 21 L. J. Ch. 827; 16 Jur. 794; 64 E. R. 1094.

339. — Form.—Intermeddling with estate by party renouncing.]—On a proxy of renunciation & consent being filed by the widow, which omitted, however, the usual declaration that she had not intermeddled in the estate of deceased, she having intermeddled therein through mistake, the ct. granted administration to the natural & lawful father of deceased.

[The widow] may renounce without declaring that she has not intermeddled in the estate. There is no doubt that she intermeddled on the supposition that she herself was one of the exors. (*SIR C. CRESSWELL*).—*In the Goods of FELL* (1861), 2 Sw. & Tr. 126; 3 L. T. 756; 9 W. R. 252; 164 E. R. 941.

340. — Executed by agent under power of attorney.]—Where the party entitled to the grant, being resident out of England, had by a power of attorney specially authorised his brother to execute for him an instrument of renunciation & consent, the ct. acted on a renunciation & consent so executed.—*In the Goods of ROSSER* (1864), 3 Sw. & Tr. 490; 33 L. J. P. M. & A. 155; 10 L. T. 695; 28 J. P. 583; 12 W. R. 1014; 164 E. R. 1366.

341. — Executed after service of citation—Irregular service.]—Where a citation has not been duly served on a married woman, the ct. will act upon a renunciation subsequently executed by herself & husband.—*HERBERT v. SHEILL* (1864), 3 Sw. & Tr. 479; 33 L. J. P. M. & A. 142; 28 J. P. 616; 164 E. R. 1361.

Annotation:—Mentd. In the Goods of Houston (1865), L. R. 1 P. & D. 85.

342. — Executed abroad.]—An executor in a deed of renunciation executed abroad, after reciting that he had not accepted or acted in the trusts of the will, or any of them, absolutely renounced & disclaimed all the real & personal estates, trusts, powers & authorities whatsoever by the will given:—*Held*: (1) there was a sufficient statement that the exor. had not intermeddled; (2) there was a sufficient renunciation of the right to probate or administration with the will annexed.—*In the Goods of GIBSON* (1866), L. R. 1 P. & D. 105; 35 L. J. P. & M. 114; 14 L. T. 23; 12 Jur. N. S. 344.

343. — Executed after institution of administration suit.]—A bill filed by a creditor for the administration of testator's estate alleged that one of defts. was named as an exor. in the will, & that, although he had not proved the will, he had never renounced probate. It also alleged that deft. was a debtor to testator's estate, & that the acting exor. was insolvent, & did not intend to enforce the debt against him. Deft. by his answer did not admit the debt. Pltf. then amended his bill by introducing charges tending to prove that deft. was a debtor to the estate. Deft. then pleaded that before the amendment of the bill he had renounced probate:—*Held*: deft. was properly made a party to the original bill, & as no new case had been made by the amended bill, deft.'s plea could not be sustained.—*MORLEY v. WHITE* (1873), 8 Ch. App. 731; 42 L. J. Ch. 880; 29 L. T. 282; 21 W. R. 828, L. J.

344. By parol—Letter—To commissary—Re-

questing grant to third party.]—*BROKER v. CHARTER* (1590), Cro. Eliz. 92; 78 E. R. 351; *sub nom.* *BEWACORNE v. CARTOR*, Moore, K. B. 272; *sub nom.* *GOODIERS' CASE*, 1 Leon. 135; *sub nom.* *ANON.*, Owen, 44.

Annotation:—Revd. Harrison v. Harrison (1846), 4 Notes of Cases, 434.

345. — Sent from abroad.]—Testator appointed A., who was resident abroad, his exor.; A., by letter, renounced probate. The ct. treated this as a valid renunciation, though not under seal, but ordered the letter to be recorded.—*In the Goods of BOYLE* (1864), 3 Sw. & Tr. 426; 4 New Rep. 120; 33 L. J. P. M. & A. 109; 10 L. T. 541; 28 J. P. 424; 164 E. R. 1340.

346. — Conduct.]—*ANON.* (1586), Gouldsb. 31; 75 E. R. 974.

347. — Declining to prove.]—The exor. of the survivor of three trustees declined to prove his will:—*Held*: the case was within 1 Will. 4, c. 60.—*Re MERRY'S TRUST, Ex p. HAGGER* (1839), 1 Beav. 98; 48 E. R. 875.

Annotation:—Mentd. Re Lunn's Charity (1847), 15 Sim. 461.

348. — Non-appearance to citation—To take probate.]—An exor. was cited to take probate of a copy of a will, the original having been lost, but did not appear, & administration with the will annexed was thereupon granted to a party interested. The original was afterwards found, & the exor. then applied for probate:—*Held*: he had no right to claim probate of the original after declining to accept probate of the copy, the application was rejected.—*DAVIS v. DAVIS* (1859), 4 Sw. & Tr. 208; 31 L. J. P. M. & A. 216; 23 J. P. 712; 164 E. R. 1496.

349. — To propound & prove will.]—Where an exor. of a later will was cited to propound it, etc., in a suit instituted by the exor. of a former will for the purpose of establishing such former will, & did not appear to such citation, the ct. held that he was not to be deemed to have been cited to take probate of the later will under Probate Act, 1858 (c. 95), s. 10.—*BEWSHER v. WILLIAMS & BALL* (1861), 3 Sw. & Tr. 62; 8 L. T. 290; 11 W. R. 541, n.; 164 E. R. 1195.

Annotation:—Mentd. Nash v. Yellooly (1862), 3 Sw. & Tr. 59.

350. — Consent to grant of administration to residuary legatees.]—The ct. will not grant administration with the will annexed to a residuary legatee on the mere consent of the exor.—*GARRARD v. GARRARD* (1871), L. R. 2 P. & D. 238; 25 L. T. 162; 35 J. P. 647; 19 W. R. 569.

351. — Renunciation of probate abroad.]—Where testator domiciled abroad has disposed by his will of all his property without qualification as to its situation, & the exor. of the will has renounced probate abroad, the ct. here may grant letters of administration with the will annexed to an administrator appointed by the foreign ct. without requiring express renunciation by the exor. of probate in this country.—*In the Goods of SCARR* (1899), 80 L. T. 206.

352. Without exhibiting inventory.]—An exor. or administrator may renounce without exhibiting any inventory.—*SUFFOLK'S (LORD) CASE* (1733), Lee temp. Hard. 9; 95 E. R. 6; *sub nom.* *lt. v. BETTESWORTH*, Kel. W. 156.

Annotation:—Mentd. R. v. Surry JJ. (1734), 2 Barn. K. B. 410.

353. Without accompaniment of original will.]—It is the practice of the office not to receive the renunciation of an exor., etc., without the original will. Hence the ct., when applied to for letters

Sect. 12.—Refusal or renunciation of office: Sub-sects. 3, 4 & 5, A.]

of administration, limited to assign a satisfied term of years to the nominee of the owner of the fee, in which case, it is not the practice of the office to annex the original will, on the renunciation of the party entitled to the administration of deceased's effects, with her will annexed, in preference to receiving the renunciation without the original will, this not being to be had, decreed the party entitled to be cited to accept or refuse, etc., promising to grant the administration to the nominee of the owner of the fee, on the others default.—*In the Goods of FENTON* (1825), 3 Add. 35; 162 E. R. 393.

SUB-SECT. 4.—EFFECT OF RENUNCIATION.

354. General rule.]—*BROKER v. CHARTER* (1590), Cro. Eliz. 92; 78 E. R. 351; *sub nom.* *BEWACORNE v. CARTOR*, Moore, K. B. 272; *sub nom.* *ANON.*, Owen, 44; *sub nom.* *GOODIERS' CASE*, 1 Leon. 135.

Annotation:—Reid. Harrison v. Harrison (1846), 4 Notes of Cases, 434.

355. —.]—Where two exors. are appointed, one of whom duly renounces probate in the ecclesiastical ct., & the other, after proving the will, dies intestate, letters of administration *de bonis non* of testator are valid, although renouncing exor. is living, & has not refused since the death of his co-exor., nor has been cited or convened for that purpose. A formal refusal of probate made in ct. at any time after testator's decease is binding under the 21 Hen. 8, c. 5, s. 3, unless the exor. so refusing, afterwards, on his own account, comes in & retracts his refusal.—*VENABLES v. EAST INDIA CO.* (1848), 2 Exch. 633; 18 L. J. Ex. 266; 12 Jur. 855.

356. Executor also creditor—Whether right to enforce payment of debt extinguished.]—If a debtor make his creditor & another person exors., & the creditor neither proves the will nor acts as exor., he may maintain an action against the other for his demand on testator.—*RAWLINSON v. SHAW* (1790), 3 Term Rep. 557; 100 E. R. 731.

Annotations:—Reid. Douglas v. Forrest (1828), 4 Bing. 686; *Lowe v. Picket* (1855), 25 L. T. O. S. 146.

357. From what time effective.]—B., an exor. & one of the residuary legatees under a will, on Nov. 20, renounced probate of the will but the proxy of renunciation was not recorded until Dec. 2, & on Nov. 22 by deed of gift conveyed his interest in the personal estate of deceased to D., who was also an exor., in order to render himself a competent witness to support the will:—*Held*: the proxy of renunciation took effect from its date.—*MUNDAY & BERRY v. SLAUGHTER* (1839), 2 Curt. 72; 163 E. R. 341.

Annotation:—Mentl. Sanders v. Wigston (1846), 5 Notes of Cases, 78.

PART I. SECT. 12, SUB-SECT. 4.

t. Liability to be sued.]—Where an exor., who has renounced probate of the will, is made deft. to a suit, the bill will be dismissed, as against him, with costs.—*STINSON v. STINSON* (1851), 2 Gr. 508.—*CAN.*

a. —.]—Three persons were named as exors. They declined to prove the will, & renounced probate, but expressed their willingness to assist the family with their advice, & accordingly assisted in preparing a list of debts due by the estate, & of the assets & value thereof. On being spoken to by a creditor, one of them stated that they had been named as exors.; assured the creditor that

he was all right, & that there was enough to pay the debts; another of them subsequently wrote to this widow stating that he & the other parties named after legal advice on the subject, have relinquished all further action on the will:—*Held*: these facts did not show such a dealing with the estate as would render the parties liable as exors., in opposition to their renunciation.—*VANNATTO v. MITCHELL* (1867), 13 Gr. 665.—*CAN.*

b. Extinction of joint personal powers.]—Testator directed "that no real estate be sold without the unanimous consent & direction of all my exors.," & also gave them power to buy & sell, give & take titles in fee

358. After intermeddling with estate—Liability to be sued as executor.]—Where one, appointed exor., intermeddled with the estate of testator, & afterwards renounced:—*Held*: he was liable to be sued in equity in the character of exor., by the legatees under the will, one of whom was also extrin., & had proved the will.—*ROGERS v. FRANK* (1827), 1 Y. & J. 409; 148 E. R. 730.

Annotation:—Reid. Re Stevens, Cooke v. Stevens, [1898] 1 Ch. 162.

359. — Extent of liability.]—An exor. who does not prove, but acts, is answerable only for what he actually receives.

Testator resident in India appointed A., B. & C. his exors. & trustees. A. & B. were resident in India, & C. in Ireland. A. proved the will in India, & C. in England; but B. did not prove at all. The assets were suffered to remain, for several years, in the hands of M. & Co. of Calcutta, testator's bankers & agents. B. was a partner in that firm at testator's death; but, shortly afterwards, he retired & came to England. He then entered into partnership with R. & Co. of London, the agents & correspondents of M. & Co., & paid some of testator's legacies to persons in England; & in order to satisfy a legacy given by testator upon certain trusts, he invested the amount in stock, in the names of A. & himself as trustees: but the payments & the investment were made by the direction of A., & out of remittances sent by him to R. & Co. M. & Co. ultimately failed:—*Held*: the above-mentioned acts were done by B. as agent to A. & not as an exor. or trustee of the will, & consequently, that he was not responsible for the loss occasioned to the estate by the failure of M. & Co.—*LOWRY v. FULTON* (1839), 9 Sim. 115; 8 L. J. Ch. 314; 3 Jur. 454; 59 E. R. 298.

Annotation:—Reid. Re Stevens, Cooke v. Stevens, [1898] 1 Ch. 162.

—.]—*See, generally*, Sect. 12, sub-sect. 2, *ante*.

360. Of probate of copy of missing will—On right to probate of original will when found.]—*DAVIS v. DAVIS*, No. 348, *ante*.

On exercise of powers.]—*See* Part V., Sect. 6, *post*.

On legacy to executor.]—*See* Part IV., Sect. 5, sub-sect. 11, *post*.

SUB-SECT. 5.—WITHDRAWAL OF RENUNCIATION.

See, now, Administration of Estates Act, 1925 (c. 23), s. 6; Non-Contentious Probate Rules, 1925, r. 115.

A. In General.

361. When withdrawal allowed—Before return to citation.]—*CRUCIFER v. REYNOLDS* (1741), 3 Hag. Ecc. 215; 162 E. R. 1135.

362. — After death of co-executor.]—An

simple in as full manner as if he were living, & appointed his widow executrix, & F. & H. exors. F. & H. renounced probate, & the widow alone proved the will:—*Held*: the powers conferred by the will were personal, & could not be exercised by the widow alone; being personal, they had become extinct; & that the division of the estate having been postponed only for the sake of the powers, its distribution was accelerated by their extinction.—*KERR v. LEISHMAN* (1860), 8 Gr. 435.—*CAN.*

PART I. SECT. 12, SUB-SECT. 5.—A.

a. When withdrawal allowed—Before renunciation filed—Official

exor. may retract a renunciation during the life of a co-exor., or even after his death, if administration with the will annexed has not been granted to any other person.—*HAYWARD v. DALE* (1756), 2 Lee, 333.

*Annotation:—**Refd. Harrison v. Harrison* (1846), 4 Notes of Cases, 434.

363. — ———.]—One of several exors. who has renounced may after the deaths of his co-exors. who have proved retract his renunciation & take probate as a matter of course, but the same right does not accrue to an exor. who has renounced after administration with the will annexed granted, from the possible inconvenience that might accrue, in other quarters, if the chain of executorship, once broken, were thus suffered to revive. Nor may administration with the will annexed be then granted to such exor. a residuary legatee, if any, being preferably entitled—if there be no residuary legatee, a next of kin.—*In the Goods of THORNTON* (1826), 3 Add. 273; 162 E. R. 479.

364. — *Before probate granted.*]—An exor., who has formally renounced, can afterwards retract such renouncement, at pleasure, before probate is granted to her co-exor.—*R. v. SIMPSON* (1764), 1 Wm. Bl. 456; 3 Burr. 1463; 94 E. R. 263.

*Annotations:—**Consd. Harrison v. Harrison* (1846), 4 Notes of Cases, 434. *Refd. Arnold v. Blencown* (1788), 1 Cox, Eq. Cas. 426; *Creswick v. Woodhead* (1842), 12 L. J. C. P. 111.

365. — *Before grant has passed seal.*]—An exor. who has renounced may at any time before administration has passed the seal retract.—*M'DONNELL v. PRENDERGAST* (1830), 3 Hag. Ecc. 212; 162 E. R. 1134.

*Annotation:—**Refd. Harrison v. Harrison* (1846), 1 Rob. Eccl. 406.

366. — ———.]—Testatrix appointed two exors., one took probate, the other renounced by proxy, &, in addition, executed a deed of disclaimer of the trusts of the will. The exor., who proved, died, leaving goods unadministered; administration was granted to a residuary legatee, the surviving exor. was not cited previously to the grant.

On question raised whether the administration ought not to be revoked:—*Held*: the grant had been made in conformity with the invariable practice of the ct., & that, though the surviving exor. might have claimed probate prior to the grant, the ct. was not bound to cite him.—*HARRISON v. HARRISON* (1846), 1 Rob. Eccl. 406; 4 Notes of Cases, 434; 10 Jur. 273; 163 E. R. 1082.

*Annotation:—**Consd. Venables v. East India Co.* (1848), 2 Exch. 633.

367. — ———.]—*VENABLES v. EAST INDIA CO.*, No. 355, *ante*.

368. — *Renunciation before Wills Act, 1837* (c. 26).]—An exor. before the operation of above Act, having renounced probate in order to become a competent witness of deceased's handwriting, allowed to retract his renunciation, & to take probate.—*In the Goods of MASON* (1854), 2 Ecc. & Ad. 193; 164 E. R. 383.

369. — *After intermeddling.*]—*In the Goods of BADENACH*, No. 333, *ante*.

370. — *Renunciation before Probate Act, 1857* (c. 77).]—Above Act, s. 79, does not apply to an exor. who had renounced before that Act came into operation; & the retraction of such

renunciation after the Act came into operation, & a second renunciation after such retraction, will not bring him within that sect.—*In the Goods of WHITHAM* (1866), L. R. 1 P. & D. 303; 36 L. J. P. & M. 26; 15 L. T. 447; 31 J. P. 215; 15 W. R. 560.

*Annotation:—**Consd. In the Goods of Stiles*, [1898] P. 12.

371. — *Effect of Probate Act, 1857* (c. 77), s. 79.]—It has never been decided that an exor. who has filed a renunciation of his rights may not afterwards retract such renunciation, notwithstanding the terms of above sect., but he certainly will not be permitted to do so, unless he can show that such retraction will be for the benefit of the estate or of those interested under deceased's will.—*In the Goods of GILL* (1873), L. R. 3 P. & D. 113.

*Annotation:—**Refd. In the Goods of Stiles*, [1898] P. 12.

372. — ———.]—(1) The old practice which, in a proper case, allowed a co-exor. who had renounced probate to retract his renunciation, is not abrogated by above sect.

(2) Where one of two exors. absconded after taking probate, the ct. allowed his co-exor., who had renounced, to retract his renunciation & take probate.—*In the Goods of STILES*, [1898] P. 12; 67 L. J. P. 23; 78 L. T. 82; 46 W. R. 444; 14 T. L. R. 61.

*Annotation:—**Generally, Refd. In the Goods of Raynor* (1908), 52 Sol. Jo. 226.

373. — *Before renunciation filed.*]—Testator having died insolvent, the exor. of his will signed a renunciation of his right to probate, & such renunciation, together with the other papers to lead a grant to a creditor, were taken into the registry. A difficulty having arisen as to such grant, the papers were withdrawn, & an application made by the executor for probate:—*Held*: a party may retract a renunciation at any time before it is filed & recorded in the registry.—*In the Goods of MORANT* (1874), L. R. 3 P. & D. 151; 43 L. J. P. & M. 16; 30 L. T. 74; 38 J. P. 168; 22 W. R. 267.

*Annotation:—**Refd. In the Goods of Stiles*, [1898] P. 12.

374. — ———.]—*In the Goods of ELMSLEY*, No. 201, *ante*.

375. — *Co-executor absconding.*]—*In the Goods of STILES*, No. 372, *ante*.

376. — ———.]—In 1896 T. died bkpt. & intestate, leaving a widow, who was his second wife, & six children surviving. His estate was in the hands of an official receiver in bkpcy. The widow & children duly renounced all rights to administration, & the official receiver took the grant to T.'s estate, & also a grant *de bonis non* to the estate of T.'s first wife.

In 1899 the administrator, having paid all the debts, desired to be relieved of his office, & with his concurrence the ct. permitted the widow & children to retract their renunciations; revoked the letters of administration; & made a joint grant to the widow & two of the children, in respect of that portion of T.'s estate remaining unadministered, thus giving them the right, as, of course, to take administration *de bonis non* in the estate of T.'s first wife.—*In the Goods of THACKER*, [1900] P. 15; 69 L. J. P. 1; 81 L. T. 790.

377. — *Necessity for application to court.*]—A husband upon the death of his wife intestate renounced his right to a grant of letters of administration to his wife's estate, the renunciation was

Trustee.]—Where the Official Trustee expressed his intention of renouncing probate, but subsequently retracted:—*Held*: that no formal renunciation having been made, he was not precluded from applying for probate.—

In the Goods of MANICK LAL SEAL (1907), 1 L. R. 35 Cal. 156.—*IND.*

d. Whether allowed.]—Under C.S.U.C., c. 16, s. 1, the renunciation of probate by one of two or more exors. is final, & cannot be recalled on the

death of the acting exor. or exors.—*ALLEN v. PARKE* (1866), 17 C. P. 105.—*CAN.*

s. Executor renouncing in England only.—Entitled to grant in Ireland.]—Testator left assets both in England &

Sect. 12.—Refusal or renunciation of office: Sub-sect. 5, A. & B. Sect. 13: Sub-sects. 1 & 2.]

duly lodged & filed. Afterwards he expressed a desire to revoke his renunciation & gave notice to the solrs. who were acting on behalf of a creditor of deceased that he wished to recall his renunciation. The solrs. for the creditor, however, carried in the papers to the Probate Registry, & applied for & obtained a grant of letters of administration, the husband being passed over on the ground of his renunciation:—*Held*: as the husband had not taken the proper course to withdraw his renunciation, namely, by application to the ct., the registrar was bound to act as he had done in making a grant to the creditor, the renunciation having been duly lodged & filed.—*MELVILLE v. ANCKETILL* (1909), 25 T. L. R. 655, C. A.

378. — Renunciation by bankrupt administrator—Annulment of bankruptcy—Property subsequently accruing to estate.]—Deceased, a married woman, died in 1888 intestate, leaving her husband & one child surviving. In May, 1889, the husband was adjudicated bkpt., & in June, 1889, he renounced his right to take out letters of administration in respect of his deceased wife's estate. In Oct. 1889, a grant of letters of administration was made to his trustee in bkpcy. In Mar. 1891, the bkpcy. was annulled, on payment by the bkpt. of 20s. in the pound. In May, 1891, the trustee in the bkpcy. obtained his release as such trustee. More than twenty years afterwards, a sum of about £700 in personalty became payable to the legal personal representative of deceased, & inquiries by the husband, who was beneficially entitled to the sum, & by his solr., elicited that the outstanding letters of administration could not be found, & that the same had been handed by the administrator to his successor in the office of official receiver in bkpcy., & the latter stated that the document must have been destroyed with the file of the bkpcy. proceedings. On a motion by the husband for leave to retract his renunciation, for revocation of the outstanding grant, & for a fresh grant of letters of administration to himself, the ct., in making the order, directed that in future every grant of letters of administration, whether issued to a person in his official capacity, or otherwise, shall contain a personal undertaking by the grantee that the letters of administration shall be brought into & lodged in the Principal Probate Registry, upon formal notification being given to the grantee at any time that this is required to be done.—*In the Estate of HEATHCOTE*, [1913] P. 42; 82 L. J. P. 40; 108 L. T. 122; 29 T. L. R. 268; 57 Sol. Jo. 266.

Power to take grant in different capacity.]—See Sub-sect. 5, B., *post*.

B. Power to take Representation in a Different Capacity.

379. General rule.]—*In the Goods of THORNTON*, No. 363, *ante*.

380. ——Where the chain of executorship has been broken, the ct. may allow an exor. who has renounced to take a grant in a different capacity.—*In the Goods of RAYNER* (1908), 52 Sol. Jo. 226.

381. Renouncing executor also residuary legatee—Administration cum testamento annexo.]—B.,

sole extrix. & joint residuary legatee, renounced the probate of the will of her testatrix, D., who was sole extrix. & universal legatee for life of her husband, & who had died leaving some of his effects unadministered, & administration thereof had been granted to their son; there being no representation of D., B., upon her retracting her renunciation, was allowed to take administration with will of the goods of D. as a residuary legatee.—*In the Goods of BULLOCK* (1845), 1 Rob. Eccl. 275; 4 Notes of Cases, 645; 163 E. R. 1037.

382. ——Where A., B. & C., exors. & residuary legatees in trust, had renounced probate or administration, & administration with the will annexed had been granted to the residuary legatee for life, who died, leaving the estate unadministered, the ct. refused to allow one of the residuary legatees in trust to retract his renunciation in that character, for the purpose of taking administration with the will annexed of the unadministered estate.—*In the Goods of RICHARDSON* (1859), 1 Sw. & Tr. 515; 1 L. T. 448; 6 Jur. N. S. 326; 164 E. R. 839.

Annotations:—Apld. In the Goods of Morrison (1861), 2 Sw. & Tr. 129. *Refd. In the Estate of Toscani*, [1912] P. 1.

383. ——Where A., B. & C., exors. & universal legatee under his wife's will which was made by virtue of a power, renounced as exor. Subsequently owing to the disposition of the trust fund under his wife's will, his consent was required by the trustees to enable them to deal with it. On motion to the ct. that he might be allowed to retract his renunciation which had already been filed in the registry, the ct. directed that appct. should take administration with the will annexed as universal legatee, in which capacity appct. had not renounced his beneficial interest under the will.—*In the Goods of BLISSET* (1881), 44 L. T. 816.

384. — Administration de bonis non.]—B. appointed C. & D. exors. & residuary legatees in trust, his widow residuary legatee for life or widowhood, & C. D., E., F., & G. substituted residuary legatees. C. & D. renounced probate & administration as exors. & residuary legatees in trust, & letters of administration with the will annexed were granted to the widow; she died, leaving part of the estate unadministered. The ct. refused to allow C. to retract his renunciation as residuary legatee in trust, but granted him administration *de bonis non* as substituted residuary legatee.—*In the Goods of MORRISON* (1861), 2 Sw. & Tr. 129; 3 L. T. 786; 9 W. R. 518; 164 E. R. 942.

Annotation:—Refd. In the Estate of Toscani, [1912] P. 1.

385. ——W., sole extrix. & universal legatee, renounced her rights as such to the grant of letters of administration, which was accordingly made to G., one of the next of kin. Upon the death of G., intestate & insolvent, W. was allowed to retract her renunciation as universal legatee, & take a grant of letters of administration *de bonis non*.—*In the Goods of WHEELWRIGHT* (1878), 3 P. D. 71; 47 L. J. P. 87; 39 L. T. 127; 42 J. P. 680; 27 W. R. 139.

386. Renouncing administrator also creditor—Signature to renunciation executed by wife as residuary legatee.]—Rules & Orders, 1862, r. 50, which directs that no person who renounces probate or administration in one character shall

Ireland, & named A. & C. his exors. C. renounced probate in England but not in Ireland, & A. alone proved the will in England. A. died, & C. then applied for probate in Ireland:—*Held*: he was entitled to the grant.—*In the*

Goods of HOUGHTON (1870), 18 W. R. 767.—IR.

PART I. SECT. 12, SUB-SECT. 5.—B. 1. Renunciation of right to administration—Death of grantee—Administra-

*tion de bonis non.]—*Administration had been granted to a person entitled in distribution on the renunciation of the sole next-of-kin. On the administrator's death the ct. gave the next-of-kin leave to retract her renunciation,

be permitted to take representation to the deceased in another, does not apply to the husband of a residuary legatee who signs a renunciation, executed by his wife, merely to signify his assent to her act. As a creditor he may take administration notwithstanding his signature to such a document.—*In the Goods of BIGGS* (1868), L. R. 1 P. & D. 595; 37 L. J. P. & M. 79.

387. Renouncing executor also creditor—Administration de bonis non with will annexed.]—A renunciation, in common form, by the sole exor. under the will of deceased testator, having been filed, a grant of administration, with the will annexed, was made to testator's mother, the residuary legatee named in the will. She died, leaving part of the estate unadministered. The ct. permitted the person who had been named as sole exor., & who had renounced, to take, in his capacity of creditor, letters of administration *de bonis non*, with the will annexed.—*In the Estate of TOSCANI*, [1912] P. 1; 81 L. J. P. 15; 105 L. T. 911; 28 T. L. R. 84; 56 Sol. Jo. 93.

388. Renouncing executor acting as attorney for co-executors.]—The ct. allowed one who had been appointed an exor., & had renounced that office, to take administration with the will annexed as attorney of the other exors. notwithstanding Rules & Orders, 1862, r. 50.—*In the Goods of RUSSELL* (1869), L. R. 1 P. & D. 634; 38 L. J. P. & M. 31; 20 L. T. 231; 33 J. P. 280; 17 W. R. 471.

389. Renouncing executor also guardian of children—Administration de bonis non with will annexed—Extension of grant until majority attained by eldest child.]—Testator by his will appointed A. & B. exors. & residuary legatees in trust, & also guardians of his children after the death or second marriage of his widow, & bequeathed the residue of his personal estate to his widow for life, & after her death to his children. A. & B. renounced probate, & also their right, as residuary legatees in trust, to administration with the will annexed, & such administration was granted to the widow. Upon the death of the widow the ct. granted administration with the will annexed *de bonis non* to A. & B., as guardians of the children, but refused to extend the grant until the eldest child should attain his majority & should apply for administration.—*In the Goods of LOFTUS* (1864), 3 Sw. & Tr. 307; 33 L. J. P. M. & A. 59; 10 L. T. 240; 28 J. P. 264; 10 Jur. N. S. 324; 164 E. R. 1293.

390. Executor renouncing in Scotland only—Whether entitled to grant in England.]—The fact of an exor. having declined to take out confirmation in Scotland is no bar to his obtaining a grant of probate in England.—*In the Goods of CAMPBELL* (1870), 23 L. T. 323; 34 J. P. 679; 18 W. R. 844.

& to take out a grant *de bonis non*.—*In the Goods of BRADFIELD*, [1922] 2 I. R. 213.—IR.

PART I. SECT. 13, SUB-SECT. 1.

391. All acts pertaining to office.]—An exor., without proving the will, has power to do almost all acts incident to his office.—ROBINSON v. COYNE (1868), 14 Gr. 561.—CAN.

f. Whether powers suspended—On taking of administration proceedings.]—The taking of administration proceedings does not deprive exors. of their functions or even suspend them.—*Re HONSBERGER*, HONSBERGER v. KRATZ (1885), 10 O. R. 521.—CAN.

h. Authority of foreign executor derived from one state—Whether powers exercisable in another.]—A foreign

exor. cannot lawfully do any act as exor. in a state other than the one from which he derives his authority.—EATON v. DEEDS REGISTRAR (1890), 7 S. C. 249.—S. AF.

k. —.]—NEWDIGATE v. DEEDS REGISTRAR (1902), 19 S. C. 269.—S. AF.

l. Right to administer estate.]—Testator burdened the inheritance of certain female heirs with *fidei commissum* in favour of their children, & expressed his special will & desire that the inheritances should not in any way be subject to the control of the husbands of the heirs.—*Held*: the exor., who was not appointed administrator, had merely to liquidate the estate & was not entitled to administer the property so as to keep it free from the control of the husbands.

SECT. 13.—POWER OF EXECUTOR BEFORE PROBATE.

SUB-SECT. 1.—IN GENERAL.

391. All acts pertaining to office.]—WANGFORD v. WANGFORD, No. 258, *ante*.

392. Death of executor before probate—Subsequent probate.]—If an exor. does an act & dies without proving the will, the act will be valid if the will is ultimately proved.—BRAZIER v. HUDSON (1836), 8 Sim. 67; 59 E. R. 27; *sub nom.* BRASIER v. HUDSON, 5 L. J. Ch. 296.

Annotation:—*Refd. Re Dallas*, [1904] 2 Ch. 385.

—.]—*See, also*, No. 416, *post*.

393. English & foreign assets & executors—Probate obtained by English executor—Whether English assets bound by acts of foreign executor.]—Where one exor. is appointed in Amboyna, & another in England, & the latter proves the will in England, & the former does not, the assets in England will not be bound by the act of the exor. in Amboyna, even supposing him to have a right, by the Dutch law, to prove the will here & administer the assets here.—LORD v. GENSLIN (1823), 1 L. J. O. S. Ch. 189.

Powers & rights generally.]—*See* Part V., *post*.

SUB-SECT. 2.—TITLE OF EXECUTOR.

394. Whether will gives title—From death of testator.]—If a man be made exor. it is right if he wish that he shall have the disposition of the estate; a man may make me his exor. & tell me nothing of it, & yet when I get knowledge of this I may well take upon me the power of administration & disposition & the ordinary may in the meantime grant administration, as was done in this case, but now by proof of the will the administration is determined, unless the exor. have renounced before the ordinary, in which case the law is otherwise (LYTTLETON, J.).—ANON. (1467), Y. B. 7 Edw. 4, fo. 12, pl. 3.

Annotations:—*Consd.* Graysbrook v. Fox (1564), 1 Plowd. 275; Hewson v. Shelley (1914), 110 L. T. 785. *Refd.* Hensloe's Case (1600), 9 Co. Rep. 36 b; Lampet's Case (1612), 10 Co. Rep. 46 b. *Mentd.* Huscombe v. Standing (1607), Cro. Jac. 187; Seymour's Case (1612), 10 Co. Rep. 95 b; Colt & Glover v. Coventry & Lichfield (Bp.) (1616), Hob. 140.

395. —.]—(1) A. makes his will & appoints an exor., & dies, the ordinary, without taking notice of the will, commits administration to S. before the exor. has proved the will, the administrator sells the goods of deceased, & the exor. afterwards proves the will, & brings detinue for the goods against the vendee, & adjudged that he should recover, for the probate supersedes the administration *ab initio*, & the sale made under it; but otherwise if it be averred

—SPENCER v. HANSON'S ESTATE (1906), 23 S. C. 267.—S. AF.

PART I. SECT. 13, SUB-SECT. 2.

m. Will gives title—From death of testator.]—The title of an exor. being derived from the will & not from the probate, the ct. refused to restrain execution against the lands of a deceased debtor on a judgment recovered against the exor. before probate.—STUM v. BRADLEY (1868), 15 Gr. 30.—CAN.

n. —.]—EXORS. not only acquire title from deceased, but they may represent him.—HAFFZABOO v. MAHOMED CASSUM (1906), 1 L. R. 31 Bom. 105.—IND.

o. Making title to land.]—It is not

sect. 15.—Power of executor before probate: sub-sects. 2, 3, 4 & 5.]

that the sale was made to discharge the funeral expenses or debts, which the administrator or exor. was compellable to pay, for there such sale shall be indefeasible for ever.

(2) For when a man makes a will, thereby he commits all his goods to his exor., & in him he reposes the greatest confidence, & the law favours his will; for wills have been ever since property has been amongst men, & they have always been, & by necessity of reason ought to be, favoured. So that it shall be called a will, & his exors., who are named, shall be called exors., before the probate of the will. For St. Paul says, a testament is confirmed by death, so that by his definition, & by our law also, it is a testament when testator is dead, & the exors. named are exors. presently & before the probate of the testament, for the probate is but a confirmation & allowance of that which testator has done.

(3) They are not called exors. in respect only that they actually execute, but in respect that they may execute. They may execute before probate, & may be sued, although they shall not sue for any duty due to testator until they have proved the testament, & they may alien or give away the goods, or otherwise dispose of them before probate.

(4) So that before probate the law allows the exors. who are named to be exors., & compels them to do some things as exors., & adjudges the property of the goods of testator to be in them before any seizure; & if any one takes them before exors. seize them, they shall have an action of trespass or replevin against him before probate, for the property & possession was cast upon them before seizure.

(5) Then if the law, immediately after the death of testator, vests the property & the possession of his goods in exor. from thence it follows that the law never vests the property in the ordinary, & from thence it follows that the law never vests the property in the administrator. For if he should have the property, then there would be two properties of one thing, or at least the law must take the property out of the exor., & vest it in the administrator; but the law will not do him such wrong, nor will it divest that which it has once vested. The administrator cannot have a greater property of the things in possession than the ordinary had before, & here the ordinary before administration had no property at all, nor any thing to do with the goods, but the exor. had the property & the full possession of them. If there should be any doubt in this point, it is removed by the probate, for thereby the will is fully perfected & consummate, & is of the same effect as if it had been proved immediately after the death of testator, by reason of the relation of the probate in this point.—*GRAYSBROOK v. FOX* (1564), 1 Plowd. 275; 75 E. R. 419.

Annotations:—As to (1) Consd. Mountford v. Gibson (1804), 4 East, 441; *Ellis v. Ellis*, [1905] 1 Ch. 613. *Overd. Hewson v. Shelley*, [1914] 2 Ch. 13. *Reid. Rouse's Case* (1587), Owen, 27; *Re West, West v. Roberts*, [1909] 2 Ch. 180. *As to (2) Reid. A.-G. v. Dimond* (1831), 9 L. J. O. S. Ex. 90; *Daly v. Mahon* (1838), 5 Scott, 606; *Pemberton v. Chapman* (1857), 26 L. J. Q. R. 117. *As to (3) Reid. Middleton's Case* (1604), 5 Co. Rep. 28 b; *Wankford v. Wankford* (1704), 1 Salk. 299; *Douglas v. Forrest* (1828), 4 Bing. 686; *As to (4) & (5) Reid. R. & Waller v. Hangor* (1615), 3 Bulst. 1. *Generally, Mentd. Bingham v. Smeatwick* (1595), Cro. Eliz. 455; *Hall v. Walland* (1621), Cro. Jac. 618; *Knolls v. Dobbins* (1624), Palm. 366; *Godfrey v. Saunders* (1770), 3 Wills. 94; *Buckley v. Barber* (1851), 6 Exch. 164.

590. ———.]—An exor. bringing a bill, to revive a decree, must show he has proved the will; & there being bona notabilia in divers dioceses, if he shows proof of the will in the spiritual ct. of one of the ordinaries, this is not good; but in such case the proof must be in the ct. of the archbishop.

The administrator receives his right entirely from the administration, but the right of the exor. is derived from the will & not from the probate, as appears from an exor.'s having power to release or assign any part of the personal estate before probate (*LORD MACCLESFIELD, C.*).—*COMBER'S CASE* (1721), 1 P. Wms. 766; 24 E. R. 605, L. C.

Annotation:—Consd. Easton v. Carter (1850), 5 Exch. 8.

597. ———.]—The will itself, before probate, is sufficient title for the exor., to the goods of deceased, as to his property as exor.; the probate being only necessary to enable him to sue for debts due to testator.—ANON. (1772), Lofft, 81; 98 E. R. 543.

598. ———.]—SMITH v. MILLES, No. 432, post.

599. ———.]—The property of a deceased person vests in his exor. from the time of his death; in an administrator from the time of the grant of the letters of administration; & therefore, where A. took out letters of administration under a will by which he was appointed exor., & after notice of a subsequent will, sold the goods of testator:—Held: the rightful exor. in an action of trover was entitled to recover the full value of the goods sold, & A. was not entitled, in mitigation of damages, to show that he had administered the assets to that amount.—WOOLLEY v. CLARK (1822), 5 B. & Ald. 744; 1 Dow. & Ry. K. B. 409; 106 E. R. 1363.

Annotations:—Expld. Welchman v. Sturgis (1849), 13 Q. B. 552. *Expld. & Distd. Hewson v. Shelley*, [1914] 2 Ch. 13. *Reid. Morgan v. Thomas* (1853), 8 Exch. 302; *Thompson v. Harding* (1853), 22 L. J. Q. B. 448; *Boxall v. Boxall* (1884), 27 Ch. D. 220; *Ellis v. Ellis* (1905), 74 L. J. Ch. 296; *Meayappa Chetty v. Supramanian Chetty*, [1916] 1 A. C. 603.

400. ———.]—In an indictment for stealing property which had belonged to a deceased person who appointed exors. who would not prove the will, it was held that the property must be laid in the ordinary & not in a person who, after the commission of the offence, but before the indictment, had taken out letters of administration with the will annexed; because, the rights of an administrator only commence from the date of the letters as distinguished from those of an exor. which commence, not from the granting of the probate but from the death of testator.—R. v. SMITH (1835), 7 C. & P. 147.

401. ———.]—It is common knowledge that an exor. derives his title from the will, & not from the grant of probate, & that he can, in his representative character, do many things, including the transfer of chattels real, notwithstanding that he has not proved the will (KEKEWICH, J.).—Re PAWLEY & LONDON & PROVINCIAL BANK, [1900] 1 Ch. 58; 69 L. J. Ch. 6; 81 L. T. 507; 48 W. R. 107; 44 Sol. Jo. 25.

Annotation:—Reid. Hewson v. Shelley, [1913] 2 Ch. 384.

402. ———.]—The person clothed by the Ct. of Probate with the character of administrator of a deceased person's estate is the legal personal representative of deceased, unless & until the grant of administration is revoked or determined, with power to dispose of deceased's assets, includ-

ing the real estate, which is vested in him by virtue of Land Transfer Act, 1897 (c. 65), s. 1.

Letters of administration were taken out to a deceased person's estate in the belief that no will existed, & the administratrix sold realty belonging to the estate. Subsequently a will was found appointing exors., & it was admitted to probate & the letters of administration revoked:—*Held*: the purchaser had a valid title to the realty as against the exors.

There is, however, a separate point under Conveyancing Act, 1881 (c. 41), s. 70. It seems to me that the order granting administration to the widow was a judicial act; & even if that grant could be held void on the ground of want of jurisdiction, the title of the purchaser would be protected under that sect. (COZENS-HARDY, M.R.).

It is said for resp. that the property of a deceased person vests in the exor. immediately upon the death & by the mere effect of the will. In some senses this is true. It is true that an exor. can properly act at once, that he can collect his testator's goods; receive & give discharge for debts due, & alien the goods, including chattels real, in due course of administration, subject always to the condition that he will some time or another satisfy the ct. that has jurisdiction over the subject-matter that there is a will & that he is the exor. But till he has proved it, or till it has been proved to the ct.—till it has become *probatum*—his title is not certain, & in that way is not complete (PHILLIMORE, L.J.).

Graysbrook v. Fox, No. 395, *ante*; *Abram v. Conyngham*, No. 2881, *post*; *Ellis v. Ellis*, No. 2882, *post*, *overd.*—*HEWSON v. SHELLEY*, [1914] 2 Ch. 13; 83 L. J. Ch. 607; 110 L. T. 785; 30 T. L. R. 402; 58 Sol. Jo. 397, C. A.

403. —.—]—An exor. derives his title & authority from the will of his testator & not from any grant of probate. The personal property of testator, including all rights of action, vests in him upon testator's death, & the consequence is that he can institute an action in the character of exor. before he proves the will. He cannot, it is true obtain a decree before probate, but this is not because his title depends on probate, but because the production of probate is the only way in which, by the rules of the ct., he is allowed to prove his title. An administrator on the other hand, derives title solely under his grant, & cannot, therefore, institute an action as administrator before he gets his grant (LORD PARKER of WADINGTON).—*MEYAPPA CHETTY v. SUPRAMANIAN CHETTY*, [1916] 1 A. C. 603; L. R. 43 Ind. App. 113; 85 L. J. P. C. 179; 114 L. T. 1002, P. C.
Annotation:—*Mentd.* *Kelsey v. Kelsey* (1922), 91 L. J. Ch. 382.

— Administration granted before probate.]—*See* Part II., Sect. 15, sub-sect. 3, *post*.

— Infant executor.]—*See, now*, Administration of Estates Act, 1925 (c. 23), s. 20 (2).

404. Proof of title—Production of probate.]—The will of a *feme covert*, authorised by a power in her marriage settlement, cannot be given in evidence, to show a title to personal property, till it has been proved in the Ecclesiastical Ct.—*STONE v. FORSYTH* (1781), 2 Doug. K. B. 707; 99 E. R. 450.

Annotations:—*Mentd.* *Stevens v. Bagwell* (1808), 15 Ves. 139; *Bird v. Higginson* (1836), 5 Ad. & El. 83; *Spencer v. Hamerton* (1836), 4 Ad. & El. 413; *Tatnall v. Hankey* (1838), 2 Moo. P. C. C. 342.

405. —.—]—The probate act-book of the Prerogative Ct. containing an entry of a will being proved & of probate being granted to the exors. therein named, admitted as evidence of

those persons being the exors. without accounting for the non-production of the probate.—*COX v. AILINGHAM* (1822), Jac. 514; 37 E. R. 944.

Annotation:—*Reid.* *Doe d. Bassett v. Mew, Doe d. Edwards v. Gunning* (1837), 7 Ad. & El. 240.

406. —.—]—In trover for a chattel claimed by pltf., as vendee of an exor., the will is not evidence of the title of the exor. The probate must be produced.—*PINNEY v. PINNEY* (1828), 8 B. & C. 335; 2 Man. & Ry. K. B. 436; C. L. J. O. S. K. B. 353; 108 E. R. 1067.

— In legal proceedings by executors begun before probate.]—*See* Sect. 13, sub-sect. 8, A., *post*.

SUB-SECT. 3.—GETTING IN ESTATE.

See, generally, Part IV., Sect. 1, sub-sect. 3, *post*.

407. General rule—Letters of administration granted to another—Action of trespass against administrator.]—*ANON.* (1600), 2 And. 150; 123 E. R. 594.

408. —.—]—An exor. before probate, may so far act, as to get in & receive his testator's estate, or release debts, or even bring actions for them.—*WILLS v. RICH* (1742), 2 Atk. 285; 26 E. R. 575, L. C.

Annotations:—*Reid.* *Jones v. Goodrich* (1839), 10 Sim. 327; *Rendall v. Rendall* (1841), 1 Har. 152. *Mentd.* *Ball v. Oliver* (1813), 2 Ves. & R. 96.

409. —.—]—*ANON.* (1772), No. 397, *ante*.

410. Executor insolvent.]—Where an insolvent exor. is getting in the assets before probate, the ct. will restrain him, & direct the money to be paid into the Bank till answer & further order.—*SMITH v. AYKWEEL* (1747), 3 Atk. 566; Amb. 66; 26 E. R. 1126, L. C.

411. Distraint for rent—Ratification after probate.]—A cognisance by deft. as bailiff of an exor., for rent due to testator, is supported by proof of a distress by him in the name of testator & by his direction, but after his death; such distress, though made before probate, having been afterwards adopted & ratified by exor.—*WHITEHEAD v. TAYLOR* (1839), 10 Ad. & El. 210; 2 Per. & Dav. 367; 9 L. J. Q. B. 65; 4 Jur. 247; 113 E. R. 81.

Annotation:—*Reid.* *Fishmongers' Co. v. Robertson* (1843), 5 Man. & G. 131.

412. Tender to executor—Validity.]—*AUSTEN v. DODWELL'S EXECUTORS* (1729), 1 Eq. Cas. Abr. 318; 21 E. R. 1073.

SUB-SECT. 4.—PAYMENT OF DEBTS.

See, generally, Part IV., Sect. 2, *post*.

413. General rule.]—*WOLFE v. HEYDON* (1618), Hut. 30; 123 E. R. 1078; *subsequent proceedings, sub nom.* *HAYTON v. WOLFE* (1621), Cro. Jac. 614.
Annotation:—*Mentd.* *Wangford v. Wangford* (1704), 11 Mod. Rep. 38.

SUB-SECT. 5.—ASSENT TO LEGACIES.

See, generally, Part IV., Sect. 5, sub-sect. 2, *post*.

414. General rule.]—An exor. [of an exor.] who has not proved cannot assent to a legacy.—*MONDAY v. HURLEY & BOND* (1827), 5 L. J. O. S. K. B. 212.

415. — Subsequent letters of administration.]—It is competent to an exor. to assent to a bequest, though he never prove the will, provided

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letters of administration with the will annexed be afterwards taken out.—*JOHNSON v. WARWICK* (1856), 17 C. B. 516; 25 L. J. C. P. 102; 26 L. T. O. S. 220; 139 E. R. 1176.

*Annotations:—**Reid. A.-G. v. New York Breweries Co.* [1898] 1 Q. B. 205; *Haas v. Atlas Assoc.*, [1913] 2 K. B. 209. *Mentd. Pritchard v. Pritchard* (1884), 14 Q. B. D. 55.

416. Death of executor after assent before probate.]—If an executor consent to a legacy, & die before probate, yet the assent is good enough (*per CUR.*).—*ANON.* (1677), *Freem. Ch.* 23; 22 E. R. 1034.

SUB-SECT. 6.—ALIENATING PROPERTY.

See, generally, Part V., Sect. 2, post.

417. General rule.]—*GRAYSBROOK v. FOX*, No. 395, *ante.*

418. —.]—*HEWSON v. SHELLEY*, No. 402, *ante.*

419. —.]—*WANGFORD v. WANGFORD*, No. 258, *ante.*

420. Grant of advowson.]—If an exor. of the grantee of the next avoidance grant it over, his grantee may maintain *quare impedit* without making a *profert* of the will.—*SMITHLEY v. CHOMELEY* (1556), 2 Dyer, 135 a; 73 E. R. 295.

421. Demise.]—Extrix. may demise before probate.—*ROE d. BENDALL v. SUMMERSSET* (1770), as reported in 2 Wm. Bl. 692; 96 E. R. 407. *Annotations:—**Mentd. Cranley v. Dixon* (1857), 23 Beav. 512; *Phillips v. Ball* (1859), 6 Jur. N. S. 48; *Humphreys v. Humphreys* (1867), L. R. 4 Eq. 475.

422. Assignment of personal estate.]—*COMBER'S CASE*, No. 396, *ante.*

423. Assignment of leaseholds—Purchaser not bound to pay purchase-money until probate.]—(1) Bill by exors. to enforce performance of a contract entered into by defts. with testator for sale of leaseholds alleged, as the fact was, that exors. had not proved. Notice of motion for an injunction was given; & at that time & when the motion would but for pressure of business have been heard, there was no probate; but when the motion was actually heard, the probate was in ct.:—*Held*: defts. could not resist the motion upon the ground of demurrer.

(2) Although exors. can make an assignment & give a receipt for purchase-money, which are binding, yet a purchaser is not bound to pay the purchase-money till probate, because till the evidence of title exists the exors. cannot give a complete indemnity.—*NEWTON v. METROPOLITAN RY. CO.* (1861), 1 Drew. & Sm. 583; 5 L. T. 542; 8 Jur. N. S. 738; 10 W. R. 102; 62 E. R. 501.

424. Assignment of patent.]—It is no ground of objection to the title of an assignee of a patent, that the assignors, the exors. of the grantee had omitted to register the probate until after the date of the assignment; though possibly it might be an obstacle to the maintenance of an action by the assignee for an infringement, if commenced before the registration of the probate.—*ELWOOD v. CHRISTY* (1864), 17 C. B. N. S. 754; 5 New Rep. 12; 11 L. T. 342; 144 E. R. 302; *sub nom. ELWOOD, ETC. v. CHRISTY*, 34 L. J. C. P. 130; 10 Jur. N. S. 1079; 13 W. R. 54.

425. Without consent of co-executor—Injunction—Appointment of receiver.]—Where an exor. had before probate, & without the assent of his co-exor., intermeddled in the estate & made preparations to dispose of a portion of it, the ct. gave leave to the co-exor. to issue a writ against

claiming an injunction to restrain him from dealing with the estate before probate, & praying for the appointment of a receiver.—*In the Goods of MOORE* (1888), 13 P. D. 36; 57 L. J. P. 37; *sub nom. In the Goods of MOORE, KER & MOORE v. AUBERT*, 58 L. T. 386; 52 J. P. 200; 36 W. R. 576.

*Annotation:—**Mentd. In the Estate of Luke* (1909), 25 T. L. R. 825.

SUB-SECT. 7.—GIVING RELEASES AND RECEIPTS.

See, generally, Part V., Sect. 3, post.

426. General rule.]—*HEWSON v. SHELLEY*, No. 402, *ante.*

427. Release—Executor may release—Action.]—An exor. may release [an action] before probate.—*RUSSEL'S CASE* (1584), 5 Co. Rep. 27 a; 77 E. R. 91.

*Annotations:—**Reid. Ketley's Case* (1613), 1 Brownl. 120; *Kniveton v. Latham* (1637), Cro. Car. 490; *Wankford v. Wankford* (1704), 1 Salk. 299; *Pennington v. Healey* (1833), 1 Cr. & M. 402. *Mentd. Lomason & Dickson's Case* (1626), Poph. 189; *Rudston & Yates' Case* (1641), March, 141; *Thrustout d. Levick v. Coppin* (1772), 2 Wm. Bl. 801; *Pemberton v. Chapman* (1858), E. B. & E. 1056.

428. — — —.]—(1) An exor. cannot have an action, but he may release [an action] before probate.

(2) If one releases & afterwards takes administration, such release is no bar.

(3) If two exors. prove a will, & the third refuses, yet he may release.—*MIDDLETON'S CASE* (1603), 5 Co. Rep. 28 b; 77 E. R. 93.

*Annotations:—**As to* (1) *Reid. Hensloe's Case* (1600), 9 Co. Rep. 36 b; *Lampet's Case* (1612), 10 Co. Rep. 46 b; *Duncombe v. Walter* (1681), *Freem. K. B.* 539; *Wangford v. Wangford* (1704), 11 Mod. Rep. 38; *Hudson v. Hudson* (1737), *West temp. Hard.* 155. *As to* (2) *Reid. Hudson v. Hudson* (1737), *West temp. Hard.* 155; *Leggott v. G. N. Ry.* (1876), 35 L. T. 334.

429. — — —.]—*WANGFORD v. WANGFORD*, No. 258, *ante.*

430. — — — Personal estate.]—*COMBER'S CASE*, No. 396, *ante.*

431. — — — Debts.]—*WILLS v. RICH*, No. 408, *ante.*

432. — — —.]—The exor. has the right immediately on the death of testator & the right draws after it constructive possession. The probate is a mere ceremony, but, when passed, the exor. does not derive his title under the probate, but under the will; the probate is only evidence of his right, & is necessary to enable him to sue; but he may release, etc., before probate (*per CUR.*).—*SMITH v. MILLES* (1786), 1 Term Rep. 475; 99 E. R. 1205.

*Annotations:—**Reid. A.-G. v. Dimond* (1831), 1 Cr. & J. 356; *Pemberton v. Chapman* (1857), 7 E. & B. 210. *Mentd. Lazarus v. Walthman* (1821), 5 Moore, C. P. 313; *Price v. Helyar* (1828), 4 Bing. 697; *Dunwich Corpn. v. Sterry* (1831), 1 B. & Ad. 331; *Balme v. Hutton* (1833), 1 Cr. & M. 262; *Garland v. Carlisle* (1837), 4 Scott, 587; *Spence v. Rogers* (1843), 11 M. & W. 191; *Brown v. Notley* (1848), 3 Exch. 219.

433. — — — General release insufficient.]—A release by an exor. before probate is not good. General release reciting the particular purposes & for what it was made is no bar to an action by the exor.—*MORRIS v. PHILPOT* (1677), 2 Mod. Rep. 108; 86 E. R. 969; *sub nom. MORRIS v. WILFORD*, 1 *Freem. K. B.* 474; T. Jo. 104; 3 Keb. 814, 840; 2 Lev. 214; 2 Show. 46.

*Annotations:—**Reid. Topham v. Tollier* (1702), 2 Ld. Raym. 786; *Solly v. Forbes* (1820), 2 Brod. & Bing. 38; *Squire v. Ford* (1851), 9 Hare, 47.

434. — — — Administration after release.]—*MIDDLETON'S CASE*, No. 428, *ante.*

435. — — — Release by renouncing executor—Validity.]—*MIDDLETON'S CASE*, No. 428, *ante.*

436. Receipt—Executor may give receipt—For purchase-money.]—NEWTON v. METROPOLITAN RY. CO., No. 423, *ante*.

SUB-SECT. 8.—IN RESPECT OF LEGAL PROCEEDINGS.

A. By Executor.

See, generally, Part V., Sect. 7, post.

437. Right to commence proceedings.]—GRAYS-BROOK v. FOX, No. 395, *ante*.

438. —.]—MIDDLETON'S CASE, No. 428, *ante*.

439. —.]—The reason why an exor. is to be sued, but not to sue before probate is, because that before he does sue, he ought to publish unto all by the probate that he is the exor. (DODDRIDGE, J.).

The reason why an exor. shall be sued before probate, because that otherwise very great mischief might happen, for that a bad exor. would never then prove the will (COKE, C.J.).—HORNIGOLD v. BRYAN (1615), 3 Bulst. 72; 81 E. R. 62.

440. —.]—SLINGSBY v. LAMBERT (1615), Cro. Jac. 394; 79 E. R. 337; *sub nom.* LAMBERT & SLINGSBY'S CASE, Godb. 262.

441. —.]—WOLFE v. HEYDON (1618), Hut.

30; 123 E. R. 1078; *subsequent proceedings, sub nom.* HAYTON v. WOLFE (1621), Cro. Jac. 614. *Annotation:—*Mentd. Wangford v. Wangford (1704), 11 Mod. Rep. 38.

442. —.]—Where an exor. brings an action before probate, yet if he shows the probate upon the declaration it is well enough.—DUNCOMB v. WALTER (1684), 1 Vent. 370; 3 Lev. 58; T. Raym. 479; 2 Show. 253; Skin. 22, 87; 1 Freem. K. B. 539; 86 E. R. 238.

*Annotations:—*Mentd. Smith v. Stracy (1703), 1 Salk. 110; Howard v. Newman (1729), 1 Barn. K. B. 315; Street v. Hopkinson (1736), 2 Stra. 1055.

443. —.]—Probate to be before declaration, but administration before suit begun.—MARTIN v. FULLER (1696), Comb. 371; 90 E. R. 534.

444. —.]—WANGFORD v. WANGFORD, No. 258, *ante*.

445. —.]—Exor. cannot bring a bill without showing thereby that he has proved the will in the spiritual ct.; if he does, this is good cause of demurrer. But it is enough to allege he has duly proved the will, without saying in what ct.—HUMPHREYS v. INGLEDON (1721), 1 P. Wms. 752; 24 E. R. 590.

446. —.]—COMBER'S CASE, No. 390, *ante*.

447. —.]—Exor. may be sued before probate.—JASPER v. GROSVENOR (1734), Cunn. 50;

PART I. SECT. 13, SUB-SECT. 8.—A.

437i. Right to commence proceedings.]—Where a father, intending in the distribution of his property to give his son 100 acres of land, was induced by the son to exchange that land for the property of a stranger, the father paying £125 for such exchange, & the son promising to repay it, so that it might go in the distribution for the rest of the family, & the father then for a nominal consideration conveyed to the son the land received in exchange:—*Held*: the exors. of the father might maintain an action against the son for the £125 as money paid to his use.—McBRIDE v. L'ARNELL (1835), 4 O. S. 152.—CAN.

437ii. —.]—Money paid by testator on an agreement for the purchase of lands, which the vendor has failed to complete, may be recovered back by the exors. as money had & received to the use of testator.—INNES v. BROWN (1839), 5 O. S. 665.—CAN.

437iii. —.]—RUTTAN v. RUTTAN (1841), 4 Ont. Dig. 7169.—CAN.

437iv. —.]—The Bank of British North America in England received money there to be transmitted to B. in Upper Canada, & sent a letter of credit to B. to receive the money at a branch of the bank in Toronto. The letter was taken out of the post office in Canada, B. having in the meantime died, & B.'s name forged on the letter of credit, & the money received by some person unknown:—*Held*: B.'s extrix. was entitled to recover the money from the bank in Toronto as money had & received to B.'s use.—GISSING v. HOPPER (1843), 6 O. S. 505.—CAN.

437v. —.]—If a covenant for title is broken in the lifetime of the covenantee, no estate descends to the heir, & an action for the breach is properly brought by the exor.—BECK v. BARLOW (1849), 1 All. 465.—CAN.

437vi. —.]—Testator named seven exors. in his will, & directed that if any of them should die or renounce the remaining exors. should by writing appoint others in their place, so that the same number should always exist. Two of the exors. named in the will died, & the survivors appointed two others, who were sworn as exors., & probate granted to them by the judge of probates, after the original probate

granted:—*Held*: these seven persons could sue as exors.—WRIGHT v. STACKHOUSE (1863), 10 N. B. R. (5 All.) 450.—CAN.

437vii. —.]—An exor. is capable of instituting a suit without obtaining a probate although he might not be able to proceed as far as decree without obtaining a probate.—JAMSETJI NARSARWANJI v. HIRJIBHAI NAOROJI (1912), I. L. R. 37 Bom. 158.—IND.

437viii. —.]—MEYAPPA CHETTY v. SUPRAMANIAN CHETTY (1916), L. R. 43 Ind. App. 113.—IND.

437ix. —.]—Although a charge for debts created by will or real estate in aid of the personal estate, does not entitle the exor. to sustain a suit to establish the will against the heir, his duty being confined to administer the assets, leaving the parties who become interested in the real estate to work out their interests as they can, yet if one of the exors. is also a devisee in trust, such a suit is proper.—FINGAL (EARL) v. BLAKE (1825), 1 Mol. 113.—IR.

437x. —.]—A., being possessed of govt. stock standing in his name, died intestate, & B. obtained administration to him. B. died, & C. obtained administration *de bonis non* to A. C. executed a power of attorney, authorising E. to sell out the stock, & receive the amount for her, which he did. C. afterwards died without having received the proceeds of the sale, & appointed D. her exor. D. may recover the amount of the proceeds in an action for money had & received by E. to the use of C.—CURROIS v. BRERETON (1837), 2 Jo. Ex. Ir. 397.—IR.

437xi. —.]—When pltf., an exor., had, after the decease of testator, made a parol letting to deft. of a house & premises, part of testator's assets:—*Held*: the action for use & occupation was properly brought by pltf. in his representative capacity.—M'AULEY v. DALTON (1852), 2 I. C. L. R. 542; 5 Ir. Jur. 359.—IR.

437xii. —.]—An exor. can maintain trespass for injury to a chattel real of his testator done in testator's lifetime.—HONE v. HAMILTON (1874), I. R. 9 C. L. 15.—IR.

437xiii. —.]—HUGHES v. WEST (1884), 13 L. R. Ir. 224.—IR.

437xiv. —.]—Testator, an old & infirm person, went to reside with his nephew. Previous to changing his residence he had made a will in favour of his niece & her children. Whilst residing with his nephew he assigned to him a deposit receipt for a large sum of money over & above what would be a reasonable charge for his maintenance, & being the moneys bequeathed under his will to his niece. The business was performed by a solr. unknown to testator & employed by the nephew. In a suit by the exor. of the will against the nephew for the whole of the amount of the deposit receipt:—*Held*: the amount must be delivered up to the exor. of the will.—EMERSON v. SHOOTIS (1881), 6 Nfld. L. R. 289.—NFLD.

437xv. —.]—Except in cases of absolute necessity, an exor., who is by law the guardian of the interests of the beneficiaries should not undertake the conduct of a proceeding which must necessarily be adverse to those interests.—*Re* MCCARTHY, [1919] N. Z. L. R. 807.—N.Z.

437xvi. —.]—When the debtor of deceased rolls upon a document executed by deceased as a discharge from liability, the exors. of the creditor, unless clearly satisfied on sufficient evidence that a release was intended, are justified in suing the debtor.—VAN DER POEL'S EXECUTORS v. MALAN (1898), 15 S. C. 70.—S. AF.

437xvii. —.]—Under Law 12 of 1870, as under Proclamation 28 of 1902 by which it is repealed, deceased's estate is vested in an exor. testamentary or dativo, & therefore such exor. is the only person who has a *locus standi* to bring a vindicatory action relative to property alleged to form part of the estate. Such action cannot be instituted by heirs *ab intestato* where no exor. has been appointed.—KRIGE v. SCOBLE (1912), T. P. D. 814.—S. AF.

437xviii. —.]—An exor., who, to the detriment of other creditors of the estate, has paid a creditor of the estate a larger proportional share of his debt than the assets of the estate warrant, is entitled as exor. to sue such creditor for a refund of the excess.—VAN WILK'S TRUSTEE v. AFRICAN BANKING CORPN. (1912), T. P. D. 44.—S. AF.

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2 Barn. K. B. 457; *Lee temp. Hard.* 52; 94 E. R. 1056.

448. —.]—WILLS v. RICH, No. 408, *ante*.

449. —.]—AN EXOR. as he is *in autre droit*, unless he has proved his testator's will, is not entitled to bring a bill of interpleader till, as standing in his place he has made himself a debtor. —MITCHELL v. SMART (1747), 3 Atk. 606; 26 E. R. 1149.

450. —.]—ANON. (1772), No. 397, *ante*.

451. —.]—SMITH v. MILLES, No. 432, *ante*.

452. —.]—Pltf. sued as exor., & in his declaration made *profert* of the letters testamentary in the usual form, which states "whereby it appears to the ct. here that pltf. is exor.," etc. Deft. did not demand oyer, but pleaded that pltf. never was nor is exor. "in manner & form" as alleged in the declaration. Pltf. replied that he was, & continued to be exor. in manner & form, etc. —*Held*: pltf. might recover on this issue, although he had not taken probate till some months after the declaration. —THOMPSON v. REYNOLDS (1827), 3 O. & P. 123.

Annotation:—*Refd.* *Meyappa Chetty v. Supramanian Chetty*, [1916] 1 A. C. 603.

453. —.]—An exor. filed a bill before probate: plea that he had not proved the will, allowed. —SIMONS v. MILMAN (1828), 2 Sim. 241; 6 L. J. O. S. Ch. 148; 57 E. R. 779.

Annotation:—*Mentd.* *Jones v. Howells* (1843), 2 Hare, 342.

454. —.]—The exor. of a creditor, who is pltf. in a creditor's suit, must take out a prerogative probate before he obtains the usual decree for an account. —YOUNG v. ELWORTHY (1833), 1 My. & K. 215; 39 E. R. 602.

Annotations:—*Refd.* *Metcalfe v. Metcalfe* (1836), 1 Keen, 74; *Faulkner v. Daniel* (1843), 3 Hare, 199. *Mentd.* *Jones v. Howells* (1843), 2 Hare, 342.

455. — *Present law*.]—To an action on an indenture, whereby deft. covenanted to pay R., pltf.'s testator, £700, deft., after setting out on oyer the will & probate granted by the Archbishop of Canterbury, pleaded that R. died in the parish of L., & at the time of his death, was resident & had the indenture in that parish; that the parish of L. was a royal peculiar, & out of the jurisdiction of the Archbishop, by reason whereof the proving the will & granting probate of the goods of R., in respect of the debt & cause of action, of right belonged to the Queen & not to the Archbishop; that the will was never proved before, nor were letters testamentary of R. ever granted by the Queen; & the letters testamentary so produced in ct., & granted by the Archbishop, were of no effect against deft. in respect of the debt & cause of action; & save as aforesaid, by the granting of those letters testamentary, pltf. never was exor. of R. On special demurrer:—*Held*: (1) the plea was properly pleaded in bar of the action generally; (2) it did not amount to an argumentative plea of *ne unques exor*.

Though it is true that an exor. may bring an action before he has obtained probate, yet that is, provided he produces the probate at the proper time when the law requires him to do so, viz. when he declares & makes *profert*, & deft. craves oyer of it (PARKE, B.). —EASTON v. CARTER (1850), 5 Exch. 8; 1 L. M. & P. 222; 19 L. J. Ex. 173; 14 L. T. O. S. 468.

456. —.]—NEWTON v. METROPOLITAN RY. CO., No. 423, *ante*.

457. —.]—MEYAPPA CHETTY v. SUPRAMANIAN CHETTY, No. 403, *ante*.

458. Necessity for production of probate before

conclusion of proceedings.]—DUNCOMB v. WALTER, No. 442, *ante*.

459. —.]—(1) Where an exor., before probate, files a bill, & afterwards proves the will, such subsequent probate makes the bill a good one.

(2) In a bill for an account of the personal estate of S., though the person who has a right to administer to S. be a party, yet this is not sufficient, without administration actually taken out. —HUMPHREYS v. HUMPHREYS (1734), 3 P. Wms. 349; 24 E. R. 1096.

Annotations:—*As to* (1) *Refd.* *Simons v. Milman* (1828), 2 Sim. 241. *As to* (2) *Refd.* *Bateman v. Margerison* (1848), 6 Hare, 496; *Creaser v. Robinson* (1851), 14 Beav. 589. *Generally, Mentd.* *Lowe v. Farlie* (1817), 2 Madd. 101.

460. —.]—YOUNG v. ELWORTHY, No. 454, *ante*.

461. —.]—EASTON v. CARTER, No. 455, *ante*.

462. — *Stay of proceedings until probate produced*.]—Pltf., suing as exor., having admitted that he had not obtained probate of testatrix's will, the ct., in exercise of its general common law jurisdiction to prevent an abuse of its process, stayed the proceedings until probate should be taken out, & reasonable notice thereof given to deft. —WEBB v. ADKINS (1854), 14 C. B. 401; 2 C. L. R. 702; 23 L. J. C. P. 96; 22 L. T. O. S. 260; 2 W. R. 225; 139 E. R. 165.

Annotations:—*Follid.* *Tarn v. Commercial Bank of Sydney* (1884), 12 Q. B. D. 294. *Mentd.* *Sim v. Edwards* (1854), 2 C. L. R. 749; *Penarth Harbour, etc. Co. v. Cardiff Waterworks Co.* (1860), 7 C. B. N. S. 816.

463. —.]—Testatrix, having indorsed & delivered a bill of exchange to her bankers for collection at maturity, died before the bill became due, & her exors., before probate of the will was granted, sued the bankers for a return of the bill or its value. Defts. were always willing to pay over the proceeds of the bill to pltf's. upon production of probate:—*Held*: all proceedings in the action ought to be stayed until pltf's. obtained probate. —TARN v. COMMERCIAL BANK OF SYDNEY (1884), 12 Q. B. D. 294; 50 L. T. 365; 32 W. R. 492.

464. —.]—MEYAPPA CHETTY v. SUPRAMANIAN CHETTY, No. 403, *ante*.

465. *Action founded on possession*.]—If an exor. bring trover upon the possession of his testator, upon not guilty, he shall not be put to prove himself exor.; but otherwise, if he had brought it upon his own possession (HOLT, C.J.). —BLAINFIELD v. MARCH (1702), 7 Mod. Rep. 141; 1 Salk. 285; 87 E. R. 1150.

Annotation:—*Mentd.* *Leake v. Loveday* (1842), 4 Man. & G. 972.

466. —.]—A sheriff's officer had wrongfully seized under a *fi. fa.* against A. a horse belonging to B. The horse was sold by the sheriff, & the money paid over to the officer. B. brought an action against the officer for money had & received to recover the amount. It appeared that the horse had belonged to her husband, but that after his death she had provided for its keep. No letters of administration were produced:—*Held*: this was sufficient evidence against a wrongdoer, to entitle her to recover in an action for money had & received. —OUGHTON v. SEPPINGS (1830), 1 B. & Ad. 241; 8 L. J. O. S. K. B. 394; 109 E. R. 776.

Annotation:—*Consd.* *White v. Mullett* (1851), 6 Exch. 713.

467. *Cause of action arising before probate—Action of trespass*.]—An exor. shall have an action of trespass, *vi et armis*, before seisin, because he has a property, being made exor., the ct. clear of opinion that this action of trespass well lies, otherwise an administrator may trice any exor. by getting the goods into his hands before probate

of the will.—*FISHER v. YOUNG* (1614), 2 Bulst. 268; 80 E. R. 1113.

468. Bankruptcy proceedings—Right to present petition.]—A commission of bkpt. may be supported on a debt due to the petitioning creditor in the character of exor., although he have not obtained a probate on a sufficient stamp at the time when the commission issued, if he afterwards obtains a valid probate, for that has relation back to testator's death.—*ROGERS v. JAMES* (1816), 7 Taunt. 147; 2 Marsh. 425; 129 E. R. 59.
Annotations:—Apld. Re Drakely, Ex p. Paddy (1818), Buck, 235. *Mentd. Burton v. Kirkby* (1816), 2 Marsh. 480; *Rose v. Tomblinson* (1834), 3 Dowl. 49.

469. —.]—A commission may be taken out by an exor. before he has obtained probate.—*Re DRAKELEY, Ex p. PADDY* (1818), 3 Madd. 241; Buck, 235; 50 E. R. 498.

470. Winding-up proceedings—Right to present petition.]—The exor. of a creditor of a co. is entitled to present a winding-up petition before he has obtained probate; it is sufficient if he has obtained probate before the hearing of the petition.—*Re MASONIC & GENERAL LIFE ASSURANCE CO.* (1885), 32 Ch. D. 373; 55 L. J. Ch. 666; 34 W. R. 739.

B. Against Executor.

See, generally, Part VI., Sect. 7, post.

471. General rule.]—*GRAYSBROOK v. FOX*, No. 395, *ante*.

472. —.]—*HORNIGOLD v. BRYAN*, No. 430, *ante*.

473. —.]—*WOLFE v. HEYDON* (1618), Hut. 30; 123 E. R. 1078; *subsequent proceedings, sub nom. HAYTON v. WOLFE* (1621), Cro. Jac. 611.
Annotation:—Mentd. Wangford v. Wangford (1704), 11 Mod. Rep. 38.

474. —.]—*WANGFORD v. WANGFORD*, No. 258, *ante*.

475. —.]—*JASPER v. GROSVENOR*, No. 447, *ante*.

476. —.]—Plea of Stat. Limitations by an exor., testator having died in 1780, though probate was not taken till 1802, allowed; the allegation of the bill upon a fair construction being, that deft. had possessed the personal estate, & therefore might have been sued as exor. *de son tort*, previously, to 1792.—*WEBSTER v. WEBSTER* (1804), 10 Ves. 93; 32 E. R. 778, L. C.

Annotations:—Apld. Douglas v. Forrest (1828), 4 Bing. 686. *Consd. Coote v. Whittington* (1873), L. R. 16 Eq. 534; *Re Lovett, Ambler v. Lindsay* (1876), 3 Ch. D. 198. *Reid. Rhodes v. Smethurst* (1840), 6 M. & W. 351; *Flood v. Patterson* (1861), 29 Beav. 295; *Sykes v. Sykes* (1870), L. R. 5 C. P. 113; *Boatwright v. Boatwright* (1873), L. R. 17 Eq. 71.

477. —.]—No action can be maintained against a party as exor. until he has taken upon himself to act as such, or has proved the will. Therefore, where testator died abroad more than six years before the commencement of the suit, but his exor. in this country had not proved the will, nor in any manner acted as exor. until within six years:—*Held: Stat. Limitations was no bar.*—*DOUGLAS v. FORREST* (1828), 4 Bing. 686; 1 Moo. & P. 663; 6 L. J. O. S. C. P. 157; 130 E. R. 933.

Annotations:—Consd. Mohamidu Mohideen Hadjar v. Pitchay, [1894] A. C. 437. *Reid. Rhodes v. Smethurst* (1840), 6 M. & W. 351. *Mentd. Don v. Lippmann* (1837), 5 Cl. & Fin. 1; *Cowan v. Braidwood* (1840), 9 Dowl. 26;

Towns v. Mead (1855), 16 C. B. 123; *Schibsey v. Westenhols* (1870), L. R. 6 Q. B. 155; *Rouillon v. Rouillon* (1880), 14 Ch. D. 351; *Musurus Bey v. Gadban*, [1894] 2 Q. B. 352; *Emanuel v. Symon*, [1908] 1 K. B. 302; *Gavin, Gibson v. Gibson*, [1913] 3 K. B. 379.

478. —.]—Bill by a residuary legatee against exors. Demurrer for want of equity, on the ground that the bill did not allege that testator died without revoking his will, or that the exors. had proved the will. The demurrer was overruled, with liberty to defendants to plead, & for plaintiff to amend. If exors. elect to act, they are liable to be sued before probate, & cannot afterwards renounce (LORD LYNTHURST, C.B.).—*BLEWITT v. BLEWITT* (1832), You. 541; 159 E. R. 541.

479. —.]—*VICKERS v. BELL*, No. 313, *ante*.

480. —.]—*Re LOVETT, AMBLER v. LINDSAY*, No. 554, *post*.

Administration suit.]—*See Part VII., Sect. 2, post*.

481. Suit for discovery of personal estate.]—A bill may be brought against an exor. for discovery of the personal estate, before the will is proved, or during the litigation thereof in the spiritual ct.—*DULWICH COLLEGE v. JOHNSON* (1688), 2 Vern. 49; 23 E. R. 643, L. C.

482. Application for new trial.]—A verdict having been found for deft., pltf. obtained a rule nisi for a new trial; but deft. having died since the trial, the rule was drawn up calling upon "his legal representatives, or their attorneys," to show cause, & it was served upon the latter:—*Held: cause might be shown against the rule by counsel instructed by the attorneys acting for the exors. named in the will, though there had been no probate.*—*THOMAS v. DUNN* (1845), 1 C. B. 139; 135 E. R. 490.

Annotation:—Mentd. Freeman v. Rosher (1840), 18 L. J. Q. B. 340.

483. Order to revive.]—An order to revive, under the 15 & 16 Vict. c. 80, s. 52, cannot be obtained against exors. who have not proved the will, though it is alleged they have acted.—*JOYCE v. RAWLINS* (1866), 35 Beav. 465; 14 W. R. 785; 55 E. R. 976.

SECT. 14.—POWER OF ADMINISTRATOR BEFORE GRANT.

SUB-SECT. 1.—TITLE OF ADMINISTRATOR.

484. Entirely from administration—Although grant not sealed.]—*NEWMAN v. BOURNE* (1714), cited in 1 Phillim. p. 178; 161 E. R. 953.

Annotations:—Reid. Elme v. Da Costa (1791), 1 Phillim. 173; *Menzies v. Pulbrook* (1841), 2 Curt. 845.

485. —.]—*COMBER'S CASE*, No. 396, *ante*.

486. —.]—*WOOLLEY v. CLARK*, No. 399, *ante*.

487. —.]—Pltf., the elder brother & creditor of intestate, being in possession of the goods of intestate under a bill of sale, said that he should not insist on his bill of sale, but that he should divide the goods with the other creditors, & he employed deft., an auctioneer, to sell the goods.

After the sale by deft., the widow of deceased gave deft. notice, through her attorney, not to pay pltf., but to retain the money until all the creditors should come in, that it might be divided

PART I. SECT. 13, SUB-SECT. 3.—B.

p. Allegation that defendant is executor—Sufficiency of allegation.]

An allegation contained in the statement of claim that deft. is an exor. is a sufficient one where deft. is sued before probate.—*CANADIAN BANK OF COMMERCE v. FRANCIS* (1919), 12 Sask. L. R. 97.—*CAN.*

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PART I. SECT. 14, SUB-SECT. 1.

485 i. Entirely from administration.]

—L., the owner of the land in question, died intestate. His widow was appointed administratrix of his estate. She died without dealing in any way with the land, & pltf. were appointed administrators of her estate:—*Held: pltfs. had no title to the land, & a grant of letters of administration of the unadministered estate of L. would be necessary, followed by a conveyance from the new administrator to pltfs., before they could get title.*—*NATIONAL TRUST CO. v. PROULX* (1910), 20 Man. L. R. 137.—*CAN.*

Sect. 14.—Power of administrator before grant: Sub-sects. 1 & 2, A. & B.; sub-sect. 3, A.]

ratably amongst them. No letters of administration were taken out:—*Held*: deft. was *prima facie* bound to account to pltf. from whom he had received the goods, & even if he would have been at liberty to set up the *jus tertii*, & show as a defence against pltf. that he was bound to account to a third person, still he was liable, no title being shown by him in any third person.—*CROSSKEY v. MILLS* (1834), 1 Cr. M. & R. 298; 3 L. J. Ex. 297; 149 E. R. 1093.

488. —. —.]—*R. v. SMITH*, No. 400, *ante*.

489. —. —.]—Where letters of administration have been granted by the Ecclesiastical Ct. in pursuance of a decree, the date of the letters, & not of the decree, will be considered as the period from which the title of the personal representative commences.—*BENNETT v. GOUDE* (1853), 21 L. T. O. S. 237.

490. —. —.]—*MEYAPPA CHETTY v. SUPRAMANIAN CHETTY*, No. 403, *ante*.

491. In whom estate vests pending grant—Real estate.]—If J. had any transmissible estate in the property it must, according to the Land Transfer Act, 1897 (c. 65), s. 1, vest in his legal personal representative, & that as none existed, it did not vest in deft. & her co-trustees, though it would do so on their taking out probate, but until then it remained where the law makes the legal estate go when a man dies intestate, *i.e.* in the heir-at-law (*NORTH, J.*).—*JOHN v. JOHN* (1898), as reported in, [1898] 2 Ch. 573; *on appeal*, [1898] 2 Ch. 577, C. A.

Annotations.—*Consd.* *Hewson v. Shelley*, [1913] 2 Ch. 384. *Mentd.* *Marshall v. Chartoris*, [1920] 1 Ch. 520.

492. —. —.]—(1) Freehold property was purchased by the predecessors of the London County Council under their compulsory powers & the purchase-money was paid into ct. On the death of the tenant for life it became necessary to procure administration to two of her sons, & in the case of one of them who disappeared in 1883, an order giving liberty to swear his death. In July, 1913, an order was made dividing up the fund & one-sixth was made payable to each of these administrators:—*Held*: the London County Council must pay the costs of obtaining the letters of administration in both cases & of the order giving leave to presume the death.

(2) Until a legal personal representative is appointed freehold property vests in the heir.—*Re GRIGGS, Ex p. SCHOOL BOARD FOR LONDON*, [1914] 2 Ch. 547; 83 L. J. Ch. 835; 111 L. T. 931; 58 Sol. Jo. 796; 13 L. G. R. 27; *sub nom. Re GRIGGS, Ex p. LONDON COUNTY COUNCIL*, 80 J. P. 35, C. A.

See, now, Administration of Estates Act, 1925 (c. 23), s. 9.

493. —. —.]—**Personal property.**—Property is in the ordinary title administration.—*MANNING v. NAPP* (1692), 1 Salk. 37; 91 E. R. 38.

Annotation.—*Mentd.* *Dyke v. Walford* (1848), 5 Moo. P. C. C. 434.

494. —. —.]—When a person dies intestate his personal estate vests temporarily in the President of the Probate Div. (*CHANNELL, J.*).—*WHITEHEAD v. PALMER*, [1908] 1 K. B. 161; 77 L. J. K. B. 60; 97 L. T. 909; 24 T. L. R. 41.

See, now, Administration of Estates Act, 1925 (c. 23), s. 9.

Administrator's bond.—*See* Part II., Sect. 7, *post*.

SUB-SECT. 2.—IN RESPECT OF LEGAL PROCEEDINGS.

A. By Administrator.

495. Right to commence proceedings—At common law.]—*MARTIN v. FULLER*, No. 443, *ante*.

496. —. —.]—Though an administration is not taken out, till after the filing of the bill, yet, if procured before a cause comes to a hearing, in equity it is sufficient, otherwise at law, because there deft. may crave oyer of the letters of administration.—*FELL v. LUTWIDGE* (1740), 2 Atk. 120; *Barn. Ch.* 319; 26 E. R. 475, L. C.

497. —. —.]—The administratrix of an exor. cannot sue for the double value of lands held over after notice to quit under a demise from testator, contrary to 4 Geo. 2, c. 28, without taking out administration *de bonis non*; even though the tenant has attorned to her.—*TINGREY v. BROWN* (1798), 1 Bos. & P. 310; 126 E. R. 921.

498. —. —.]—If an administrator shows that he sues for a greater value than is covered by the *ad valorem* stamp of his letters of administration, he shows his administration to be void, & cannot recover. Although he sues for a doubtful claim. He must prove his administration, for that constitutes his title to recover. It will not suffice to sue out new letters of administration on a larger stamp after he has obtained judgment.—*HUNT v. STEVENS* (1810), 3 Taunt. 113; 128 E. R. 46.

Annotations.—*Expld.* *A.-G. v. Hope* (1834), 1 Cr. M. & R. 530. *Reid.* *Carr v. Roberts* (1831), 2 B. & Ad. 905; *A.-G. v. Bouwens* (1838), 4 M. & W. 171; *A.-G. v. Brunning* (1860), 8 H. L. Cas. 243; *Re Rowe, Jacobs v. Hind* (1889), 80 L. T. 596.

499. —. —.]—By the special memorandum of a declaration, it was stated, that pltf., administratrix, on Jan. 20, brought her bill into the office of the clerk of the declarations of K. B., according to the course & practice of the ct., & filed the same as of Michaelmas term. Plea, that at the time of exhibiting the bill, pltf. was not administratrix, upon which issue was joined. It appeared that deft. was neither an attorney, nor a prisoner in the custody of the marshal. The bill was delivered on Jan. 20. The letters of administration were granted on Jan. 10:—*Held*: upon the issue joined, the verdict was properly found for pltf. the latter having been administratrix at the time when the bill was exhibited.—*WOOLDRIDGE v. BISHOP* (1827), 7 B. & C. 406; 6 L. J. O. S. K. B. 101; 108 E. R. 774; *sub nom. WOOLDRIDGE v. WOOLDRIDGE*, 2 Man. & Ry. K. B. 431, n.

500. —. —.]—An administrator *cum testamento annexo*, cannot declare before administration is granted.—*PHILLIPS v. HARTLEY* (1827), 3 C. & P. 121, N. P.

501. —. —.]—L. was possessed of furniture & other property, & on his death intestate, in 1827, the furniture was removed by his widow to another house, in which she resided, until her death in 1832, with her daughter E., & continued

PART I. SECT. 14, SUB-SECT. 2.—A.

g. Right to commence proceedings.]—The rule in equity is, that when a person is entitled to obtain letters of administration he may begin an action as administrator before he has fully clothed himself with that character;

but the same doctrine does not apply where the person immediately entitled to obtain administration is not the one who begins the action.—*CHARD v. RAE* (1889), 18 O. R. 371.—*CAN.*
r. —. —.]—The English chancery rule allowing an action to be main-

tained by an administrator in his representative capacity before grant, so long as he was able to prove a grant at the hearing, will not be applied to actions brought under Fatal Accidents Act, 1920.—*BURLINGTON v. GRAND TRUNK PACIFIC RY. CO.*, [1923] 4

during that period to use the furniture. In Oct. 1829, the widow caused the furniture to be valued, in order to her taking out administration to L., which she afterwards did. In 1838, the furniture was sold by deft., who had married another daughter of L., with E.'s concurrence.

In 1840 disputes having arisen about the distribution of the proceeds E. took out administration to her mother :—*Held* : E. could not maintain trover for the furniture, without having taken out administration *de bonis non* to L.—*ELLIOTT v. KEMP* (1840), 7 M. & W. 306; 10 L. J. Ex. 321; 151 E. R. 783.

Annotations :—*Held*. *Fyson v. Chambers* (1842), 11 L. J. Ex. 190; *Jeffries v. G. W. Ry.* (1856), 5 E. & B. 802; *Barclay v. Owen* (1889), 60 L. T. 230. *Mentd. Re Beverly, Watson v. Watson*, [1901] 1 Ch. 681.

502. ——— *Action founded on possession.* —M., the owner of certain goods, put C. into possession of them, who remained so until & after the death of the owner, who died intestate. After M.'s death, deft. sold the goods by the desire & as the property of C., who had previously committed an act of bkpcy., of which deft. was cognisant. The intestate's goods had not been administered, & the ordinary had not claimed them.

In an action by the assignees of C. for the conversion of the goods :—*Held* : deft. was not entitled to set up the right of the ordinary to the goods; & therefore, that deft. could not insist that the property was not shown to have been in the order & disposition of the bkpt. with the consent of the true owner.—*WHITE v. MULLETT* (1851), 6 Exch. 713; 20 L. J. Ex. 291; 17 L. T. O. S. 146; 155 E. R. 732.

503. ——— *Application for new trial.* —Where pltf. has died since the trial. *Scmble* : a rule for a new trial cannot be moved for without letters of administration being first taken out.—*LLOYD v. OGLEBY* (1859), 5 C. B. N. S. 667; 141 E. R. 268.

504. ——— *Present law.* —An administrator cannot sue in the K. B. Div. until he has obtained letters of administration.—*TATTERSHALL v. ASHWORTH* (1903), cited in *Yearly Practice of Supreme Court for 1925*, at p. 11.

—]—*MEYAPPA CHETTY v. CHETTY*, No. 403, *ante*.

506. ——— *In equity.* —*FELL v. LUTWIDGE*, No. 496, *ante*.

507. ——— —]—A bill may be filed as administrator by a person who afterwards takes out administration.—*MOSES v. LEVI* (1839), 3 Y. & C. Ex. 359; 160 E. R. 741.

508. ——— *Necessity for production of grant before conclusion of proceedings.* —A bill having been filed by a party as administratrix, who had not taken out letters of administration, deft. pleaded that fact, & pltf. replied, & afterwards took out letters of administration :—*Held* : the fact, that administration was not granted to pltf. until after she had replied to the plea, did not preclude her from having a decree at the hearing.—*DAVIES v. COLEMAN* (1839), 3 Jur. 948.

509. ——— —]—A bill was filed to administer testator's estate by his six infant

children. The exor. of testator, who was deft., died. A supplemental bill was filed by two of pltf.s. who had come of age, alleging that they had taken out administration to the exor. The other pltf.s. also filed a supplemental bill alleging that administration had been granted to the two adult pltf.s. Defts. to the latter bill put in a plea averring that letters of administration had not been granted at the time the bill was filed, though it was admitted they had since been obtained :—*Held* : it was sufficient if administration was granted before the hearing of the cause & the plea was untenable.—*HORNER v. HORNER* (1853), 23 L. J. Ch. 10; 22 L. T. O. S. 115; 2 W. R. 47.

Cause of action arising before grant—*Action of contract.* —See Sub-sect. 3, B. (b), *post*.

Action of tort. —See Sub-sect. 3, B. (c), *post*.

B. Against Administrator.

510. *Suit for account of personal estate of intestate*—*Person having right to administer being party.* —*HUMPHREYS v. HUMPHREYS*, No. 459, *ante*.

511. *Application for new trial.* —*SHOMAN v. ALLEN* (1838), 1 Man. & G. 96, n.; 133 E. R. 262. *Annotation* :—*Distd. Thomas v. Dunn* (1845), 1 C. B. 139.

512. *Proceedings to place administrator on list of contributories.* —The brother of a shareholder who died intestate was allowed by the co. to receive dividends on intestate's shares, without administering to his estate on his signing receipts as representative of intestate :—*Held* : it was not competent for the master, upon a notice to the brother that his name was intended to be inserted on the list of contributories in his representative character to insert his name as a contributory without qualification.—*Re NORTH OF ENGLAND JOINT STOCK BANKING CO., Ex p. GLAHOLM* (1849), 1 H. & Tw. 121; 18 L. J. Ch. 147; 12 L. T. O. S. 306; 13 Jur. 75; 47 E. R. 1351; *sub nom. GLAHOLME'S CASE*, 1 De G. & Sm. 583, L. C.

SUB-SECT. 3.—DOCTRINE OF RELATION BACK.

A. In General.

513. *General rule* —Exists solely to protect estate.]—The doctrine of relation, by which the letters of administration are held to relate back to acts done between the death of intestate, & the taking out of the letters of administration, exists only in those cases where the act done is for the benefit of the estate.

The widow of an intestate remained in the possession of her husband's property for some time after his decease. Intestate's son did not interfere in any way with the property, which was seized under a writ of *fi. fa.* issued against the widow. The son afterwards took out letters of administration :—*Held* : (1) there was no evidence of the administrator's assent to the widow's taking the property; (2) if such an assent could be implied, the estate was not bound by it, as the act to which the assent was

D. L. R. 334; 2 W. W. R. 1161.—*CAN.*

s. —]—B., believing X. died intestate, took out administration intestate to him, & commenced an action as such administrator against C. C., who had been aware that X. left a will, appointing him exor. declared that fact for the first time in his defence, & thereupon B. took out administration with the will annexed, L. having renounced, & sought to

amend the pleadings accordingly :—*Held* : B.'s application must be refused, as at the date of the issue of the writ she had no title to sue.—*CREED v. CREED*, [1913] 1 I. R. 48.—*IR.*

PART I. SECT. 14, SUB-SECT. 2. —B. t. *General rule.* —Administrators are not liable to be sued before letters of administration have been taken out.—*Ex p. JAMSON* (1902), T. H. 98.—

s. —]—*MUTER & STONE v. SPANGENBERG* (1834), 2 Men. 457.—*S. AF.*

PART I. SECT. 14, SUB-SECT. 3.—A.

b. *General rule.* —Letters of administration when obtained relate back to the death, & it is sufficient if pltf. suing as administrator qualifies before the trial.—*TRICE v. ROBINSON* (1868), 16 O. R. 433.—*CAN.*

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given did not benefit the estate.—**MORGAN v. THOMAS** (1853), 8 Exch. 302; 22 L. J. Ex. 152; 20 L. T. O. S. 225; 17 Jur. 283; 155 E. R. 1302.
Annotation:—As to (1) **Reid. Dalton v. Angus** (1881), 6 App. Cas. 740.

—Compare No. 530, *post*.

Application of doctrine.]—See Sub-sect. 2, B., *post*.

B. Application of Doctrine.

(a) In General.

514. General rule.]—**ANON.** (1588), 3 Leon. 197; 74 E. R. 630.

515. —.]—Where a party at the time of the misapplication of a trust fund was, as the ct. assumed, cognisant of the fact, but had then no right or interest whatever in the fund, & afterwards acquired such right as administrator to the *cestui que trust*:—**Held**: his rights as administrator were not affected by such assumed previous knowledge on the ground of acquiescence.—**Re CLARKE, Ex p. SMITH** (1841), 2 Mont. D. & De G. 113, Ct. of R.

516. —.]—In an action of ejectment by an administrator, to recover possession of land leased to the intestate, it was first proved that the lease had been burnt, & then that the intestate had been in possession, & had paid rent. It was then proved that pltf. had mortgaged the land in question to deft., but prior to his title as administrator:—**Held**: pltf. was not estopped from recovering by reason of the mtge.—**METTERS v. BROWN** (1863), 1 H. & C. 686; 1 New Rep. 367; 32 L. J. Ex. 138; 7 L. T. 795; 9 Jur. N. S. 416; 11 W. R. 429; 158 E. R. 1060.

517. —.]—**HILL v. CURTIS**, No. 600, *post*.

518. Acquisition of settlement by residence.]—A sole next of kin has such an equitable interest in a leasehold tenement of intestate, that she gains a settlement by residing 40 days in the same parish after intestate's death, before administration granted to her. It matters not that the widow of intestate survived him, if she died afterwards without having taken out administration, leaving the other sole next of kin to intestate. But no settlement is gained by the mere relation back to the death of the intestate of the letters of administration when granted, taken out only eighteen days before the next of kin parted with her interest in the leasehold; so as to connect the residence for those eighteen days with a residence by such next of kin in the same parish for more than forty days, after the deaths of the intestate & his widow, before such administration granted.—**R. v. HORSLEY (INHABITANTS)** (1807), 8 East, 405; 103 E. R. 398.

Annotations:—**Consd. In the Goods of Pryse**, [1904] P. 301. **Reid. Barnett v. Guildford** (1856), 11 Exch. 19. **Mentd. Turner v. Barnes** (1802), 2 B. & S. 435.

(b) To Contracts.

519. General rule.]—**KENRICK v. BURGESS** (1583), Moore, K. B. 126; 72 E. R. 483.

Annotations:—**Consd. Morgan v. Thomas** (1853), 8 Exch. 302. **Reid. Norwich City v. Johnson** (1885), 2 Show. 457; **Hill v. Curtis** (1865), L. R. 1 Eq. 90. **Mentd. Cross v. Gardner** (1888), 1 Show. 68.

520. —.]—Pltf. was the widow of the lessee of the house, & took out administration between the date of the agreement, & the day when it was

to be performed:—**Held**: a plea denying her possession of the premises & goods, as alleged in the declaration, put in issue her title at the date of the agreement, & that upon such issue pltf. must fail, notwithstanding the subsequent grant of administration.—**BACON v. SIMPSON** (1837), 3 M. & W. 78; Murp. & H. 309; 7 L. J. Ex. 34; 150 E. R. 1064.

Annotations:—**Reid. Tharpe v. Stallwood** (1843), 7 J. P. 400. **Mentd. Gwynne v. Davy** (1840), 1 Man. & G. 857.

521. Right to repudiate agreement:—For surrender of term for years vested in intestate.]—Lessee of premises, under a covenant of re-entry if the rent should be in arrear twenty-eight days, died in bad circumstances, & his brother became exor. *de son tort*. B., his brother, agreed with the landlord to give him possession, & suffer the lease to be cancelled on his abandoning the rent, which was twenty-eight days in arrear. B. afterwards took out letters of administration:—**Held**: the agreement of B., as exor. *de son tort*, did not conclude him as rightful administrator, nor give a right of possession to the landlord who had entered under the agreement, but who had not made any formal claim in respect of the forfeiture nor taken a regular surrender of the lease.—**DON D. HORNBY v. GLENN** (1834), 1 Ad. & El. 49; 3 Nev. & M. K. B. 837; 3 L. J. K. B. 161; 110 E. R. 1126.

Annotations:—**Consd. Metters v. Brown** (1863), 1 H. & C. 686. **Mentd. Leggett v. G. N. Ry.** (1876), 35 L. T. 334.

522. Right to enforce agreement:—For sale of goods.]—P. having sent a quantity of goods to Fernando Po for sale, died intestate; & after his death defts. purchased the goods from the agent of intestate there, who sold them for the benefit of intestate's estate; subsequently to the sale, pltf. took out letters of administration to intestate, & now sued defts. for the price of the goods:—**Held**: the action was maintainable; the title of an administrator, though it did not exist until the grant of administration, related back to the time of the death of intestate so as to entitle the administrator to sue in *assumpsit* for goods sold & delivered; & as the act of the agent was ratified by pltf. after he became administrator, it was no objection that the intended principal was unknown at the time to the person who intended to be the agent.—**FOSTER v. BATES** (1843), 12 M. & W. 226; 1 Dow. & L. 400; 13 L. J. Ex. 88; 2 L. T. O. S. 150; 7 Jur. 1093; 152 E. R. 1180.

Annotations:—**Consd. Hill v. Curtis** (1865), L. R. 1 Eq. 90; **Baker v. Blaker** (1886), 55 L. T. 723; **In the Goods of Pryse**, [1904] P. 301. **Reid. Holland v. King** (1848), 6 C. B. 727; **Welchman v. Sturgis** (1849), 13 Q. B. 552; **Crossfield v. Such** (1853), 1 C. L. R. 668; **Morgan v. Thomas** (1853), 22 L. J. Ex. 152; **Bodger v. Arch** (1854), 10 Exch. 333; **Thorne v. Tilbury** (1858), 27 L. J. Ex. 407; **Ellis v. Ellis**, [1905] 1 Ch. 613. **Mentd. Copner v. Copner** (1852), 19 L. T. O. S. 67; **Pemberton v. Chapman** (1858), E. B. & E. 1056; **Durant v. Roberts & Keighley, Maxstead**, [1900] 1 Q. B. 629.

523. —For payment of debt.—Payment of interest before grant.—Acknowledgment of debt within Statute of Limitations.]—Payment of interest on a promissory note to an administrator, who had omitted to take out administration in the diocese in which the note was a *bonum notabile*, held a sufficient acknowledgment of debt to defeat a plea of above statute.—**CLARK v. HOOPER** (1834), 10 Bing. 480; 4 Moo. & S. 353; 3 L. J. C. P. 159; 131 E. R. 981.

Annotations:—**Reid. Bodger v. Arch** (1854), 10 Exch. 333; **Baker v. Blaker** (1886), 55 L. T. 723; **Stamford, Spalding**

PART I. SECT. 14, SUB-SECT. 3.—

B. (a).

514i. General rule.]—**HILL v. ZIV-MACK** (1908), 7 C. L. R. 352.—**AUS.**

514 ii. —.]—The title of an administrator when acquired by letters

of administration have relation back to the date of the decease of intestate, so as to vest in such administrator from the death of all the goods & chattels of deceased.—**DON D. PRENDERGAST v. BEER** (1863), 4 Nfld. L. R. 751.—**NFLD.**

PART I. SECT. 14, SUB-SECT. 3.—

B. (b).

a. Right to enforce agreement:—For benefit of estate.—Executor *de son tort* acting in capacity of administrator.]—A contract made by the exor. *de son tort*, which appears to have been for

& Boston Banking Co. v. Smith, [1892] 1 Q. B. 765; Lloyd v. Coote & Ball, [1915] 1 K. B. 242.

524. ———.]—In 1833, pltf. married, at which time his wife was the holder of a promissory note made by deft., & which had been given to her whilst sole. In 1834, pltf.'s wife died, after giving birth to a child. It was then agreed between pltf., who claimed the note as the representative of his late wife, & deft., that the latter should maintain the child, & that in consideration thereof deft. should receive the rents of certain cottages which had been the property of pltf.'s wife, & that he should also retain the interest to become payable on the note. In 1839, deft. signed an indorsement on the note, to the effect that all interest on the note was then paid. Deft. continued to maintain the child to the time of its death in 1848. In 1853, letters of administration were granted to pltf.; & subsequently, in the same year, pltf. brought the action on the note:—*Held*: (1) the agreement between pltf. & deft., that the future maintenance of the child should be taken in part payment of the interest upon the note, & which had been acted upon within six years before action brought was a sufficient payment of interest within Statute of Frauds Amendment Act, 1828 (c. 14), s. 2; (2) the contract being with a person acting on behalf of intestate's estate, & for its benefit, the administration had relation back to what was done after the death of intestate, & before the grant of letters of administration so as to entitle pltf. to sue as administrator on a promise made to him as such.—*BODGER v. ARCH* (1854), 10 Exch. 333; 2 C. L. R. 1491; 24 L. J. Ex. 19; 24 L. T. O. S. 96; 156 E. R. 472.

Annotations:—*As to* (1) *Refd.* *Amos v. Smith* (1862), 1 H. & C. 238; *Maber v. Maber* (1867), L. R. 2 Exch. 153. *As to* (2) *Consd.* *Baker v. Blaker* (1886), 55 L. T. 723. *Generally*, *Mentd.* *Kregor v. Hollins* (1913), 109 L. T. 225.

525. ———.]—*For compromise.*—Pltf. in an action having, at the instance of deft., consented to a compromise of the action, pltf.'s solrs. suggested that deft. should make an offer of a money payment in satisfaction of pltf.'s interest in certain property which was the subject of the action. Deft.'s solrs. asked pltf. to name a sum which he would accept. A few days later pltf. died intestate. His daughter thereupon instructed pltf.'s solrs. to agree to a compromise of the action on payment by deft. of £500. Deft.'s solrs. replied that deft. would pay £450 in discharge of all claims. This offer was accepted by pltf.'s daughter.

It was then arranged that a summons should be taken out by consent, staying all further proceedings in the action on the terms agreed upon.

Shortly afterwards deft.'s solrs. stated that, deft. having discovered the property to be less valuable than he originally believed it was impossible for him to pay £450.

Pltf.'s solrs. declined, however, to vary the terms of the compromise. Letters of administration to pltf.'s estate were subsequently granted to his daughter, & an order was made that the proceedings in the action should be carried on by her as pltf.

A summons was then taken out, on behalf of pltf. to stay all further proceedings in the action on the terms agreed upon.

Deft. refused to consent to such summons:—*Held*: the administration related back to the date of the death of pltf. intestate, & the pltf.'s daughter was entitled to enforce the agreement to

compromise the action, although the same had been entered into before the grant of administration.—*BAKER v. BLAKER* (1886), 55 L. T. 723.

523. Money applied by stranger before grant in payment of debts, etc.—Right to bring action against stranger for money had & received.—Where money belonging to an intestate at the time of his death, or due to him & paid in after his death, or proceeding from the sale of his effects after his death, has, before grant of administration, been applied by a stranger to the payment of intestate's debts & funeral expenses, the administrator may recover it from such stranger as money had & received to his use as administrator; the letters of administration relating back, for that purpose, to the death of the intestate.—*WELCHMAN v. STURGIS* (1849), 13 Q. B. 552; 18 L. J. Q. B. 211; 13 L. T. O. S. 91; 13 Jur. 388; 116 E. R. 1374.

(c) To Torts.

527. Trover—Goods taken before grant.—Letters of administration relate back to the time of the death of intestate, & an administrator may therefore bring trespass or trover & conversion for goods of intestate taken by one before the grant.—*LONG v. HEBB* (1852), Sty. 341; 82 E. R. 700.

Annotations:—*Consd.* *Tharpe v. Stallwood* (1843), 1 Dow. & L. 24. *Refd.* *Forster v. Bates* (1843), 1 Dow. & L. 400; *In the Goods of Pryso*, [1904] P. 801.

523. ———.]—If a widow, after the death of her husband, seize his goods without taking letters of administration, although she afterwards dispose of them by will, or otherwise, yet he that takes out letters of administration to the husband, may bring trover for these goods: for an administrator may have trover for goods taken after the death of intestate, & before administration committed; & although he declares of goods taken out of his own possession, whereas they were taken before he was administrator, yet it is good enough, for the administration shall have relation to the death of the intestate (*HOLT, C.J.*).—*ANON.* (1697), Comb. 451; 90 E. R. 585.

529. ———.]—*With administrator's consent.*—Administrator cannot bring trover for any thing taken by his own consent before administration granted.—*WHITEHALL v. SQUIRE* (1703), 3 Salk. 161; 1 Salk. 295; Carth. 103; Holt, K. B. 45; 3 Mod. Rep. 276; Skin. 274; 91 E. R. 752.

Annotations:—*Consd.* *Mountford v. Gibson* (1804), 4 East. 411. *Refd.* *Mitchell v. Moorman* (1826), 1 Y. & J. 21; *Lacey v. Walrod* (1837), 3 Hodg. 215; *Forster v. Bates* (1843), 13 L. J. Ex. 88; *Morgan v. Thomas* (1853), 8 Exch. 302; *Metters v. Brown* (1863), 32 L. J. Ex. 138; *Williams v. Hepenstall* (1874), 22 W. R. 412. *Mentd.* *Bailey v. Wilson* (1744), 9 Mod. Rep. 473.

530. ———.]—*STEWART v. EDMONDS* (1828), cited in *Williams on Executors*, 11th ed. p. 317, n.

Annotation:—*Refd.* *Morgan v. Thomas* (1853), 8 Exch. 302.

531. ———.]—Deft. who had taken a farm under a person in possession, & claiming as devisee under a will, & had paid for manure, etc., under a valuation according to the custom:—*Held*: liable for the value to pltf. who had afterwards taken out letters of administration, the will having turned out to be invalid; but liable only in trover.—*SEARSON v. ROBINSON* (1860), 2 F. & F. 351, N. P.

532. Trespass—To goods.—*LONG v. HEBB*, No. 527, ante.

533. ———.]—An administrator may maintain trespass for acts done after the death of

the benefit of the estate, will be enforced against him, by relation back, when acting in the capacity of administrator.—*MURRAY v. MUNRO* (1916), 49 N. S. R. 501.—*CAN.*

PART I. SECT. 14, SUB-SECT. 3. — B. (e).

d. *Replevin of goods—Taken before grant.*—The title of an administrator

relates back to the death of intestate, so as to enable him to replevy goods taken before the grant of administration.—*DEAL v. POTTER* (1867), 26 U. C. R. 578.—*CAN.*

Sect. 14.—Power of administrator before grant: Sub-sect. 3, B. (c). Sect. 15: Sub-sect. 1, A. & B. (a) i.]

intestate, & before the grant of administration.—**THARPE v. STALLWOOD** (1843), 5 Man. & G. 760; 1 Dow. & L. 24; 6 Scott, N. R. 715; 12 L. J. C. P. 241; 7 J. P. 400; 7 Jur. 492; 134 E. R. 766; *sub nom.* **SHARPE v. STALLWOOD**, 1 L. T. O. S. 110.

Annotations:—**Consd.** **Foster v. Bates** (1843), 1 Dow. & L. 400; **Barnett v. Guildford** (1855), 11 Exch. 19. **Refd.** **Welchman v. Sturgis** (1849), 18 L. J. Q. B. 211; *In the Goods of Fryse*, [1904] P. 301. **Mentd.** **Litchfield v. Ready** (1850), 5 Exch. 939; **Ocean Accident & Guarantee Corp. v. Ilford Gas Co.**, [1905] 2 K. B. 493; **Isaacs v. Hobhouse**, [1919] 1 K. B. 398; **Elliott v. Boynton**, [1924] 1 Ch. 236.

534. — To leaseholds.]—Semble: the rule of law, that the title of an administrator has relation to the death of intestate so as to enable him to recover for injury to personal chattels prior to the grant of administration applies also to leasehold property, but in that case he must first enter.—**BARNETT v. GUILDFORD (EARL)** (1855), 11 Exch. 19; 3 C. L. R. 1440; 24 L. J. Ex. 281; 25 L. T. O. S. 85; 1 Jur. N. S. 1142; 3 W. R. 406; 156 E. R. 728.

Annotations:—**Mentd.** **Dunlop v. Macedo** (1891), 8 T. L. R. 43; **Ocean Accident & Guarantee Corp. v. Ilford Gas Co.**, [1905] 2 K. B. 493; **Elliott v. Boynton**, [1924] 1 Ch. 236.

535. — Against realty—Appointment of receiver.]—In the Goods of PRYSE, No. 52, *ante*.

SECT. 15.—EXECUTOR DE SON TORT.

SUB-SECT. 1.—WHAT ACTS CONSTITUTE PERSON EXECUTOR DE SON TORT.

See, now, Administration of Estates Act, 1925 (c. 23), s. 28.

A. In General.

536. General rule.]—If H. gets goods of an intestate into his own hands after administration is actually granted, it does not make him exor. of his own wrong; but if he gets the goods into his hands before, though administration be granted afterwards, yet he remains chargeable as a wrongful exor., unless he delivers the goods over to the administrator before the action brought, & then he may plead *plene administravit*. But if he takes upon himself to act as exor., he is chargeable at all events (**HOLT, C.J.**).—**ANON.** (1702), **Holt, K. B. 44**; 7 Mod. Rep. 31; 1 Salk. 313; 90 E. R. 922. **Annotation:—****Refd.** **Vernon v. Curtis** (1792), 2 Hy. Bl. 18.

537. What acts make party chargeable—Question of law.]—PADGET v. PRIEST, No. 559, *post*.

PART I. SECT. 15, SUB-SECT. 1.—A.

536 i. General rule.]—A party may make himself an exor. *de son tort* by answering as exor. to any action brought against himself, or by pleading any other plea than *ne unques exor.*—**HAACKE v. GORDON** (1860), 6 U. C. R. 424.—**CAN.**

536 ii.]—Probate is necessary to complete the title of a rightful exor., & until it is actually taken out a person intermeddling with the assets constitutes himself executor *de son tort*.—**NAVABZAI v. PESTONJI PATANJI** (1895), 1 L. R. 21 Bom. 400.—**IND.**

PART I. SECT. 15, SUB-SECT. 1.—B. (a) i.

545 i. General rule.]—The brother of deceased, at the request of his creditors, made an agreement with them to take the property of deceased & pay them a proportion of their respective claims on getting a discharge. The property was placed in the hands of a third

person by the creditors till the agreement could be performed, but it was soon afterwards abandoned.—**Held:** all the parties to the agreement were liable as exors. *de son tort*, but they discharged themselves from liability by afterwards delivering the property to the administrator before action brought.—**CROOKSHANK v. MACFARLANE** (1853), 2 All. 544.—**CAN.**

545 ii.]—Any dealing with the goods of deceased, by which the party so dealing assumes to exercise a control over the goods, is evidence against him as exor. *de son tort*.—**POWELL v. WATHEEN** (1862), 10 N. B. R. (5 All.) 258.—**CAN.**

545 iii.]—The party who sells or gives the goods of a deceased person to another, but not the purchaser or receiver, is subject to the liability of an exor. *de son tort*.—**MERCHANTS BANK v. MONTKEITH** (1885), 10 P. R. 467.—**CAN.**

545 iv.]—Action was brought against debts, as exors. *de son tort*, to

538. Whether acts sufficiently proved—Question of fact.]—PADGET v. PRIEST, No. 559, *post*.

Intermeddling—Generally.]—See Sub-sect. 1, B., post.

539. — By next of kin.]—ACKERLEY v. OLDHAM & WILBRAHAM (1811), 1 Phillim. 248; 161 E. R. 974.

540. Acts of necessity—General rule.]—LONG & FEAVER v. SYMES & HANNAM, No. 308, *ante*.

541. — Giving directions & appropriating sum for funeral—By party intending to take out administration.]—LAURY v. ALDRED & EDMONDS (1812), 2 Brownl. 183; 123 E. R. 886.

542. —]—HARRISON v. ROWLEY, No. 307, *ante*.

543. —]—The mere interference to order the funeral of the intestate, & the payment for it, out of money received on account of a debt due to her, will not make a person exor. *de son tort*; but whether he has made himself so by the receipt of more money than is reasonably sufficient for the funeral expenses, regard being had to the condition in life & circumstances of the deceased, is a question for the jury.—**CAMDEN v. FLETCHER** (1838), 4 M. & W. 378; 1 Horn & H. 361; 8 L. J. Ex. 17; 3 Jur. 57; 150 E. R. 1475.

544. — Preservation of goods of deceased.]—LAURY v. ALDRED & EDMONDS (1812), 2 Brownl. 183; 123 E. R. 886.

B. Particular Acts.

(a) Taking Possession and Disposing of Goods of Deceased.

i. In General.

545. General rule.]—The giving of a receipt for the payment of a debt due to testator is sufficient to charge a man as exor.—**STOKES v. PORTER** (1558), 1 And. 11; 2 Dyer, 166 b; 73 E. R. 364.

Annotations:—**Refd.** **Padget v. Priest** (1787), 2 Term Rep. 97; **Edwards v. Harben** (1788), 2 Term Rep. 587. **Mentd.** **Hastings v. Douglas** (1833), Cro. Car. 343; **Thompson v. Leach** (1690), 2 Vent. 198; **Thrustout d. Levick v. Coppin** (1771), 2 Wm. Bl. 801.

546. — Whether dealing must be as executor.]

(1) He who takes the goods of the dead shall not be charged as exor. of his own wrong, unless he does something as exor. as to pay debts, make acquittances, etc. (**MANWOOD, J.**).

(2) If one takes the goods of the dead, & converts them to his own use, he is chargeable as exor. (**MANWOOD, J.**).

(3) Where no lawful exor., or administrator is, there, if a stranger takes the goods of the dead into his possession, the same is a good administration to charge him as exor. of his own wrong (**MAN-**

recover the amount of \$165.97 on an account rendered, & damages against debts, for wrongfully interfering with & selling & otherwise converting the chattels & effects of deceased.—**Held:** debts, had so intermeddled with the estate of deceased, as to render them liable as exors. *de son tort*, although acting with good intent & at the request of the widow of deceased.—**RE DEY v. MCGILL** (1905), 6 O. W. R. 329; 10 O. L. R. 408.—**CAN.**

545 v.]—GREEN v. CLARK (1907), 3 E. L. R. 349.—**CAN.**

545 vi.]—CHUNI LAL BOSE v. OSMOND BEEBY (1903), 1 L. R. 30 Calc. 1044.—**IND.**

545 vii.]—The widow of deceased, by the fact of being in possession of a portion of the joint family property, does not become liable as an exor. *de son tort*, as she has not intermeddled with any estate belonging to deceased.—**RAMASAMI AYYAR v. VEERAPPA CHETTY** (1910), 1 L. R. 33 Mad. 423.—**IND.**

WOOD, J.).—*STAMFORD'S CASE* (1574), 2 Leon. 223 ; 74 E. R. 496.

547. ———.]—*KEBLE v. OSBASTON* (1614), Hob. 49 ; 80 E. R. 198.

Annotation.—*Reid*. *Kellow v. Westcombe* (1673), *Freem. K. B.* 122.

548. ———.]—(1) To make a man liable as exor. *de son tort* it is not essential that the dealing with the chattels of deceased should be in the character of exor. ; therefore, where a party had received possession of goods from the widow of a deceased person, being aware at the time that they were the property of deceased :—*Held* : it was sufficiently an intermeddling to make him liable as an exor. *de son tort*.

(2) A possession of goods which debt. had received from deceased in his lifetime under a colourable sale, may be sufficient to charge him as an exor. *de son tort*.—*SEALLY v. POWIS* (1835), 1 Har. & W. 2 ; 4 L. J. K. B. 107.

549. ———.]—Where executor appointed.]—(1) If a man dies intestate, & a stranger takes the intestate's goods & uses them, or sells them, he is exor. of his own wrong. The using of the goods of the deceased by any one, or the taking of them into his possession, is a good administration to charge him as exor. of his own wrong.

(2) When an exor. is made, & he proves the will or administers, if a stranger takes any of the goods, & uses & disposes of them as his own, that does not make him exor. of his own wrong, but if he claims to be exor., pays debts, or legacies, etc., & intermeddles as exor., he may be charged as exor. of his own wrong, although there be another exor. of right.

(3) If a stranger takes goods of testator before the rightful exor. has taken upon him or proved the will. He may be charged as exor. of his own wrong.—*READ'S CASE* (1604), 5 Co. Rep. 33 b ; 77 E. R. 103.

Annotations.—*As to* (1) *Consd.* *Mountford v. Gibson* (1804), 4 East, 441. *Reid*. *Kellow v. Westcombe* (1673), *Freem. K. B.* 122 ; *Anon.* (1702), *Holt, K. B.* 44 ; *Camden v. Fletcher* (1838), 1 Horn & H. 361. *Generally*, *Mentd.* *Bailey v. Wilson* (1744), 9 Mod. Rep. 473 ; *Thomson v. Harding* (1853), 2 E. & B. 630.

550. ———.]—Before administration.]—One who gets goods of testator into his hands may be sued as exor. ; although [afterwards &] before the writ brought, administration be granted to another during the minority of the rightful exors.—*KELLOW v. WESTCOMBE* (1673), 1 *Freem. K. B.* 122 ; 3 Keb. 202 ; 89 E. R. 90.

551. ———.]—*ANON.* (1702), No. 536, *ante*.

552. ———.]—*LYSLEY v. CLARKE*, No. 601, *post*.

553. ———.]—Where a person possesses himself of the assets of testator or of an intestate without having administered, a bill for an account to the extent of the specific assets he has received, will lie against him as exor. *de son tort*, though there is no legal personal representative.—*COOTE v. WHITTINGTON* (1873), L. R. 16 Eq. 534 ; 42 L. J. Ch. 846 ; 29 L. T. 206 ; 21 W. R. 837.

Annotations.—*Consd.* *Re Lovett, Ambler v. Lindsay* (1876), 3 Ch. D. 198. *Reid*. *Nokes v. Gandy* (1874), 43 L. J. Ch. 276. *Mentd.* *Rowell v. Morris* (1873), L. R. 17 Eq. 20.

554. ———.]—A creditor of testator brought an action against the exors., who had not proved but had got in part of the assets in Australia, alleging that they had paid some of the legacies, but refused to pay the funeral expenses & debts ; & also against other debts, alleging that they had got in a portion of the assets in England, & that they threatened to dispose of such assets without regard to the debts. *Pft.* claimed as against the exors., administration of the estate & payment of the debts ; & against the other debts. he claimed an injunction to restrain

them from parting with the assets. Upon demurrer to the claim :—*Held* : the exors. were rightly sued although they had not proved ; & other debts. were properly made parties as exors. *de son tort*.—*Re LOVETT, AMBLER v. LINDSAY* (1876), 3 Ch. D. 198 ; 45 L. J. Ch. 768 ; 35 L. T. 93 ; 24 W. R. 982.

555. Converting goods of deceased to own use.]—*STAMFORD'S CASE*, No. 546, *ante*.

556. ———.]—A husband who after the death of his wife extrix., has goods, which she being sole made a gift of by covin, shall be charged as exor. *de son tort*.—*WILCOCKS v. WATSON* (1595), Cro. Eliz. 405 ; 78 E. R. 649.

557. ———.]—*KEBLE v. OSBASTON* (1614), Hob. 49 ; 80 E. R. 198.

558. ———.]—By executor refusing to take probate.]—If a person named in a will exor. before probate, possesses himself of the goods of testator, pays a debt, converts the residue, & then refuses to take out a probate ; an administration granted to the widow, on this refusal, is void ; for he continues an exor. *de son tort*, & is liable in debt to the creditors of the deceased.—*PARTEN & BASEDEN'S CASE* (1676), 1 Mod. Rep. 213 ; 86 E. R. 836 ; *sub nom.* *PARSONS v. MAYESDEN*, 1 *Freem. K. B.* 151.

Annotations.—*Reid*. *Morgan v. Thomas* (1853), 8 Erch. 303 ; *Hewson v. Shelley*, [1913] 2 Ch. 384. *Mentd.* *Wankford v. Wankford* (1704), 1 Salk. 299 ; *Curtis v. Vernon* (1790), 3 Term Rep. 587.

559. Retention of proceeds of sale of goods of deceased.—By agent.]—(1) If A., the servant of B., sell the goods of C., an intestate, as well after his death as before, though by the orders of C. & pay the money, arising therefrom into the hands of B., B. may be sued as an exor. *de son tort*.

(2) If a person having intermeddled in an intestate's affairs has money belonging to the intestate in his hands at the time when an action is brought against him as exor., for a debt due from the intestate, he is liable as an exor. *de son tort*.

(3) What acts make a person liable as exor. *de son tort* is a matter of law for the judge to decide ; it is for the jury to say whether the acts are sufficiently proved.—*PADGET v. PRIEST* (1877), 2 Term Rep. 97 ; 100 E. R. 53.

Annotations.—*As to* (1) *Consd.* *Sharland v. Mildon, Sharland v. Loosmore* (1846), 5 Haro. 469. *Reid*. *Lysley v. Clarke* (1851), 18 L. T. O. S. 141 ; *Sykes v. Sykes* (1870), L. R. 5 C. P. 113 ; *New York Breweries Co. v. A.-G.*, [1899] 22 Q. B. 448 ; *Reid*. *Thompson v. Harding* (1853), 22 L. J. Q. B. 448 ; *Sykes v. Sykes* (1870), L. R. 5 C. P. 113. *Generally*, *Mentd.* *Oxenham v. Clapp* (1831), 9 L. J. O. S. K. B. 229 ; *Hill v. Curtis* (1865), L. R. 1 Eq. 90.

560. Conditional sale of goods of deceased.—Purchaser to pay rent & funeral expenses of deceased.]—A. had pledged goods to B. for a debt. B. died, & the parish officers took the goods, & gave them to J., the carpenter, who made the coffin of B., on condition of his paying B.'s rent & the funeral expenses :—*Held* : by taking these goods, the parish officers became exors. *de son tort*.—*SAMUEL v. MORRIS* (1834), 6 C. & P. 620, N. P.

Annotation.—*Reid*. *Owen v. Knight* (1837), 7 L. J. C. P. 27.

561. Purchase of portion of goods of deceased & sale by auction of residue.—Valuation price & proceeds of sale handed over to administrator.]—B. was manager of some iron works, & as such lived in a house in the neighbourhood. B. died intestate & insolvent on June 22, 1877. Shortly after his decease & before letters of administration could be taken out, the widow was required to vacate the premises, & it became necessary to remove the furniture which belonged to deceased. Accordingly, part of it was taken by her to a smaller house, & afterwards purchased by her,

Sect. 15.—Executor de son tort: Sub-sect. 1, B. (a) i. & ii., (b), (c), (d) & (e).]

& the residue sold by auction. The proceeds of the auction, as well as the valuation price of the goods retained by the widow, were duly handed over to the administrator afterwards appointed. Actions having been brought both against the widow & the auctioneer, charging them respectively as exors. *de son tort*:—**Held**: they were not liable, on the ground that there had been no wrongful intermeddling with the assets, or dealing with them in such a way as denoted a usurpation of the functions of an exor.—**PETERS v. LEEDER, PETERS v. BORGUET** (1878), 47 L. J. Q. B. 573; 43 J. P. 37.

Annotation:—**Reid, A.-G. v. New York Breweries Co.**, [1897] 1 Q. B. 738.

562. Taking possession of part only of goods of deceased.—If the husband of a *feme* extrix. detain part only of testator's goods, he is an exor. *de son tort*.—**ANON.** (1596), Cro. Eliz. 472; 78 E. R. 710.

563. — Foreign assets under foreign grant.—An Englishman having died intestate in Belgium, possessed of real & personal property there, his brother went over from England & obtained representation to him *pur et simple*, which by the Belgian law imposed upon him a personal obligation to pay all the debts of intestate independently of the amount of the assets. The intestate's brother afterwards returned to this country but did not take possession of any property in England belonging to the intestate; a creditor of the intestate obtained letters of administration to him in England:—**Held**: intestate's brother, as he had not taken possession of any of the English property of the intestate, was not an exor. *de son tort*.—**BEAVAN v. HASTINGS (LORD)** (1856), 2 K. & J. 724; 27 L. T. O. S. 282; 2 Jur. N. S. 1044; 4 W. R. 785; 69 E. R. 973.

564. Transferring shares & debentures to foreign executors—Refusal of executors to take out probate.—**NEW YORK BREWERIES CO. v. A.-G.**, No. 645, *post*.

565. By executor whose appointment is revoked—After notice of revocation.—**WOOLLEY v. CLARK, No. 399, ante**.

As agent—Of rightful representative.—**Sect. Sub-sect. 1, B. (a) ii., post**.

566. — Of executor de son tort.—**HARVEY v. BURGESS** (1844), 3 L. T. O. S. 54, 74.

567. ——The widow of testator employed A. to collect some of the debts due to testator's estate, which A. accordingly collected, & paid over to the widow, believing that she was the administratrix. The widow subsequently died without having obtained letters of administration:—**Held**: (1) A., having received moneys which he knew to be part of the estate of testator, & not having accounted for such moneys to the legal personal representative of testator, A. was liable to be sued as exor. *de son tort*; (2) the liability was not avoided by the suggestion that A. acted as the agent of the widow, inasmuch as the acts of the widow & A., in reference to testator's estate, were the acts of wrongdoers, & the law does not recognise the relation of principal & agent as existing amongst wrongdoers; (3) A. was liable as exor. *de son tort* to account to a party interested in testator's estate, in a suit for that purpose, without any charge of collusion between such exor.

de son tort & the legal personal representative.—**SHARLAND v. MILDON, SHARLAND v. LOOSEMORE** (1846), 5 Hare, 469; 15 L. J. Ch. 434; 7 L. T. O. S. 223; 10 Jur. 771; 67 E. R. 997.

Annotations:—**As to (1) Reid, Re Lovett, Ambler v. Lindsay** (1876), 3 Ch. D. 198; **A.-G. v. New York Breweries Co.**, [1898] 1 Q. B. 205. **As to (2) Connd, Hill v. Curtis** (1865), L. R. 1 Eq. 90; **Sykes v. Sykes** (1870), L. R. 5 C. P. 113. **Reid, Lyaley v. Clarke** (1851), 18 L. T. O. S. 141; **Thompson v. Harding** (1853), 18 Jur. 58; **Re Chapman, Ex p. Edwards** (1884), 13 Q. B. D. 747.

ii. As Agent of Rightful Representative.

568. General rule—Agent not chargeable.—A man who possesses himself of effects of deceased under authority, as agent for rightful exor., cannot be charged as exor. *de son tort*.—**HALL v. ELLIOT** (1791), Peake, 119, N. P.

Annotation:—**Reid, Sykes v. Sykes** (1870), 39 L. J. C. P. 179.

569. — Even before probate.—A person who deals with testator's goods as agent of exor. cannot be treated as exor. *de son tort*, whether the will has been proved or not. S.'s exor. & extrix. appointed C., extrix.'s husband, to carry on S.'s business before probate. Judgment was entered up against C. as exor. of S.:—**Held**: the sheriff could not seize goods of S. in possession of C. as manager for exors.—**SYKES v. SYKES** (1870), L. R. 5 C. P. 113; 39 L. J. C. P. 179; 22 L. T. 236; 18 W. R. 551.

Annotation:—**Expld. A.-G. v. New York Breweries Co.**, [1898] 1 Q. B. 205.

570. Acts done by consent of party—By whom administration afterwards taken.—If a person act as an exor. *de son tort*, by consent of the person who afterwards becomes administrator, & he administers all the goods which the intestate died possessed of, an action will not lie against the exor. *de son tort*.—**WHYTMORE v. PORTER** (1627), Cro. Car. 88; 79 E. R. 678.

571. Acts done in executor's presence.—**BAILEY v. WILSON** (1744), 9 Mod. Rep. 473; 2 Hov. Supp. 2; 88 E. R. 583, L. C.

Annotations:—**Mentd. Abrahams v. Bunn** (1768), 4 Burr 2251; **Smith v. Prager** (1796), 7 Term Rep. 60.

572. Acts done after revocation of authority—By death of executor—Under advice of co-executor—By whom will not proved.—Although a person cannot be charged as exor. *de son tort* while he acts under a power of attorney, made to him by one of several exors. who has proved the will, yet if he continue to act after the death of such exor., he may be charged as exor. *de son tort*, though he act under the advice of another of the exors. who has not proved.—**COTTE v. ALDRICH** (1815), 4 M. & S. 175; 1 Stark. 37; 105 E. R. 799.

Annotations:—**Connd, Re Lovett, Ambler v. Lindsay** (1876), 3 Ch. D. 198. **Reid, Sykes v. Sykes** (1870), L. R. 5 C. P. 113.

573. — Retention of assets.—A person, who is permitted by an exor. to possess himself of part of the assets of testator, & who, after the exor.'s death, & when there is no legal personal representative either of testator or of the exor., retains the assets, & acts in the execution of the trusts of the will, is not exor. *de son tort* to the original testator.—**TOMLIN v. BECK** (1823), Turn. & R. 438; 37 E. R. 1167.

574. Acts done by request of foreign executors domiciled abroad—With notice of intention of executors not to obtain probate in England—Transfer of shares & debentures to executors.—**NEW YORK BREWERIES CO. v. A.-G.**, No. 645, *post*.

PART I. SECT. 15, SUB-SECT. 1.— B. (a) ii.

e. General rule.]—A person acting

in the management of assets, though there be an exor., who afterwards proves the will, is liable as an exor. *de son tort*, unless it clearly appears that

he was only an agent.—**KELLY v. MURPHY** (1848), 12 L. Eq. R. 614.—**IR.**

f. —.]—An auctioneer who sells

(b) Entry upon Leasehold Property of Deceased.

575. General rule—Merger of term in reversion.]—There may be an exor. *de son tort* of a term; unless it be merged in the reversion by surrender.—*FLOYD v. LANGFIELD* (1676), 1 Freem. K. B. 218; 89 E. R. 155; *sub nom.* *LOYD v. LANGFORD*, 2 Mod. Rep. 174.

*Annotations:—**Held*, *Baker v. Gostling* (1834), 1 Bing. N. C. 19. *Mentd.* *Pluck v. Digges* (1831), 5 Bll. N. S. 31.

576. —.]—There may be an exor. *de son tort* of a term. If a stranger enters on land generally, of which deceased was lessee, & meddles not with his goods, he is a disseisor; but if he meddles as exor. he only gains the term.—*GARTH v. TAYLOR* (1679), 1 Freem. K. B. 261; 89 E. R. 187.

577. —.]—If a lessee die intestate during the term, & a stranger enter & take possession, he thereby becomes an exor. *de son tort* of the term; & if he commit waste therein, he is liable, as exor. *de son tort*, to an action of waste.—*NORWICH CORPN. v. JOHNSON* (1886), 3 Mod. Rep. 90; Comb. 7; 3 Lev. 35; 2 Show. 457; 87 E. R. 58.

578. —.]—There may be an exor. *de son tort* of a term.—*ANON.* (1690), 1 Show. 250; 89 E. R. 553.

579. Receipt of rent—Payment of ground-rent—Distribution of balance.]—In 1810 a lease for sixty-one & a quarter years was granted by the predecessors in title of pftfs. to one "G., his exors., administrators & assigns." In 1814 G. died intestate. His widow administered to his effects & remained possessed of the lease till her death in 1843. After her death H., the father of deft., who had married a daughter of G., without any administration took possession of the premises & received the rent, paying the ground-rent; & he continued to do so until his death, in 1856. After the death of H., deft. received the rent of the premises, & after paying the ground-rent, handed over the balance to his mother, conceiving her to be entitled to it. He also from time to time let the premises. After the death of his mother deft. continued to receive the rent of the premises, paying the ground-rent, & dividing the balance between his two sisters & himself, no further administration having been taken out. He continued to do this down to the expiration of the lease, when he delivered up the premises to pftfs. out of repair:—*Held*: deft. beyond all doubt had estopped himself from denying that he was assignee. *Seemle*: deft. was exor. *de son tort* of the term.—*WILLIAMS v. HEALES* (1874), L. R. 9 C. P. 177; 43 L. J. C. P. 80; 30 L. T. 20; 22 W. R. 317.

*Annotations:—**Distd.* *Stratford-upon-Avon Corpn. v. Parker*, [1914] 2 K. B. 562. *Mentd.* *Justice v. James* (1898), 14 T. L. R. 385.

580. —.]—*STRATFORD-UPON-AVON CORPN. v. PARKER*, No. 616, *post*.

581. Grant of underlease by administrator—Rendering rent to grantor, his executors, etc.—Position of administrator's executor.]—An administrator makes an underlease of intestate's term rendering rent to himself, his exors., etc., & dies: his exor., & not the administrator *de bonis non*, shall have the rent & shall be chargeable with it as assets, in the nature of an executor *de son tort*.—*DREW v. BAILIE* (1875), Freem. K. B. 402; 1 Vent. 275; 89 E. R. 299; *sub nom.* *DREW v. BAYLY*, 2 Lev. 100; 3 Keb. 495, 549.

(c) Setting up Colourable Title to Goods of Deceased.

582. General rule.]—If a person sets up in himself a colourable title to the possession of the

goods of deceased, though he may not be able to establish a completely strict & legal title, it is sufficient to exempt him from being charged as exor. *se son tort*.—*FEMINGS v. JARRAT* (1795), 1 Esp. 335, N. P.

(d) Payment of Debts of Deceased.

583. General rule.]—*STAMFORD'S CASE*, No. 546, *ante*.

584. —.]—*PARTEN & BASEDEN'S CASE*, No. 558, *ante*.

585. —.]—A widow does not become extrix. *de son tort* by occupying for three months her late husband's house & shop, if she in no way carries on the business.

The widow of a hair-dresser, who died in Oct. 1836, continued to reside in his house & keep open the shop (through which was the entrance to the house), but there was no proof of any articles being sold. In Dec. she received notice of a bond debt of £100 due from him, & had his goods valued. In Jan. 1837, on the application of a creditor to whom he owed £24 for goods, she gave a promissory note for that amount, payable to the creditor twelve months after date. In Mar. she took out administration. In an action against her on the promissory note:—*Held*: this was not evidence to charge her as extrix. *de son tort*.—*SERLE v. WATERWORTH* (1838), 4 M. & W. 9; 6 Dowl. 684; 1 Horn & H. 281; 7 L. J. Ex. 202; 150 E. R. 1321; *sub nom.* *SEARLE v. WATERWORTH*, 2 Jur. 745; *reversd.* on other grounds, *sub nom.* *NELSON v. SERLE* (1839), 4 M. & W. 795, Ex. Ch. *Annotations:—**Mentd.* *Jones v. Jones* (1840), 6 M. & W. 84; *Baker v. Walker* (1845), 3 Dow. & L. 46; *Mather v. Maidstone* (1856), 18 C. B. 273; *Balfour v. Sea, Fire, Life Assoc.* (1857), 27 L. J. C. P. 17; *Ashpitel v. Bryan* (1864), 5 B. & S. 723.

586. What constitutes payment—Cancellation of bond in which deceased bound—In exchange for bond in own name.]—If a person cancel a bond in which intestate was bound to another & gives his own bond for the same sum this is in the nature of a payment, & may make him exor. *de son tort*.—*MARTIN v. WHIPPER* (1588), Cro. Eliz. 114; 78 E. R. 372.

587. —.]—For part & promise to pay balance.]—If a person calls in a bond of an intestate, & gives his own bond for part of the sum with a promise to pay the remainder, it is an administration of intestate's effects.—*STAMPE v. HUTCHINS* (1588), Cro. Eliz. 120; 78 E. R. 378. —.]—*See, generally*, *CONTRACT*, Vol. XII., pp. 447 et seq.

(e) Carrying on Business of Deceased.

588. General rule.]—Living in the house & carrying on the trade of deceased, a victualler, is sufficient intermeddling to make deft. exor. *de son tort* & as such liable *de bonis propriis*; notwithstanding his wife proved the will after the action was commenced.—*HOOPER v. SUMMERSETT* (1810), Wight. 16; 145 E. R. 1157.

*Annotations:—**Consd.* *Hill v. Curtis* (1865), L. R. 1 Eq. 90. *Held*, *Sykes v. Sykes* (1870), L. R. 5 C. P. 113.

589. —.]—Where two of the next of kin neglected to take out letters of administration, but possessed themselves of the goods of the intestate, & dealt with them as their own, paying nevertheless some of the intestate's debts, & her funeral expenses, & after the lapse of two years, being still in such possession, became bkpts.; & afterwards another of the next of kin took out letters of administration & claimed the goods from the assignees:—*Held*: these goods were within

assets of deceased is liable for debts | he can show that he acted under | *NULTY v. FAGAN* (1888), 22 L. R. Ir. 604.—*IR.*
of deceased as exor. *de son tort*, unless | an exor. who has proved the will.—

Sect. 15.—Executor de son tort: Sub-sect. 1, B. (e), (f) & (g); sub-sect. 2.]

6 Geo. 4, c. 16, s. 72, & the assignees were entitled to them.—*Re THOMAS, Ex p. THOMAS* (1842), 1 Ph. 159; 3 Mont. D. & De G. 40; 12 L. J. Ch. 59; 6 Jur. 979; 41 E. R. 591, L. C.

Annotations:—*Reid, Re Marshall, Re Marshall* (1846), De G. 273; *Re Plimmer, Ex p. Plimmer* (1853), 1 Bankr. & Ins. R. 83.

590. What constitutes carrying on business.]—*SERLE v. WATERWORTH*, No. 585, *ante*.

(f) Obtaining Goods from Deceased by Fraudulent Conveyance.

See, now, Administration of Estates Act, 1925 (c. 23), s. 28.

591. General rule.]—Taking a deceased's property under a fraudulent deed, makes an exor. *de son tort*.—*HAWES v. LEADER* (1611), 1 Brownl. 111; *Yelv.* 196; *Cro. Jac.* 270; 123 E. R. 698.

Annotation:—*Reid, Doe d. Roberts v. Roberts* (1819), 2 B. & Ad. 367.

592. Executor obtaining goods without probate—Intention to defeat creditors.]—*ANON.* (1573), 3 Leon. 57; 74 E. R. 538.

593. Conveyance before death—Possession taken after death.]—*KITCHIN v. DIXSON* (1594), *Gouldsb.* 116; 75 E. R. 1033.

594. — Administration afterwards taken.]—If a person intermeddles with goods of which a gift has been made by covin in the lifetime of testator, he shall be considered as exor. *de son tort*, although administration has been granted to him.—*BETHEL v. STANHOPE* (1601), *Cro. Eliz.* 810; *Owen*, 132; 78 E. R. 1037.

Annotations:—*Reid, Shears v. Rogers* (1832), 3 B. & Ad. 362; *Re Mouat, Kingston Cotton Mills Co. v. Mouat*, [1899] 1 Ch. 831; *Harrods v. Stanton*, [1923] 1 K. B. 516.

595. — Bill of sale in fraud of creditors.]—If a creditor take an absolute bill of sale of the goods of his debtor, but agree to leave them in his possession for a limited time, & in the meantime debtor die, whereupon creditor takes & sells the goods, he will be liable to be sued as exor. *de son tort* for the debts of deceased; for debtor's continuing in possession is inconsistent with the deed & fraudulent against creditors.—*EDWARDS v. HARBEN* (1788), 2 Term Rep. 587; 100 E. R. 315.

—Reid. — v. Cramphorne (1825), 3 L. J. O. S. Ch. 223; *Lewis v. Rogers* (1834), 1 Cr. M. & R. 48; *Lindon v. Sharp* (1843), 6 Man. & G. 895. **Mentd.** *Manton v. Moore* (1796), 7 Term Rep. 67; *Steel v. Brown & Parry* (1808), 1 Taunt. 381; *Jezepeh v. Ingram* (1817), 1 Moore, C. P. 189; *Armstrong v. Baldock* (1818), *Gow*, 33; *Steward v. Lombo* (1820), 1 Brod. & Bing. 506; *Reed v. Wilmot* (1831), 7 Bing. 577; *Martindale v. Booth* (1832), 3 B. & Ad. 498; *Ward v. Audland* (1847), 16 M. & W. 862.

596. — Necessity to show fraudulent intent.]—A deed of trust conveyed the lease of a farm, & all the grantor's effects, & all debts due to him, to trustees, in consideration of a certain sum to be paid to him by one of the trustees, in trust to dispose of all the property, & out of the produce to reimburse the trustee the sum advanced by him to the grantor, & all other the trustee's demands upon him, & then to pay all such debts

as were justly due from the grantor, as the trustees in their discretion should think proper, the surplus to be holden for the benefit of the grantor's wife, whose property the bulk of it originally was as a separate maintenance for her in consequence of a separation between them, on account of her husband's ill usage:—*Held*: (1) such deed was not fraudulent or void as against creditors, it appearing to have been made *bonâ fide* at the time, & all the creditors of the grantor known at the time had, upon application to the trustees, received payment of their debts; (2) the wife was not liable as extrix. *de son tort*, after the death of her husband intestate, on account of her possession of this property under the deed of trusts.—*NUNN v. WILSMORE* (1800), 8 Term Rep. 521; 101 E. R. 1524.

Annotations:—*As to* (1) *Reid, Doe d. Otley v. Manning* (1807), 9 East, 59; *Bach v. Meats* (1816), 5 M. & S. 200. **Generally, Mentd.** *Westmeath v. Westmeath* (1821), *Jac.* 126.

597. — Assignment to trustee for benefit of creditors.]—A trader & small farmer being embarrassed in her affairs & pressed by a creditor, assigned "all her effects, stock, books & book-debts," for the benefit of her creditors, & at the same time dictated a list of persons whom she stated to be creditors of her estate. The assignee having dealt with the property after her death, was sued by one of her creditors as exor. *de son tort*:—*Held*: the list was evidence as part of the transaction of the assignment in order to establish the *bona fides* of it, & so justify debt's intermeddling.—*LEWIS v. ROGERS* (1834), 1 Cr. M. & R. 48; 4 Tyr. 872; 3 L. J. Ex. 326; 149 E. R. 988.

Annotation:—*Mentd. Anderson v. Anderson*, [1895] 1 Q. B. 749.

598. — —.]—*SEALLY v. POWIS*, No. 548, *ante*.

(g) Receipt of Property from Executor de son tort.

599. General rule.]—A party who knowingly receives a chattel from an exor. *de son tort*, & deals with it as his own, does not himself become thereby exor. *de son tort*. So held, where the widow of an intestate possessed herself of a lease, part of his estate, without taking out administration, & handed it to another party, who kept it, & occupied the premises for the residue of the term with the landlord's assent.—*PAULL v. SIMPSON* (1846), 9 Q. B. 365; 15 L. J. Q. B. 382; 11 Jur. 13; 115 E. R. 1313.

Annotations:—*Consd. Lysley v. Clarke* (1851), 18 L. T. O. S. 141. *Fold, Hill v. Curtis* (1865), L. R. 1 Eq. 90; *Hursell v. Bird* (1891), 65 L. T. 709. *Reid, Williams v. Heales* (1874), L. R. 9 Q. B. 177; *A.-G. v. New York Breweries Co.*, [1898] 1 Q. B. 205.

600. — At law & in equity.]—(1) At law an exor. *de son tort* cannot discharge himself unless he hands over the property to the rightful representative, before action brought. If an exor. *de son tort* hands over part of the property of which he has wrongfully possessed himself to a second person, that person may possibly be sued in equity; but he is not liable as exor. *de son tort*.

(2) The rule in equity follows the rule at law;

PART I. SECT. 15, SUB-SECT. 1.— B. (e).

5901. What constitutes carrying on business.]—The wife of a grocer & liquor seller, who continues after his death to keep house open & sell liquors left therein at his decease, is made thereby an extrix. *de son tort*, & cannot protect herself under the plea of *ne unques extrix* against a demand by a simple contract creditor of her husband, by showing that there was an outstanding judgment against

her husband for an amount exceeding all the assets of the estate.—*KEITH v. PERKS* (1844), 4 N. B. R. (3 Kerr) 552.—*CAN.*

590 II. —.]—L., after the death of her husband, D., ordered goods from debts. & used them in continuing the business, which had been carried on by her husband in his lifetime. Out of the proceeds of goods sold she remitted money to debts, & also sent them a quantity of produce. Debts, filed their claim against the estate without

crediting the money or goods so sent. In an action by L. & H., her present husband, for goods sold & money paid:—*Held*: debts would have been justified in treating L. as extrix. *de son tort*, but not having done so, & L. as a matter of fact, not having acted as extrix. *de son tort* when the payments were made, debts were entitled to judgment.—*DART v. DAVIDSON BROTHERS* (1894), 26 N. S. R. (14 R. & G.) 220.—*CAN.*

so that if an exor. *de son tort* can prove a settled account with the rightful representative before suit, it is a sufficient answer to a bill in equity against him for an account.—*HILL v. CURTIS* (1865), L. R. 1 Eq. 90; 35 L. J. Ch. 133; 13 L. T. 584; 12 Jur. N. S. 4; 14 W. R. 125.

Annotations:—As to (1) *Fold. Hursell v. Bird* (1891), 65 L. T. 709. *Reid. Sykes v. Sykes* (1870), L. R. 5 C. P. 113; *Williams v. Heales* (1874), L. R. 9 C. P. 177; *A. G. v. New York Breweries Co.*, [1898] 1 Q. B. 205. As to (2) *Reid. Coote v. Whittington* (1873), L. R. 18 Eq. 534.

601. Receipt of money—Payment of debt due to donee & funeral expenses—Return of balance.—A person receiving money from another, who is an exor. *de son tort*, which he applies partly in payment of a debt due to himself from deceased, & partly in payment of funeral expenses, returning a small balance in his hands, is not an exor. *de son tort*; but it may be evidence thereof in connection with other facts.

In order to constitute an exor. *de son tort*, it must be a person who interferes himself with the effects of testator, not receiving them from the exor. *de son tort*, but himself either intermeddling with the personal chattels belonging to testator, & taking possession of them himself, or receiving money from the debtors of testator. If he does so, whether he receives it on his own account or as the agent for somebody else, would make him equally exor. *de son tort*: he is a wrongdoer, & whether he acts on his own account or for another, he is equally responsible (*PARKE, B.*).—*LYSLEY v. CLARKE* (1851), 18 L. T. O. S. 141.

602. Creditor obtaining payment of debt.—Action by a creditor against the widow of an intestate, who had rendered herself liable as extrix. *de son tort*, to administer the estate. Deceased at his death owed rent to S., his landlady, who took over the house including the stock-in-trade at a valuation, as a going concern in part satisfaction of her debt. Pltf. joined her as a deft., suing her as an extrix. *de son tort*:—*Held*: a creditor who obtains payment of a debt from an exor. *de son tort* does not thereby become an exor. *de son tort*.—*HURSELL v. BIRD* (1891), 65 L. T. 709; 8 T. L. R. 8, D. C.

SUB-SECT. 2.—EFFECT OF ACTS OF EXECUTOR DE SON TORT UPON PROPERTY OF DECEASED.

See, now, Administration of Estates Act, 1925 (c. 23), s. 28.

603. When binding—When lawful.—*SANDS v. PECKHAM* (1489), Y. B. 4 Hen. 7, fo. 13, pl. 12; cited 1 Plowd. at p. 282; 75 E. R. 432.

Annotations:—*Reid. Graysbrook v. Fox* (1865), 1 Plowd. 275. *Mentd. Colt & Glover v. Coventry & Lichfield (Bp.)* (1817), Hob. 140.

604. ———.]—(1) An exor. of his own wrong shall not retain any part of the deceased's goods to satisfy his own debt.

(2) All lawful acts which an exor. of his own wrong, or a disseisor, or abator, etc., does, are good.—*COULTER'S CASE* (1598), 5 Co. Rep. 30 a; 77 E. R. 98; *sub nom. IRELAND v. COULTER*, Cro. Eliz. 630; *sub nom. COLTER v. IRELAND*, Moore, K. B. 527.

Annotations:—As to (1) *Reid. Alexander v. Lamb* (1608), 1 Brownl. 103; *Bond & Green's Case* (1613), Godb. 216; *Vaughan v. Brown* (1739), 7 Mod. Rep. 274; *Vernon v. Curtis* (1792), 3 Hy. Bl. 18; *Oxenham v. Clapp* (1831), 2 B. & Ad. 309; *H. v. Saddlers Co.* (1861), 30 L. J. Q. B. 186. As to (2) *Reid. Parker v. Kett* (1700), 1 Ld. Raym. 658; *Oxenham v. Clapp* (1831), 2 B. & Ad. 309. Generally,

Mentd. R. v. Loggen & Froome (1718), 1 Stra. 73; *Scott v. Wedlake* (1845), 7 Q. B. 766; *Wood v. Kerry* (1846), 2 C. B. 515.

605. ———.]—A legal act done by an exor. *de son tort* will bind the rightful exor. & yet he is but an exor. *de facto*, & if the rightful exor. bring trover against him, he shall recover only so much in damages as he has administered unduly; & the reason is because the creditors are not bound to seek further than him who acts as exor.; therefore if an exor. *de son tort* pays £100 of the testator's in a bag to a creditor, the rightful exor. shall not have trover & conversion against the creditor (*per OUR.*).—*PARKER v. KETT* (1701), as reported in 1 Ld. Raym. 658; 12 Mod. Rep. 467; 1 Salk. 95; 91 E. R. 1338.

Annotations:—*Consd. Mountford v. Gibson* (1804), 4 East, 441. *Reid. Woolley v. Clark* (1822), 1 Dow. & Ry. K. B. 409; *Doe d. Hornby v. Glenn* (1834), 3 Nev. & M. K. B. 837; *Thomson v. Harding* (1853), 2 E. & B. 630; *Ellis v. Ellis* (1905), 53 W. R. 617. *Mentd. R. v. Lisle* (1738), Andr. 163; *Andrews v. Emmott* (1788), 3 Bro. C. C. 297; *R. v. Bedford Level Corp.* (1805), 6 East, 356; *Langley v. Sneyd* (1822), 7 Moore, C. P. 165; *Doe d. Nowell v. Roake* (1825), 3 Bing. 497; *Bridges v. Garrett* (1869), L. R. 4 C. P. 580.

606. ——— & in due course of administration.]—The act of an exor. *de son tort* is good against the true representative of deceased only where it is lawful, & such an act as the true representative was bound to perform in the due course of administration.—*BUCKLEY v. BARBER* (1851), 6 Exch. 164; 20 L. J. Ex. 114; 16 L. T. O. S. 463; 15 Jur. 63; 155 E. R. 498.

607. ——— Executor *de son tort* must have assumed character of executor—Single act of wrong.]—A creditor of an intestate, who received goods of intestate after his death from his widow, in payment of the debt, cannot protect his possession against an action of trover by the lawful administrator, upon the ground of such delivery having been made by one who had, by such intermeddling, made herself extrix. *de son tort*; no fact appearing to give colour to her having acted in that respect in the character of extrix., except the single act of wrong complained of, in which deft. participated. *Qu.*: how far any payment by an exor. *de son tort* to a creditor can be set up as a bar to an action of trover by the lawful executor, etc.; though if it be such as the latter would have been bound to make, it shall be recouped in damages.—*MOUNTFORD v. GIBSON* (1804), 4 East, 441; 1 Smith, K. B. 129; 102 E. R. 900.

Annotations:—*Reid. Doe d. Hornby v. Glenn* (1834), 3 Nev. & M. K. B. 837; *Morgan v. Thomas* (1853), 2 Exch. 302; *Thomson v. Harding* (1853), 2 E. & B. 630. *Mentd. Edmonson v. Nuttall* (1864), 4 New Rep. 366.

608. ——— & creditor reasonably believe him executor.]—The creditor of a deceased person may retain, against the representative of deceased, payments made to him out of the assets of deceased, in due course of administration, by an exor. *de son tort*, if the exor. *de son tort* was really acting as exor. so that the creditor might reasonably suppose him to be rightful representative. But acts sufficient to make the exor. *de son tort* chargeable as such do not necessarily make the payment good against the rightful exor.—*THOMSON v. HARDING* (1853), 2 E. & B. 630; 1 C. L. R. 887; 22 L. J. Q. B. 448; 21 L. T. O. S. 305; 18 Jur. 58; 1 W. R. 468; 118 E. R. 904.

609. On whom binding—On executor *de son tort*—Subsequently taking administration.]—After the death of the intestate, A. gets possession of the goods & gives them to B. & afterwards is made

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administrator, now he shall not take the goods out of the possession of B. The reason hereof is, that by the first seizure he had the goods to the use of the intestate, as the law says, for he was chargeable as exor. of his own wrong, & so after the administration committed he shall be said to have them to the same use, & therefore he has no other capacity, for which reason he cannot take them. But if S. wrongfully takes the goods of K. & gives them to L., & afterwards K. makes S. his exor., now he may take the goods out of the possession of L. for he has another capacity now than he had at the time of giving them, viz. the interest of another person.—ANON. (prior to 1580), Plowd. Queries, 36, pl. 195; 75 E. R. 909.

610. ————]—If one enters as exor. *de son tort* & sells goods & then takes out letters of administration the sale is good by relation, but in this case the property was such that no entry could be made.—KENRICK v. BURGESS (1583), Moore, K. B. 126; 72 E. R. 483.

Annotations:—*Reid*, Morgan v. Thomas (1853), 8 Exch. 302; Hill v. Curtis (1865), L. R. 1 Eq. 90. *Mentd.* Norwich City v. Johnson (1885), 2 Show. 457.

611. ————]—On rightful representative.—In favour of creditor.]—PARKER v. KETT, No. 605, *ante*.

612. ————]—THOMSON v. HARDING, No. 603, *ante*.

613. Rights of buyer from executor *de son tort*—Right to interplead.]—Deft. having bought a rick of hay from pltf., who was the exor. *de son tort* of S. before payment of the price, received a notice from a third party, stating that he was the administrator of S. & demanding payment of the sum for which it had been sold. Deft. being subsequently sued by pltf. for the price of the hay:—*Held*: he was not entitled to relief under the Interpleader Act, 1831 (c. 58), s. 1.—JAMES v. PRITCHARD (1840), 7 M. & W. 216; 8 Dowl. 890; H. & W. 49; 10 L. J. Ex. 92; 4 Jur. 1038, 1180; 151 E. R. 744.

Annotations:—*Reid*, Slaney v. Sidney (1845), 3 Dow. & L. 250. *Mentd.* Turner v. Kendal Corp. (1844), 13 M. & W. 171; Meynell v. Angell (1862), 1 New Rep. 126; Attenuborough v. London & St. Katharine's Dock Co. (1878), 3 C. P. D. 450.

———]—*See, now*, C. L. P. Act, 1860 (c. 126), & generally, INTERPLEADER.

614. ————]—Against wrongdoer—Right to maintain trover—Sufficiency of title.]—An exor. *de son tort* cannot confer such a title as would suffice to maintain trover against a wrongdoer.—HOUNSLOW v. FOUNTAIN (1846), 7 L. T. O. S. 91, N. P.

SUB-SECT. 3.—RIGHTS OF EXECUTOR DE SON TORT.

See, now, Administration of Estates Act, 1925 (c. 23), s. 28.

A. In General.

615. General rule.]—(1) A party, sued as exor. *de son tort* jointly with the rightful exor., stated by his answer that he had, before the bill was filed, accounted for his receipts & payments to his co-deft. & paid over to him the balance:—*Held*: such settlement would not be binding on pltf. who was beneficially interested in the estate,

& the ct. refused to insert in the decree the usual direction as to not disturbing settled or stated accounts.

(2) An exor. *de son tort* is subject to all the liabilities, but entitled to none of the privileges, of an ordinary exor.—CARMICHAEL v. CARMICHAEL (1846), 2 Ph. 101; 9 L. T. O. S. 17; 10 Jur. 908; 41 E. R. 880, L. C.

Annotations:—*As to* (1) N.F. Hill v. Curtis (1865), L. R. 1 Eq. 90. *Follid.* Coote v. Whittington (1873), L. R. 16 Eq. 531.

616. ————]—The assignee of a lease granted by pltf., died intestate, leaving no estate other than the lease. Deft., her son, who had collected the rents of the demised premises on his mother's behalf during her lifetime, continued to collect them after her death, & after paying the ground rent in her name to pltf., he handed the balance to his sister. After his sister's death deft. still continued to collect the rents & to pay the ground rent in his mother's name to pltf., retaining the surplus for such person or persons as might in law be found entitled thereto. Shortly after deft.'s sister's death pltf. became aware for the first time of the death of deft.'s mother, the assignee of the lease, & after some correspondence with deft. they entered into possession of the premises & sought to make him personally liable for breach of the repairing covenant contained in the lease on the ground that he had intermeddled with the lease & had become an exor. *de son tort*:—*Held*: deft. was not liable by privity of estate as the lease was never vested in him, & he had not so acted as to make himself liable by estoppel.

The decision in *Williams v. Heales*, No. 579, *ante*, was founded upon estoppel.

An exor. *de son tort* has no title to the term. If he intermeddles he becomes subject to the liabilities that an ordinary exor. is subject to in respect of the assets with which he has intermeddled, but he has none of the privileges or benefits of the ordinary exor. & does not by operation of law or otherwise become entitled to the term of years which has never been assigned to him (LUSH, J.).—STRATFORD-UPON-AVON CORPN. v. PARKER, [1914] 2 K. B. 562; 83 L. J. K. B. 1309; 110 L. T. 1004; 58 Sol. Jo. 473, D. C.

617. Allowance for payments of debts.]—A widow paying just debts of her husband out of his estate in her hands, shall have allowance for the same from the exor.—AYRE v. AYRE (1663), 1 Cas. in Ch. 33; 22 E. R. 680, L. C.

B. Right of Retainer.

Sec, generally, Part IV., Sect. 4, *post*.

618. General rule.]—An exor. *de son tort* cannot pay himself a debt or legacy (*per Cur.*).—COLTER v. IRELAND (1598), Moore, K. B. 527; 72 E. R. 736; *sub nom.* IRELAND v. COULTER, Cro. Eliz. 630; *sub nom.* COULTER'S CASE, 5 Co. Rep. 30 a.

Annotations:—*Consd.* Oxenham v. Clapp (1831), 2 B. & Ad. 309. *Reid.* Alexander v. Lamb (1608), 1 Brownl. 103; Bond & Green's Case (1613), Godb. 216; Pyne v. Woolland (1690), 2 Vent. 179; Vaughan v. Brown (1739), 7 Mod. Rep. 374; Vernon v. Curtis (1792), 2 Hy. Bl. 18; Scott v. Wedlake (1845), 7 Q. B. 766. *Mentd.* Parker v. Kett (1701), 1 Ld. Raym. 658; Wood v. Kerry (1846), 2 C. B. 515; R. v. Saddlers Co. (1861), 30 L. J. Q. B. 186.

619. ————]—An exor. *de son tort* cannot retain to pay himself.—ALEXANDER v. LANE, WEST v.

PART I. SECT. 15, SUB-SECT. 3.—A.

h. Widow in possession of house—Leased to deceased—No administration taken out—Insurable interest.]—A widow having continued for four

years after her husband's death, in possession of a house built on land of which he was the lessee for years, & paid the ground rent, insured the house in her own name. No administration

was taken out on the husband's estate:—*Held*: she had an insurable interest as extrix. *de son tort*.—LINGLEY v. QUEEN INSURANCE CO. (1868), 12 N. B. R. (1 Han.) 280.—CAN.

LANE (1608), Yelv. 137; 1 Brownl. 103; 80 E. R. 92.

Annotation.—*Mentl. Campbell v. St. John* (1894), 1 Ld. Raym. 20.

620. —.]—An exor. of his own wrong, should not retain to satisfy his own debt (*per CUR.*).—BOND & GREEN'S CASE (1613), Godb. 216; 78 E. R. 132.

621. —.]—Exor. *de son tort* cannot retain for his own debt.—PRINCE v. ROWSON (1675), 1 Mod. Rep. 200; 2 Mod. Rep. 51; 86 E. R. 832, 935.

622. —.]—PYNE v. WOOLLAND, No. 653, *post*.

623. —.]—MOUNTFORD v. GIBSON, No. 607, *ante*.

624. —.]—A duly registered bill of sale from deceased may be kept by the exor. *de son tort*, if *bona fide*, though possession was not taken until after the death, but for any goods not included in the bill of sale he must account as exor.—WEBSTER v. BLACKMAN (1861), 2 F. & F. 490.

625. Effect of taking administration.]—WILLIAMSON v. NORWICH (1652), Sty. 337; 82 E. R. 757.

Annotation.—*Refd. Whitehead v. Sampson* (1679), Freem. K. B. 265.

626. —. Pendente lite—Before pleading.]—If exor. *de son tort* takes out administration after suit & before plea, he may plead a retainer to satisfy his own debt: but not if he takes out administration after plea (ELIJS, J.).—WHITEHEAD v. SAMPSON (1679), Freem. K. B. 265; 89 E. R. 190.

Annotation.—*Refd. Curtis v. Vernon* (1790), 3 Term Rep. 587.

627. —. —.]—Whether exor. *de son tort* can justify a retainer for his own debt, by taking administration *pendente lite*.—WATSON v. HARRISON (1680), Freem. K. B. 533; 89 E. R. 399.

628. —. —.]—To debt as exor., if debt. plead judgment recovered by way of retainer, & no assets *ultra*, & pltf. reply "exor. *de son tort*," debt. may rejoin, *puis darrein continuance*, that he is administrator.—VAUGHAN v. BROWN (1739), 7 Mod. Rep. 274; 2 Stra. 1106; Andr. 328; 87 E. R. 1237.

Annotation.—*Refd. Curtis v. Vernon* (1790), 3 Term Rep. 587.

629. —. —.]—PYNE v. WOOLLAND, No. 653, *post*.

630. Effect of consent of rightful representative.]—VERNON v. CURTIS, No. 666, *post*.

SUB-SECT. 4.—LIABILITIES OF EXECUTOR DE SON TORT.

See, now, Administration of Estates Act, 1925 (c. 23), s. 28.

A. In General.

631. General rule.]—CARMICHAEL v. CARMICHAEL, No. 615, *ante*.

632. —.]—STRATFORD-UPON-AVON CORPN. v. PARKER, No. 616, *ante*.

633. For waste.]—NORWICH CORPN. v. JOHN-SON, No. 577, *ante*.

634. To give security.]—A party who had possessed himself of a portion of the goods of a deceased person, before he had proved his title to the administration, directed to give security for the safety of those effects.—JONES v. YARNOLD (1728), 2 Lee, 570.

635. For debts of original testator.]—Debt against an exor. of his own wrong, who pleads that he never was exor., nor administered as an exor. held not to be any whit material whether he has any assets or no, but to prove he has administered of anything never so little in value & it shall

charge him for the whole debt.—TOWNSLEY v. INGHAM (1633), Clay. 6.

636. —. Executor de son tort of rightful executor.]—Debt on bond by pltf. as exors. against debt. as extrix. of one S., who was extrix. of W. Plea, that S. died intestate, without this that debt. ever was rightful extrix. of S.:—*Held*: on special demurrer, the plea, though good in form, was no answer to the action, for an exor. *de son tort* of a rightful exor. is liable in the same manner as a rightful exor. for the debt of the original testator.—MEYRICK v. ANDERSON (1850), 14 Q. B. 719; 19 L. J. Q. B. 231; 15 L. T. O. S. 24; 14 Jur. 457; 117 E. R. 277.

637. For legacies.]—Legacies payable by exor. *de son tort*.—NICHOLSON v. SHERMAN (1664), Freem. Ch. 181; 1 Cas. in Ch. 57; 22 E. R. 1146.

Annotation.—*Refd. Holland v. Prior* (1834), Coop. temp. Brough. 426.

638. To take probate.]—LONG & FEAVER v. SYMES & HANNAM, No. 303, *ante*.

639. —.]—RAYNER v. GREEN, No. 297, *ante*.

640. —. (1) An administrator with the will annexed, who has intermeddled with the estate cannot be compelled to take a grant of administration with a later will annexed upon the revocation of the original administration.

(2) An exor. who has intermeddled can be compelled to take probate (SIR C. CRESWELL).—*In the Goods of DAVIS* (1860), Sea. & Sm. 152; 4 Sw. & Tr. 213; 29 L. J. P. M. & A. 72; 164 E. R. 1498.

641. To take grant.]—*In the Goods of DAVIS*, No. 640, *ante*.

642. For breach of contract.]—The exor. of an extrix. *de son tort* is not liable for a breach of contract committed by the person with whose property the extrix. *de son tort* has intermeddled.—WILSON v. HODSON (1872), L. R. 7 Exch. 84; 41 L. J. Ex. 49; 36 J. P. 344; 20 W. R. 438.

643. To account.]—SHARLAND v. MILDON, SHARLAND v. LOOSEMORE, No. 567, *ante*.

644. —. Necessity for proof of intermeddling.]

—Where an originating summons was taken out against an alleged administratrix, for an account & administration, & it subsequently transpired that debt. was not the administratrix & that there was, in fact, no exor. or administrator of the estate, but that debt. had intermeddled, leave was refused to amend the summons & describe debt. as administratrix *de son tort*, because an administrator *de son tort* is not liable to account until it has been proved that he has intermeddled, & this can only be done in an action, & cannot be done on an originating summons, it not being a matter falling within R. S. C. Ord. 55, at all.—*Re CHALMERS*, CHALMERS v. CHALMERS (1921), 65 Sol. Jo. 475; 56 L. Jo. 139; 151 L. T. Jo. 230.

645. To pay probate duty.]—Upon the death of testator, a foreign subject domiciled in America, shares & debentures in an English co., of which he was the registered holder in the books of the co. in London, passed by his will to his exors. in America, according to the law of his domicile. At their request the co. paid to them the dividends & interest payable upon testator's shares & debentures, & transferred into their names in the co.'s books in London two shares & a debenture. The exors. to the knowledge of the co. had not obtained & did not intend to obtain probate in England:—*Held*: the co. had made themselves exors. *de son tort*; they had taken possession of the administered part of testator's estate & were liable to penalties, & to deliver an account & pay such duty as would have been payable if probate

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(a), (b) i., ii., iii., & (c).]

had been obtained in England.—NEW YORK BREWERIES Co. v. A.-G., [1899] A. C. 62; 68 L. J. Q. B. 135; 79 L. T. 568; 63 J. P. 179; 48 W. R. 32; 15 T. L. R. 93; 43 Sol. Jo. 111, H. L.; *affg.* S. C. *sub nom.* A.-G. v. NEW YORK BREWERIES Co., [1898] 1 Q. B. 205, C. A.

Annotation.—*Mentd.* Winans v. A.-G., [1910] A. C. 27.

Extent of liability, *see* Sect. 15, sub-sect. 4, B. (c), *post*.

B. Liability to be sued.

(a) In General.

646. Necessity for personal representative.]—There can be no decree against an exor. *de son tort*, without setting up an administrator.—EDNOWES v. DEANE (1718), Bumb. 36; 145 E. R. 586.

647. —.]—A bill by a creditor to administer the estate of testator alleged that testator by his will gave to his wife, deft., the use for her life of half his estate, & appointed her guardian of his children; that administration with the will annexed had been granted to deft., who was "the only legal personal representative & also heir of the undisposed of movables & immovables," & that she had received & entered into possession of all the real & personal estate of deceased. Plea, that deft. was not, nor had ever been, administratrix with will annexed or legal personal representative of deceased:—*Held*: if deft. was not administratrix, she was extrix. *de son tort* & the bill could be sustained.—RAYNER v. KOEHLER (1872), L. R. 14 Eq. 262; 41 L. J. Ch. 697; 27 L. T. 506; 20 W. R. 859.

Annotations.—*Dhtd.* Cary v. Hills (1872), 42 L. J. Ch. 100; Rowell v. Morris (1873), L. R. 17 Eq. 20. *Follgd.* Coot v. Whittington (1873), L. R. 16 Eq. 534. *Refd.* *Re* Lovett, Ambler v. Lindsay (1876), 3 Ch. D. 198.

648. —.]—Bill stating a will & codicils giving pltf. an annuity & appointing deft. exor.: that deft. had proved the will & also previously meddled with the assets, & praying administration. Plea, that deft. had not proved the will:—*Held*: the plea was good, since the only relief that could be given against an exor. *de son tort* in absence of proper exor. is the appointment of a receiver.—CARY v. HILLS (1872), L. R. 15 Eq. 79; 42 L. J. Ch. 100; 28 L. T. 6; 21 W. R. 166.

Annotations.—*Dhtd.* Coot v. Whittington (1873), L. R. 16 Eq. 534. *Refd.* Rowell v. Morris (1873), L. R. 17 Eq. 20.

649. —.]—COOTE v. WHITTINGTON, No. 553, *ante*.

650. —.]—The legal personal representative of testator is a necessary party to a suit for the administration of his real & personal estate; & if he is not made a party, no decree can be made in such a suit even although an exor. *de son tort* & the trustees of the real estate are before the ct.—ROWSELL v. MORRIS (1873), L. R. 17 Eq. 20; 43 L. J. Ch. 97; 29 L. T. 446; 22 W. R. 67.

Annotations.—*Consd.* *Re* Lovett, Ambler v. Lindsay (1876), 3 Ch. D. 198. *Refd.* Nokes v. Gandy (1874), 43 L. J. Ch. 376.

PART I. SECT. 15, SUB-SECT. 4.— B. (a).

646i. Necessity for personal representative.]—An action will not lie against one as exor. *de son tort*, where there is a legally appointed administrator, even though the latter may have conveyed the estate to the former on condition of his paying the debts of deceased.—ARMSTRONG v. ARMSTRONG (1879), 44 U. C. R. 615.—CAN.

k. Effect of taking administration—By defendant's nominee.]—A son & daughter of deceased were held not

liable as exors. *de son tort* because shortly after deceased's death they requested another to take charge of his estate & apply for administration & dealt with the property only under his instructions, & accounted to him, he being subsequently appointed administrator.—LANGSTAFF v. LANGSTAFF, [1920] 2 W. W. R. 418; 13 Sask. L. R. 365.—CAN.

651i. What must be pleaded.]—Pltf. alleging that he was a creditor of R. & that, shortly before his death, R. conveyed all his land & transferred all his personal property to his wife,

651. — Originating summons—R. S. C., Ord. 55.]—*Re* CHALMERS, CHALMERS v. CHALMERS, No. 644, *ante*.

652. Effect of taking administration—By defendant.]—An exor. *de son tort* cannot plead in abatement that he is administrator & not exor.—STUBBS v. RIGHTWISE (1588), Cro. Eliz. 102; 78 E. R. 360.

Annotation.—*Refd.* Hooper v. Summerset (1810), Wight. 16.

653. —.]—(1) An exor. of his own wrong cannot retain.

(2) If she disposed of the goods as extrix. of her own wrong, the taking of administration afterwards though before writ brought will not hinder pltf. from charging her as extrix. of her own wrong (*per* CUR.).—PYNE v. WOOLLAND (1690), 2 Vent. 179; 86 E. R. 380.

Annotation.—*As to* (1) *Refd.* Vaughan v. Browne (1738), Andr. 328.

654. — By plaintiff.]—ASHBY v. CHILD (1653), Sty. 384; 82 E. R. 797.

655. What must be pleaded.]—A bill of revivor & supplement stated that I, deft., had died, leaving by his will C. extrix., & that she had taken upon herself the execution thereof, & possessed herself of testator's effects. The bill prayed that the suit might be revived against C. as extrix. The will had not been proved. C. pleaded that she was not extrix.:—*Held*: the plea was good, the form of the bill praying relief against deft. only as extrix., & not as extrix. *de son tort*. To warrant any decree against her in the latter character, the special facts ought to have been stated; but, *qu.*: whether a bill of revivor & supplement, or an original bill, was the proper course.

Qu.: whether the bill could be sustained against the extrix. *de son tort* alone.—COOKE v. GITTINGS (1856), 21 Beav. 497; 26 L. T. O. S. 268; 4 W. R. 268; 52 E. R. 951.

Annotations.—*Consd.* Jones v. Williams (1864), 11 L. T. 284. *Refd.* Rayner v. Koehler (1872), L. R. 14 Eq. 262; Coot v. Whittington (1873), L. R. 16 Eq. 534.

For debts of original testator.]—*See* No. 636, *ante*, No. 684, *post*.

For breach of contract.]—*See* No. 642, *ante*.

For waste.]—*See* No. 577, *ante*.

656. In ejectment—Remaining in possession.]—A tenant from year to year died, & a regular notice to quit was served on the widow, who remained in possession:—*Held*: the landlord might recover in ejectment unless it were shown that some other person, & not the widow, was the exor. or administrator of the tenant, & it was not incumbent on the landlord to show that the widow was either extrix. or administratrix.—REES d. MEARS v. PERROT (1830), 4 C. & P. 230, N. P.

657. Injunction—To restrain executor de son tort from acting as executor.]—Deft., who claimed to be the lawful widow of an intestate, possessed herself of his personal estate, & was alleged to have sold a portion of the property. Pltf. claimed the grant of administration as next of kin, & denied that deft. was married to deceased. On the *ex p.* application of pltf., after issue of a writ

whom he named extrix., sued the wife, charging that the conveyance & transfer were voluntary & were fraudulent & void as against pltf. & all other creditors of R. Deft. had not applied for probate of R.'s will, & alleged that she had not intermeddled with his assets, which, according to her contention, were non-existent:—*Held*: pltf. could sue the wife as extrix. *de son tort*, describing her as extrix.—COLEMAN v. RYAN (1923), 55 O. L. R. 182.—CAN.

l. Extent of liability.]—The liability of one exor. *de son tort* for the

of summons but before service. The ct. granted an injunction restraining deft. from disposing of or removing any of the estate of intestate until further order of the ct.—**BRAND v. MITSON** (1876), 45 L. J. P. 41; 34 L. T. 854; 40 J. P. 407; 24 W. R. 524; 2 Char. Pr. Cas. 83.

(b) *What Defences Available.*

i. *Ne unques Executor.*

658. *Plea false—Extent of liability.*—**ANON.** (circa 1600), Noy, 69; 74 E. R. 1037.

659. — *Plea false to defendant's knowledge.*—**HARVEY v. BURGESS** (1844), 3 L. T. O. S. 54, 74.

ii. *Plene administravit.*

660. *When available—Settlement of accounts—With rightful representative.*—**BARHAM'S CASE** (1590), Sav. 121; 123 E. R. 1047.

661. — *Action by beneficiaries.*—**CARMICHAEL v. CARMICHAEL**, No. 615, *ante*.

662. — *—*—**HILL v. CURTIS**, No. 600, *ante*.

663. — *With executor de son tort.*—**SHARLAND v. MILDON**, **SHARLAND v. LOOSEMORE**, No. 567, *ante*.

664. — *Delivery of effects of deceased—To rightful representative.*—An exor. *de son tort* remains liable, though he has delivered the effects of the intestate to the administrator.—**BRADBURY v. REYNEL** (1597), Cro. Eliz. 565; 78 E. R. 809.

665. — *Before action brought.*—**ANON.** (1702), No. 536, *ante*.

666. — *After action brought.*—To an action brought by a simple contract creditor, against an exor. *de son tort* of an intestate, the exor. *de son tort* cannot plead, that after action brought but before plea pleaded, he delivered over the effects to the rightful administrator, though in fact no administration was granted till after the action was brought; nor can he plead a retainer for his own debt of a superior degree, with the assent of the rightful administrator.—**VERNON v. CURTIS** (1792), 2 Hy. Bl. 18; 126 E. R. 405, Ex. Ch.; *affg.* S. C. *sub nom.* **CURTIS v. VERNON** (1790), 3 Term Rep. 587.

*Annotations:—***Consd.** **Hill v. Curtis** (1865), L. R. 1 Eq. 90. **Refd.** **Hooper v. Summersett** (1810), Wight. 16.

667. — *—*—**Deft.'s exors. de son tort**, paying over what they had received in that character to one who had taken out administration with the will annexed pending the suit not discharged thereby.—**LAYFIELD v. LAYFIELD** (1834), 7 Sim. 172; 4 L. J. Ch. 2; 58 E. R. 802.

668. — *Payment of debts.*—**BAKER v. BERESFORD** (1662), 1 Keb. 285; 1 Sid. 76; 83 E. R. 992.

*Annotations:—***Consd.** **Curtis v. Vernon** (1790), 3 Term Rep. 587. **Refd.** **Vaughan v. Brown** (1739), 7 Mod. Rep. 274.

669. — *—*—**Payment of debts by exor. de son tort**, is only in mitigation of damages.—**ANON.** (1701), 12 Mod. Rep. 441; 88 E. R. 1437.

670. — *Specialty debt—Action by simple contract creditor.*—An exor. *de son tort* may, after action brought by a simple contract creditor, pay a specialty debt, & plead the payment of that debt in bar of action.—**OXENHAM v. CLAPP**

(1831), 2 B. & Ad. 309; 9 L. J. O. S. K. B. 229; 109 E. R. 1158.

*Annotation:—***Refd.** **Thomson v. Harding** (1853), 2 E. & B. 630.

671. — *Seizure of goods under execution.*—The execution was a good discharge against another creditor that should sue him, to whom he might plead *riens inter res mains*, but it was no discharge against an administrator, for men must not be encouraged to meddle with a personal estate without right (**NORTH, C.J.**).—**ANON.** (1680), 1 Vent. 349; 86 E. R. 226.

672. — *Action by rightful representative.*—To trover & trespass for taking goods of pltf. as administrator, deft. pleaded that the claims arose by reason only of deft. being exor. *de son tort* of intestate before grant of administration to pltf., & that before such grant deft. fully administered all the estate which had come to his hands:—**Held**: the plea was bad.—**ELWORTHY v. SANDFORD** (1864), 3 H. & C. 330; 34 L. J. Ex. 42; 10 L. T. 654; 12 W. R. 1008; 159 E. R. 558; *sub nom.* **ELSWORTHY v. HEWETT**, 4 New Rep. 371.

*Annotation:—***Mentd.** **Knight v. Williams**, [1901] 1 Ch. 256.

673. *Effect of plea.*—A person who is sued as an exor., & who pleads *plene administravit*, only admits thereby that he is exor. *de son tort*; & an exor. *de son tort* is not liable to the amount of all the property of testator that would pass by a will, but only for the amount of assets that come to his hands.

A. was sued as exor. of his father, & pleaded *plene administravit*. It appeared that the father left no will, & was the owner of a leasehold house, & that A., after his father's death, had received some small sums which had been due to his father, & had paid the expenses of his father's funeral:—**Held**: A. was not liable for the value of the leasehold house, & was only liable to the extent of the sums he had actually received, against which he had a right to deduct reasonable funeral expenses.—**YARDLEY v. ARNOLD** (1842), Car. & M. 134; 10 M. & W. 141; 2 Dowl. N. S. 311; 11 L. J. Ex. 413; 6 Jur. 718; 152 E. R. 416.

*Annotation:—***Mentd.** **Jacobs v. Laybourn** (1843), 1 Dow. & L. 352.

iii. *Statutes of Limitation.*

See, generally, LIMITATION OF ACTIONS.

674. *When available.*—**WEBSTER v. WEBSTER**, No. 476, *ante*.

(c) *For What Amount Liable.*

675. *Limited to extent of maladministration.*—**PARKER v. KETT**, No. 605, *ante*.

676. *Limited to value of assets received.*—**YARDLEY v. ARNOLD**, No. 673, *ante*.

677. *What deductions allowed.*—A party who has taken possession of the goods of intestate after his death, cannot set up as a defence to an action of trover by the administrator, that intestate had been first insolvent & then bankrupt, & had not paid 15s. in the pound under the flat, & therefore the property in the goods vested absolutely in the assignees; the goods having being acquired by intestate after the bkpcy., & he having been allowed by the assignees to retain possession of them.

acts of another exor. *de son tort* is not limited to the extent to which there has been an actual personal receipt of goods or money by the first-named wrongful exor.; but one exor. *de son tort* may be liable for the acts of another when such acts have been authorised & directed by him.—**Re RYAN, KERRY v. RYAN**, [1897] 1 I. R. 513.—**IR.**

m. — *—*—An exor. or administrator becomes liable for the full amount of the debts of deceased if he be executor *de son tort*.—**JACKSON v. WILSON** (1858), 3 Moo. P. C. C. 177; 13 E. R. 75.—**I. of M.**

PART I. SECT. 15, SUB-SECT. 4.—**B. (b) iii.**

6741. *When available.*—A person

who has gone into possession of chattels real of deceased, as exor. *de son tort* & remained in possession for twelve years, may, in the absence of circumstances raising an inference of an express trust, rely on Stat. Limitations in answer to an action for the recovery of the lands brought by a person taking out administration to deceased.—**DOYLE v. FOLEY**, [1903] 2 I. R. 95.—**IR.**

Sect. 15.—Executor de son tort: Sub-sect. 4, B. (c); sub-sect. 5. Part II. Sect. 1: Sub-sect. 1, A. (a).]

Now it is very true, if an action had been brought in trover by the administrator against the exor. *de son tort*, the cases have decided that an exor. *de son tort* may recoup himself in damages for all money he has paid *bond fide* on account of testator; & so might debt. in this case, if he had given any evidence that the exor. *de son tort* had paid the debts of testator out of the proceeds of the sale (LORD ABINGER).—FYSON v. CHAMBERS (1842), 9 M. & W. 460; 11 L. J. Ex. 190; 152 E. R. 195.

*Annotations:—*Reld. Welchman v. Sturgis (1849), 13 Q. B. 552. *Mentd.* Herbert v. Sayer (1844), 5 Q. B. 965; Newnham v. Stevenson (1851), 10 C. B. 713; Morgan v. Knight (1864), 15 C. B. N. S. 669; Bourne v. Fosbrooke (1865), 18 C. B. N. S. 515; *Re* Clark, *Ex p.* Beardmore, [1894] 2 Q. B. 393.

678. — Value of collateral security for debt.]—In an action brought against an extrix. *de son tort*, upon a bond given by testator, & where pltf. holds a policy on testator's life as a collateral security which has been paid, the ct. will not compel pltf. to enter satisfaction upon the roll upon receiving the amount of the bond less by the whole amount of the policy, unless it appear that he has actually received the whole of it, although it appear that he has improperly permitted the administrator to deduct from the policy the expenses of administration, there being general assets enough for that purpose.—MORRIS v. ROBERTS (1844), 4 L. T. O. S. 159.

679. —.]—(1) A. had ordered a pair of boots of B. & had paid B. for them. The boots had never been delivered to A., & being in the hands of the journeyman who made them, A. was obliged to pay the journeyman the price of making them before he could get possession of them. A. being sued as exor. *de son tort* of B. :—*Held*: he was liable

for the value of the boots as exor. *de son tort*, but he was entitled to be allowed the sum he paid the journeyman.

(2) A., after the death of B. obtained possession of the cattle of B. from C., with whom they were agisted, A. paying C. for the agisting; A. being sued as exor. *de son tort* of B. : *Held*: he was not entitled for the sum he paid to C. for the agisting of the cattle.—HOBBY v. RUELL (1845), 1 Car. & Kir. 716.

680. Plea of ne unques executor—False plea.]—ANON. (circa 1600), Noy. 69; 74 E. R. 1037.

681. — Whether liable for whole amount claimed.]—HARVEY v. BURGESS (1844), 3 L. T. O. S. 54, 74.

SUB-SECT. 5.—EFFECT OF DEATH OF EXECUTOR DE SON TORT.

682. Liability of executor of executor *de son tort*.]—Exor. *de son tort* wastes & dies. Whether his goods are liable to answer.—ASTRY v. NEVIT (1675), 2 Lev. 133; 83 E. R. 484.

683. —.]—The exor. or administrator of an exor. *de son tort*, is liable in the same manner as testator or intestate would have been.—ANON. (1678), 2 Mod. Rep. 293; 86 E. R. 1080, Ex. Ch.

*Annotations:—*Reld. Garth v. Cotton (1753), 1 Ves. Sen. 546; Meyrick v. Anderson (1850), 19 L. J. Q. B. 231.

684. Liability of executor *de son tort* of executor *de son tort*—For debts of original testator.]—*Semble*: an exor. *de son tort* of an exor. *de son tort*, is not liable for the debts of the first deceased.—HAMMOND v. GATLIFFE (1738), Andr. 252; 95 E. R. 385.

*Annotation:—*Reld. Meyrick v. Anderson (1850), 14 Q. B. 719.

Part II.—Probate and Letters of Administration.

SECT. 1.—JURISDICTION.

SUB-SECT. 1.—WHAT COURTS HAVE JURISDICTION.

A. Probate Division.

(a) In General.

See Court of Probate Acts, 1857 (c. 77), 1858 (c. 95); Administration of Estates Act, 1925 (c. 23); Judicature Acts, 1873 (c. 66), 1875 (c. 77); Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), ss. 20, 150–152, & generally, COURTS, Vol. XVI., p. 177.

685. Effect of Judicature Acts.]—In the Estate of HEYS, WALKER v. GASKILL, No. 697, *post*.

686. — Non-contentious matters.]—A will of a married woman made during coverture, under a power & disposing of real property only, is not entitled to probate, though there is an appointment of exors. Jud. Acts do not alter the jurisdiction of the Ct. of Probate in non-contentious matters.—In the Goods of TOMLINSON (1881), 6 P. D. 209; 50 L. J. P. 74; 46 L. T. 484; 46 J. P. 73; 30 W. R. 61.

*Annotations:—*Mentd. In the Goods of Hornbuckle (1890), 15 P. D. 149; O'Grady v. Willmot, [1916] 3 A. C. 231.

687. — Transfer of former jurisdiction of Court of Chancery.]—The Ct. of Probate, as a Division of the High Ct. of Justice, to which the jurisdiction formerly exercised by the Ct. of Ch. has been transferred by Jud. Act, 1873 (c. 66), s. 16, has power to issue an order prohibiting the dealing in any share of a ship for a time & on

conditions to be named therein, & the registrar of shipping, on being served with such order, or an official copy thereof, must obey the same.—NICHOLAS v. DRACACHIS (1875), 1 P. D. 72; 45 L. J. P. 45; 24 W. R. 461.

— On jurisdiction of Chancery Division.]—See Sub-sect. 1, B., *post*.

688. — Power to order execution of deed.]—The Probate Div. has jurisdiction under Jud. Act, 1884 (c. 61), s. 14, in the event of any person neglecting or refusing to obey its order to execute a deed, to direct its execution by any other person whom it may nominate for the purpose.

Semble: as a general rule the Ct. should not make an order under Jud. Act, 1884 (c. 61), s. 14.—HOWARTH v. HOWARTH (1880), 11 P. D. 95; 55 L. J. P. 49; 55 L. T. 303; 34 W. R. 633; 2 T. L. R. 705, C. A.

*Annotation:—*Mentd. *Re* Evans, Evans v. Noton, [1893] 1 Ch. 252.

689. In respect of will or administration of assets of Sovereign.]—Of a sovereign who dies intestate, the successor is exclusively entitled to the personal property; but in order to have legal authority to collect & recover that property, there is no instance of any such successor coming into this ct., as all persons must do, for letters of administration—for the authority of the ordinary to invest him with the legal character of administrator. Nothing of the sort has ever taken place: &, indeed, it would be against all principle, &

contrary to all analogy, that it should. Now the total absence of any exercise of such a jurisdiction by this ct. on the death of a sovereign in cases either of testacy or intestacy, is pretty strong evidence, to my mind, that no such a jurisdiction exists (SIR J. NICHOLL).—*In the Goods of KING GEORGE III.* (1822), 1 Add. 255; 1 State Tr. N. S. 1273; 162 E. R. 89.

Annotation.—Fold. *In the Goods of George III.* (1862), 32 L. J. P. M. & A. 15.

690. ———]—The Ct. of Probate has no jurisdiction to decide on the validity of the will of a deceased sovereign of this realm. When, therefore, application was made on behalf of the personal representative of a legatee under an alleged will of His late Majesty King George III. for leave to cite the A.-G., as representative of the reigning sovereign, the heir general of His late Majesty King George IV., the heir-at-law of the alleged testator, to see the alleged will propounded, the Ct. rejected the application.—*In the Goods of KING GEORGE III.* (1862), 3 Sw. & Tr. 199; 1 New Rep. 69; 32 L. J. P. M. & A. 15; 27 J. P. 137; 8 Jur. N. S. 1134; 11 W. R. 190; 164 E. R. 1250.

691. Inquiry into execution of power.—To determine whether instrument testamentary.—(1) A ct. of Probate has jurisdiction to examine into the execution of a power, so far as is necessary to determine whether the instrument executing it is testamentary.

(2) A will disposing of personal estate situate in this country, made in pursuance of a power of appointment & executed in compliance with the requisites of the power, is entitled to probate, though not executed according to the testamentary law of the domicile of the party making it.—*TATNALL v. HANKEY* (1838), 2 Moo. P. C. C. 342; 12 E. R. 1036, P. C.

Annotations.—As to (1) *Consd.* *Barnes v. Vincent* (1846), 5 Moo. P. C. C. 201. As to (2) *Consd.* *Barnes v. Vincent* (1846), 5 Moo. P. C. C. 201; *In the Goods of Alexander* (1860), 29 L. J. P. M. & A. 93. *Refd.* *In the Goods of Hallyburton* (1860), L. R. 1 P. & D. 90; *In the Goods of Huber*, [1896] P. 209. *Generally, Mentd.* *Brenchley v. Lynn* (1852), 2 Rob. Eccl. 441; *D'Huart v. Harkness* (1865), 34 L. J. Ch. 311.

692. ———]—To determine whether instrument duly executed.—The Prerogative Ct. refused probate to a will of a *feme covert* made in pursuance of a power, because it was, upon the face of it, not executed according to the requisites of the power:—*Held*: such will was entitled to probate, the Ecclesiastical cts. having no jurisdiction to inquire as to the due execution of the power, but simply to grant probate, leaving it to a ct. of equity to determine the question of the due execution of the power.—*BARNES v. VINCENT* (1846), 5 Moo. P. C. C. 201; 4 Notes of Cases, App. 21; 7 L. T. O. S. 445; 10 Jur. 233; 13 E. R. 468, P. C.; *See subsequent proceedings*, 5 Notes of Cases, 91, P. C.

Annotations.—*W.F.* *Esto v. Este* (1851), 2 Rob. Eccl. 351. *Consd.* *Brenchley v. Lynn* (1852), 2 Rob. Eccl. 441. *Fold.* *De Chatain v. De Pontigny* (1859), 1 Sw. & Tr. 411. *Consd.* *In the Goods of Hallyburton* (1860), L. R. 1 P. & D. 90. *Appl.* *Paglar v. Tongue* (1866), L. R. 1 P. & D. 158. *Fold.* *In the Goods of De Pradel* (1867), L. R. 1 P. & D. 454. *Appl.* *Noble v. Phelps* (1871), L. R. 2 P. & D. 276. *Consd.* *In the Goods of Graham* (1872), L. R. 2 P. & D. 385; *Parkinson v. Townsend & Townsend* (1875), 44 L. J. P. & M. 32; *In the Goods of Tharp* (1878), 3 P. D. 76. *Refd.* *In the Goods of Wollaston* (1863), 32 L. J. P. M. & A. 171; *Hawksley v. Barrow* (1866), L. R. 1 P. & D. 147; *Phillips v. Jenkins* (1881), 44 L. T. 281; *In the Goods of Huber*, [1896] P. 209.

693. ———]—Since Wills Act, 1837 (c. 26).—An allegation propounding a will, dated in 1845, of a married woman, alleged the same to have been made in pursuance of a deed of settlement; but that deed was not produced:—*Held*: the allega-

tion must be reformed by pleading & annexing that instrument.

Though certainly there are some dicta in the judgment [of *Barnes v. Vincent*, No. 692, *ante*] leading to the conclusion that this ct. has no right to look to the power, I think they must be construed in reference to the law prior to 1838 (SIR H. JENNER FUST).—*ESTO v. ESTE* (1851), 2 Rob. Eccl. 351; 16 L. T. O. S. 469; 15 Jur. 159; 163 E. R. 1342.

See, further, POWERS.

694. Alteration of papers of which probate granted.—The Vice-Chancellor of England directed in a suit in equity certain promissory notes, which formed part of a probate, to be cancelled. The judge of the Prerogative Ct. on application made to cancel the notes refused to do so on the ground that he had no authority to alter papers of which probate had been taken.—*In the Goods of HUGHES* (1850), 2 Rob. Eccl. 341; 163 E. R. 1339.

695. Prohibiting dealings in share of ship.—*NICHOLAS v. DRACACHIS*, No. 687, *ante*.

696. To order execution of deed.—By any nominated person.—When order to execute disobeyed.—Judicature Act, 1884 (c. 61), s. 14.—*HOWARTH v. HOWARTH*, No. 688, *ante*.

Execution of deeds by order of court.—*See DEEDS*, Vol. XVII., pp. 216, 217, Nos. 288, 290.

697. Construction of documents.—Only for purposes of admission to probate.—A husband & wife, whose property consisted almost entirely of leaseholds, which they held as joint tenants, made in 1907 two identical wills, each in favour of the other, with certain similar provisions in favour of defts. to take effect upon the death of the survivor. These wills were made in pursuance of an agreement that they were to be irrevocable. The husband died in 1911, neither his will nor that of his wife having at that time been revoked. In 1912 the wife executed a codicil & in Jan. 1913, she executed a will. In May, 1913, the wife died. Pltfs., who were the exors. of the will of 1913, claimed the probate of that will in solemn form, & defts. who were legatees under the wife's will of 1907, asked the ct. to pronounce in favour of that will & alternatively claimed a declaration that pltfs. were trustees for defts. of the benefits given to defts. by the wife's will of 1907:—*Held*: the agreement together with the execution of the two wills of 1907 severed the joint tenancy & created a tenancy in common; as a will is in its nature & essence revocable the wife's will of 1907 did not become irrevocable on the death of her husband, & therefore the ct. must pronounce in favour of the will of 1913; even if there was a contract giving rise to a trust in favour of defts., inasmuch as the Probate Div. should as a rule only construe testamentary documents so far as it is necessary to decide whether they should be admitted to probate, the ct. ought not to make a declaration of any trusts, but ought to leave defts. to pursue their remedies in the Ch Div.

No doubt, theoretically, this ct. as a ct. of one of the Divisions of the High Ct. of Justice, under the Judicature Acts can & ought to— but only where it can conveniently & properly do so—decide all matters in controversy in any action between the parties to the action (SIR S. EVANS, P.).—*In the Estate of HEYS, WALKER v. GASKILL*, [1914] P. 192; 83 L. J. P. 152; 111 L. T. 941; 30 T. L. R. 637; 59 Sol. Jo. 45.

698. In matter commenced in or transferred to county court.—When a testamentary cause, in which a county ct. has jurisdiction, has been commenced in, or has been transferred to, a county ct.,

Sect. 1.—Jurisdiction: Sub-sect. 1, A. (a) & (b), & B.]

the Ct. of Probate has no power to grant a new trial, or to make any order in the cause, unless it is brought before it by way of appeal from the determination of the judge of the county ct. in point of law, or upon the admission or rejection of evidence, under Court of Probate Act, 1857 (c. 77), s. 58.—*ZEALLEY v. VERYARD* (1866), L. R. 1 P. & D. 195; 14 L. T. 769; 30 J. P. 663; 14 W. R. 970; *sub nom.* *LEALLEY v. VERYARD*, 35 L. J. P. & M. 127.

699. — Jurisdiction as to costs before transfer.]—After a testamentary cause has been transferred from the Probate Ct. to a county ct., the Probate Ct. has no power to make an order as to the costs incurred before the transfer. The judge of the county ct. has power to make an order as to such costs.—*MACLEUR v. MACLEUR* (1868), L. R. 1 P. & D. 604; 37 L. J. P. & M. 68.

See, now, County Courts Act, 1919 (c. 73), s. 12, & generally, COUNTY COURTS, Vol. XIII., pp. 490 et seq.

Probate jurisdiction of county cts., *see, generally, Sub-sect. 1, C., post.*

700. Grant sealed in Ireland—Not resealed in England.]—Irish Probate Act, 1857 (c. 79), s. 95, which enables an Irish grant to be resealed in England does not take away the power of the English ct. to grant probate or letters of administration in cases where the Irish grant has not in fact been resealed.—*In the Estate of MILLAR, IRWIN v. CARUTH*, [1916] 1 P. 23; 85 L. J. P. 25; 114 L. T. 373; 32 T. L. R. 193; 60 Sol. Jo. 210.

Irish & Scottish grants generally, *see* Part II., Sect. 18, sub-sects. 1 & 2, *post.*

Jurisdiction of district registries.]—*See, now, Administration of Justice Act, 1925 (c. 28), s. 18 (1), (3).*

(b) Foundation of Jurisdiction.

701. For letters of administration—Personalty in England.]—The Ct. of Probate having, as a general rule, no jurisdiction to grant letters of administration unless deceased leaves personal property in this country, where administration to the estate of a person, who died resident abroad, is applied for, it should appear upon affidavit that he left personal property in this country. Where A., the person primarily entitled to letters of administration, is abroad, & a citation has issued, but has not been personally served, calling on him to accept or refuse letters of administration, or show cause why they should not be granted to B., who, in the event of A.'s refusing to accept administration, would be entitled to them, the ct., before granting administration to B., requires an affidavit that A. has no agent in this country.—*EVANS v. BURRELL* (1859), 4 Sw. & Tr. 185; 28 L. J. P. & M. 82; 23 J. P. 280; 164 E. R. 1487.

702. — — —.]—Administration will not be granted when it appears that deceased left no personal property in England.—*In the Goods of FITTOCK* (1863), 32 L. J. P. M. & A. 157; 9 Jur. N. S. 311.

703. — English administration required by law of country where assets situate.]—A married woman died intestate in France, leaving personal property there, but none in this country. Her husband, who survived her, was by the law of France unable to obtain possession of deceased's property without first obtaining letters of administration in England.—*Held*: as deceased left no personal property in England, the ct. had no jurisdiction to grant to her husband administra-

tion limited to the purpose of substantiating in France his title to the property there situate.—*In the Goods of TUCKER* (1864), 3 Sw. & Tr. 585; 34 L. J. P. M. & A. 29; 164 E. R. 1402.

Annotations:—Held. In the Goods of LOCK (1875), 40 J. P. 168; *In the Goods of MURRAY*, [1896] P. 65.

704. — With will annexed—Property within the jurisdiction.]—Testator was lost at sea having made a will by which he constituted his wife his universal legatee. The wife died without having proved the will, & after her death the Bank of England required her representatives to take out administration to the estate of testator before they would transfer or pay the dividends on certain stock which the widow had been in the habit of receiving regularly during her widowhood. In the absence of proof that the husband died possessed of property within the jurisdiction, the ct. refused to grant administration with the will annexed of his effects to the administrator of the widow. The ct. will not, for the protection or convenience of the Bank of England, depart from its ordinary requirements.—*In the Goods of LOCK* (1875), 40 J. P. 168; 24 W. R. 281.

705. — Assets in jurisdiction.]—(1) A creditor will not be granted letters of administration to defeat the right of retainer of the next of kin unless he can show the existence of assets in the jurisdiction.

(2) A general allegation of information & belief as to the existence of assets is useless.—*In the Goods of FOY* (1898), 78 L. T. 49.

706. For probate of will—No property in England passing under will.]—The ct. refused to grant probate of an authenticated copy of a will, of which the original had been lost, where it did not appear that there was any property in this country upon which the original will could have operated.—*In the Goods of ROBINSON* (1859), 23 J. P. 263.

707. — — —.]—As personal property, wherever situate, follows the person, the ct. will grant probate of a document though it purports to deal only with property out of its jurisdiction.—*In the Goods of WINTER* (1861), 4 Sw. & Tr. 204; 30 L. J. P. M. & A. 56; 25 J. P. 217; 164 E. R. 1494.

708. — — —.]—A will disposing only of property in a foreign country is not entitled to probate in this country.—*In the Goods of OODNE* (1867), L. R. 1 P. & D. 449; 36 L. J. P. & M. 129; 16 L. T. 746.

Annotations:—Distd. In the Goods of HARRIS (1870), 22 L. T. 630; *In the Goods of HOWDEN* (1874), 43 L. J. P. & M. 26. *Held. In the Goods of MURRAY*, [1896] P. 65.

709. — — — Separate wills of English estate & foreign immovables.]—*In the Goods of TAMPLIN*, No. 1391, *post.*

710. — — — Property brought to England after death.]—The ct. granted probate of a will disposing of property abroad where some of the property that passed under that will was brought to England.—*STURRINGS v. CLUNIES-ROSS* (1911), 27 T. L. R. 361.

Separate wills for foreign property—Whether incorporated in English probate.]—*See* Sect. 10, sub-sect. 7, B. (a), *post.*

711. Entry of caveat.]—Simple contract debts make *bona notabilia* where deceased died; whereas specialty debts constitute *bona notabilia* at the place where the specialty is at the time of the death. The mere entry of a caveat will not found the jurisdiction.—*FRANCE v. AUBREY* (1758), 2 Lee, 534; 161 E. R. 430.

Wills disposing of realty only.]—*See* Sect. 2, sub-sect. 2, *post.*

Wills appointing executors.]—See Nos. 867, 868, 872–877, *post*.

B. Chancery Division.

See Jud. Acts, 1873 (c. 66), 1875 (c. 77).

712. To grant probate—Former jurisdiction.]—A married woman having a power to appoint a sum of money by will, or by any writing in the nature thereof, signed, sealed, & published in the presence of two witnesses, by her will, made in 1837, & signed in the presence of two witnesses, but not sealed, assumed to appoint the sum in question, & other property & nominated an exor., who proved her will in the diocesan ct. The husband survived the wife, & after his death, his representative obtained letters of administration of the estate of the wife from the prerogative ct., & procured the diocesan ct. to recall the grant of probate to the exor. of the wife, so far as related to the sum in question. In a suit by the appointee of the wife, against the representative of the husband, & the trustees of the fund:—*Held*: the ct. could not treat the probate of the diocesan ct., which excluded from the grant the sum in question, as probate of a testamentary instrument executing the power; & a probate sufficient to cover the sum in question was necessary, in order to enable the party claiming under the appointment to sustain the suit. *Qu.*: whether, in such a case, if the party claiming under the appointment, by appealing from the ct. of probate, had shown that the probate had been refused by the ct. of ultimate jurisdiction in such causes, upon principles not recognised in this ct., this ct. would consider the question of the execution of the power independently of the probate.

If the ct. of probate has improperly refused to admit the will to proof, which I cannot assume, the matter may be set right by an appeal to the Privy Council; & if, as it has been urged, that Ct. should act on principles different from those which this ct. is in the habit of applying, & should, acting upon those principles, take upon itself to say that a document, which, in the opinion of this ct., is good as an exercise of the power, cannot be admitted to proof as a will, owing to some defect of form, it may be competent to this ct. to resume its old jurisdiction, & act independently of the ct. of probate (WIGHAM, V.-C.).—(GOLDSWORTHY v. CROSSLEY (1844), 4 Hare, 140; 67 E. R. 594.

713. ———.]—This ct. can entertain a suit to establish a will against parties claiming under a prior will, & disputing pltf.'s claim; a devisee being entitled to have the will established & his title quieted not only against the heir, but against all persons setting up adverse rights.

Qu.: whether the ct. can establish a will against a devisee claiming under another instrument, without directing an issue (except where an issue would be merely frivolous & vexatious).—LOVETT v. LOVETT (1856), 3 K. & J. 1; 28 L. T. O. S. 98; 2 Jur. N. S. 1130; 5 W. R. 5; 69 E. R. 997.

714. ———.]—Under Judicature Acts—Discretion of court.]—PINNEY v. HUNT, No. 859, *post*.

715. To revoke probate—Discretion of court.]—BRADFORD v. YOUNG, No. 2916, *post*.

716. ———.]—In an action in the Probate Div. T. & G. propounded an earlier & P. a later will. The action was compromised, & by consent verdict & judgment were taken for establishing the earlier will. Subsequently P. discovered that the earlier will was a forgery, & in an action in the Ch. Div., to which T. & G. were parties, obtained the verdict of a jury to that effect, & judgment that the com-

promise should be set aside. In another action in the Probate Div. for revocation of the probate of the earlier will:—*Held*: T. & G. were estopped from denying the forgery. *Semble*: a ct. of the Ch. Div. has no jurisdiction to revoke the probate of a will.—PRIESTMAN v. THOMAS (1884), 9 P. D. 210; 53 L. J. P. 109; 51 L. T. 843; 32 W. R. 842, C. A.

Annotations:—*Mentd.* *Re* Owtram, Marshall v. Edolston (1884), 50 L. T. 592; Cole v. Langford, [1898] 2 Q. B. 36; Wyatt v. Palmer (1899), 80 L. T. 639; Birch v. Birch, [1902] P. 62; Poulton v. Adjustable Cover & Boiler Block Co., [1908] 2 Ch. 430.

See, generally, Sect. 13, *post*.

717. To relieve against testamentary dispositions—After probate granted—On ground of undue influence.]—Testator by his will & codicils gave A. large bequests, which he revoked by a final codicil, providing only a small weekly allowance for him during his life. The will & all the codicils having been admitted to probate, after litigation as to the last codicil in the Ecclesiastical Ct., A. filed a bill in Ch. alleging that testator had executed the last codicil under undue influence of the residuary legatee, & false representations made at her instance respecting A.'s character; & that he had not been permitted in the Ecclesiastical Ct. to take any objections to that codicil, except such as affected the validity of the whole instrument: the bill therefore prayed that the exors. or residuary legatee might be declared trustees or trustee for A. to the amount of the revoked bequests:—*Held*: (1) the Ct. of Ch. had no jurisdiction in the matter, & the proper course would have been an appeal to the Judicial Committee of the Privy Council against the sentence of the Ecclesiastical Ct.

It was formerly considered that fraud in obtaining a will might be investigated & redressed in a ct. of equity, but that doctrine has long since been overruled (LORD LYNDHURST).

(2) It is perfectly clear that the Ecclesiastical Ct. may admit a part of an instrument to probate, & refuse it as to the rest (LORD LYNDHURST).—ALLEN v. M'PHERSON (1817), 1 H. L. Cas. 191; 11 Jur. 785; 9 E. R. 727, H. L.

Annotations:—*As to* (1) FOLLE, Meluish v. Milton (1876), 2 Ch. D. 27. *Reid*. (Campbell v. Beaufort (1859), John. 329; Pinney v. Hunt (1877), 6 Ch. D. 98. *As to* (2) *Consd.* *In the Goods of Duano* (1862), 2 Sw. & Tr. 590; Guardhouse v. Blackburn (1866), L. R. 1 P. & D. 109. *Reid*. Harter v. Harter (1873), L. R. 3 P. & D. 11. *Generally*, *Mentd.* Newton v. Ricketta (1847), 9 L. T. O. S. 430; Morgan v. Annis (1849), 3 De G. & Sm. 461; Hindson v. Weatherill (1854), 5 De G. M. & G. 301.

718. ———.]—On ground of fraud.]—Testator made a will giving all his property to his wife, & appointing her sole extrix. She proved the will. The heir at law & sole next of kin filed a bill to have her declared a trustee of the property for him, on the ground that she had fraudulently concealed from testator the fact that she was not his lawful wife, as she had a former husband living:—*Held*: the Ct. of Ch. had no jurisdiction to entertain the case, which was within the exclusive jurisdiction of the Ct. of Probate; & the case was not distinguished from *Allen v. M'Pherson*, No. 717, *ante*, by the fact that the lady had not asked testator to make a will in her favour.—MELUSH v. MILTON (1876), 3 Ch. D. 27; 45 L. J. Ch. 836; 35 L. T. 82; 24 W. R. 892, C. A.

Effect of Judicature Acts—On Divisions of High Court.]—See COURTS, Vol. XVI., p. 174, Nos. 800 *et seq.*

Jurisdiction of Chancery Division generally.]—See COURTS, Vol. XVI., p. 176, Nos. 820 *et seq.*

Transfer of former jurisdiction of Court of Chancery—To Probate Division.]—See No. 687, *ante*.

Sect. 1.—Jurisdiction: Sub-sect. 1, C. & D.; sub-sect. 2. Sect. 2: Sub-sect. 1, A. & B. (a), (b) i.]

C. County Courts.

County Courts, generally, see COUNTY COURTS, Vol. XIII., pp. 441 *et seq.*

See Court of Probate Act, 1857 (c. 77); Court of Probate Act, 1858 (c. 95); Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 150, Sched. V., Part I., 1 (i).

Reality not amounting to £300.—See COUNTY COURTS, Vol. XIII., p. 557, Nos. 1147, 1148.

719. Cause commenced in or transferred to county courts—Jurisdiction of county court as to costs before transfer.—MACLEUR v. MACLEUR, No. 699, *ante*.

Costs of probate actions generally, see Sect. 20, *post*.

—Jurisdiction of Court of Probate.—See Nos. 698, 699, *ante*.

See, now, County Courts Act, 1919 (c. 73), s. 12, &, generally, COUNTY COURTS, Vol. XIII., pp. 490 *et seq.*

720. Remitting actions to county court—Practice on application—Evidence.—By Court of Probate Act, 1857 (c. 77), s. 59, it is provided, that where, in any contentious matter arising out of an application for probate or administration, it is shown to the Ct. of Probate that the state of the property & the place of abode of deceased were such as to give contentious jurisdiction to the judge of a county ct., the Ct. of Probate may send the cause to such ct.:—*Held*: where proceedings have been commenced in the Ct. of Probate, the Ct. will receive evidence from both sides as to the state of the property, & the place of abode of deceased, before it determines whether or not it will send the cause to the proper county ct.—*SLATER v. ALVEY* (1870), 1 L. R. 2 P. & D. 154; 23 L. T. 324; 34 J. P. 604; 18 W. R. 1108.

—*J.*—See, generally, COUNTY COURTS, Vol. XIII., pp. 483 *et seq.*

Administration of estates of deceased persons.—See COUNTY COURTS, Vol. XIII., p. 473.

D. Courts of Dominions and Dependencies.

721. Straits Settlements.—By the Civil Procedure Code, 1907 (Ordinance No. XXXI. of

1907), of the Straits Settlements, s. 3, where no other provision is made the English procedure shall be followed & adopted, & therefore probate may be granted of the will of a person domiciled outside the Settlements upon proof that it is a valid will according to the law of the domicile, & that there are assets within the jurisdiction.

According to English practice, probate may be granted of the will of a person domiciled abroad upon proof that it is a valid will according to the law of the domicile, & that there are assets within the jurisdiction. It is not necessary that it should be first proved in the cts. of the domicile (*LORD PARKER*).—*MEYAPPA CHETTY v. SUPRAMANIAN CHETTY*, [1916] 1 A. C. 603; L. R. 43 Ind. App. 113; 114 L. T. 1002; *sub nom.* CHETTY v. CHETTY, 85 L. J. P. C. 179, P. C.

Annotation:—*Mentd.* Kelsey v. Kelsey (1922), 91 L. J. Ch. 382.

Jurisdiction of colonial courts, generally, see DEPENDENCIES, Vol. XVII., pp. 452 *et seq.*

SUB-SECT. 2.—PROPERTY WITHIN THE JURISDICTION.

As condition precedent to jurisdiction, see Sub-sect. 1, A. (b), *ante*.

722. Bond.—*DANIEL v. LUKER*, No. 2934, *post*.

723. Simple contract debt.—A promissory note due to testator domiciled in England, by a person resident at the Cape, passes by the words: "property I shall leave in the Colony."

The law, therefore, says that for the purpose of determining in what ct. to take out probate, there shall be observed certain rules with respect to the locality, or supposed locality of the property; & where there is a simple contract debt upon a promissory note, the ct. has said, that for the purpose of probate that debt shall be considered as having locality in the place where the debtor inhabited, which I understand to be the same as that of his residence (*KINDERSLEY, V.-C.*).—*SCOREY v. HARRISON* (1852), 20 L. T. O. S. 302; 16 Jur. 1130.

See, generally, CHOSSES IN ACTION, Vol. VIII., p. 423; CONFLICT OF LAWS, Vol. XI., pp. 858 *et seq.*

PART II. SECT. 1, SUB-SECT. 1.—D.

a. For probate—No property in jurisdiction.—A will disposing of property in a foreign country only is not entitled to probate in Victoria, though the testator be domiciled in Victoria.—*Re PALMER'S WILL* (1904), 29 V. L. R. 946.—*AUS.*

c. —.—The high ct. of Madras has no jurisdiction to grant probate, or letters of administration of estate of intestate, who did not dwell, & who did not leave assets, within the limits of the Presidency.—*Re LEARMOUTH* (1900), 1 L. R. 24 Mad. 120.—*IND.*

p. —.—The foundation of the jurisdiction of the Ct. of Probate is that there are assets of deceased to be distributed within its jurisdiction. Therefore the ct. refused to grant administration to an officer whose domicile was Ireland, but who died in India, & whose only assets were some property in India & a sum of money in the hands of the Secretary of State for War.—*In the Goods of BURTON* (1881), 9 L. R. Ir. 21.—*IR.*

q. —.—**Domicil of testator governs grant.**—In the absence of special circumstances, probate will be refused in any district other than that in which testator was resident or domiciled at

the time of his death.—*Re CLEARY'S WILL* (1893), 12 N. Z. L. R. 151.—*N.Z.*

r. —.—Deceased, a married woman, living with her husband in one judicial district, died there. By her will she gave her property to a beneficiary, who resided in another district, where the whole of the estate was situated. The executor applied for probate in the latter district:—*Held*: the application must be made in the district in which the testatrix was resident or domiciled.—*Re TAYLOR* (1902), 22 N. Z. L. R. 388.—*N.Z.*

s. —.—**Property in jurisdiction—Of testator domiciled elsewhere.**—The Ct. of Probate in Ireland has jurisdiction to grant probate of testator whose assets were in Ireland, although his domicile was English.—*ROBINSON v. PALMER*, [1901] 2 I. R. 489.—*IR.*

t. Jurisdiction of surrogate court.—The personality of a person who died since Devolution of Estates Act was less than \$2,000, but the whole estate, including land, was more:—*Held*: a contest as to probate could not be removed from a surrogate ct. to the high ct.—*Re NIXON* (1889), 13 P. R. 314.—*CAN.*

a. —.—The jurisdiction to award a grant, being a discretionary kind, could be exercised by the surro-

gate judge.—*Re McLEOD* (1894), 16 P. R. 261.—*CAN.*

b. —.—The jurisdiction of the surrogate judge, in all matters of which he becomes seized during the absence of the judge, continues undiminished until he shall be discharged thereof by the delivery of final judgment.—*R. v. FOSTER, EASON'S ESTATE* (1897), 30 N. S. R. (18 R. & G.) 1.—*CAN.*

c. —.—Where applications for letters of administration are made in more than one surrogate ct. preference will be given to that made by the person nearest in the order in which administration is usually granted.—*Re TOUGHER* (1901), 22 C. L. T. 98; 3 O. L. R. 144.—*CAN.*

d. County Court jurisdiction.—Govt. of Ireland (Supreme Ct. Matters, etc.) Order, 1922, has not deprived county ct. judges in the counties within the Principal Probate Registry of Northern Ireland of their jurisdiction in probate matters under County Officers & Cts. (Ireland) Act, 1877.—*BRIGGS v. BRENNAN* (1922), 56 I. L. T. 92.—*IR.*

PART II. SECT. 1, SUB-SECT. 2.

a. Insurance policy.—An insurance policy, being a chose in action, must be deemed to be property

746. ——— ———.] — *Re DAVIES* (1902), 46 Sol. Jo. 338.

Sect. 2.—Presumption of death and survivorship: Sub-sect. 1, B. (b) i. & ii., (c) & C. (a), (b), (c) & (d);

747. ———.]—*In the Goods of HENNAH* (1902), 46 Sol. Jo. 451.

748. ———.]—*In the Goods of HAMBLAY* (1902), 46 Sol. Jo. 602.

749. ——— *Admiralty satisfied of loss.*]—*In the Goods of SOLATER* (1902), 46 Sol. Jo. 480.

750. ———.]—*In the Goods of TRANCHANT* (1902), 47 Sol. Jo. 31.

ii. *Personal Belongings Found.*

751. *On sea-shore.*]—*Re WATKINS* (1902), 46 Sol. Jo. 359.

752. *Near cliff-edge.*]—*In the Goods of LAKE* (1903), 47 Sol. Jo. 279.

(c) *Following Competent Court.*

753. *Foreign court.*]—Deceased, with his wife & children, sailed from Calcutta to South Australia in 1839. Neither the ship, crew nor any of the passengers, had since been heard of, & the insurance had been paid upon the cargo as for a total loss. Administration of deceased's effects in India had been granted by the Ct. of Calcutta. Administration of his effects in England was now granted, without the usual advertisement, to his brother.—*In the Goods of WOODRICH* (1844), 2 L. T. O. S. 335.

754. ———.]—Where a party dies abroad, & his will is proved, & the estate administered to there, & the property brought to this country, although there is no certificate of burial, the ct. will consider that sufficient evidence of death, & will direct payment to the exor.—*JERRAD v. SPICER* (1863), 11 W. R. 634.

755. ———.]—Where a foreign ct. of competent jurisdiction had made a grant of administration on the presumption of the death of intestate:—*Held*: the grant might be accepted by the Ct. of Probate as sufficient proof of the death without requiring it to be proved by independent evidence.—*In the Goods of SPENCERLEY*, [1802] P. 255; 61 L. J. P. 133.

756. *Inferior court.*]—On an application for presumption of death, a previous order to the same effect made by an inferior ct. of competent jurisdiction, supported by a general affidavit of the facts of the case on behalf of appt., will be accepted as sufficient evidence & followed without the production *de novo* of the evidence to support such an application usually required by the practice of this ct.—*In the Goods of RISITON* (1921), 90 L. J. P. 374; 125 L. T. 863; 37 T. L. R. 798.

C. *Practice.*

(a) *In General.*

757. *Provisional grant—Pending further evidence.*]—*In the Goods of SMYTH*, No. 760, *post*.

758. ———.]—*In the Goods of PEACOCK* (1902), 46 Sol. Jo. 603.

PART II. SECT. 2, SUB-SECT. 1.—C. (a).

h. Grant on giving security.]—B., a captain in the Bombay Staff Corps, who was in England on leave of absence, left his lodgings in London on Feb. 4, 1868, with his luggage, stating he was going to Ireland. He had never since been heard of, nor could anything be heard of his luggage, though advertisements & inquiries had been made.—*Held*: a grant of administration with will annexed might be granted to his brother on giving security, & on the renunciation of the exor., named in the will,

as the ct. could not dispense with justifying security.—*In the Goods of MCKREDY* (1868), 15 L. T. 134.—*IR.*

PART II. SECT. 2, SUB-SECT. 1.—C. (b).

k. In case of disappearance.]—W. left his home in New Zealand taking one son with him, but deserting his wife & other children. He was known to have been alive & in San Francisco during the first seven years of his absence.—*Held*: as W. might have made a will during the first seven years of his absence, administration of estate ought not to be granted. Advertise-

759. *Grant to remain in registry—Pending seven years from disappearance.*]—*In the Goods of WINSTONE*, No. 731, *ante*.

(b) *Necessity for Advertisements.*

* 760. *In case of disappearance—Previous advertisements not answered—Eight years before.*]—S. had not been heard of since 1828. Advertisements offering a reward for information respecting him were inserted, without result, in 1841. The ct. granted the administration to his estate, without requiring further advertisements.—*In the Goods of STEVENSON* (1849), 13 Jur. 736.

761. ——— *Twenty-five years before.*]—On an application for leave to swear an affidavit of the death of a person who had disappeared, the ct., though the estate was small, & the person had not been heard of for twenty-five years, ordered the advertisements requesting information concerning him should be published in newspapers.—*In the Goods of ROBERTSON*, [1896] P. 8; 65 L. J. P. 16.

762. ——— *Seventeen years before—Deceased in bad health at time of disappearance.*]—*In the Goods of WORSTER* (1903), 47 Sol. Jo. 515.

763. ——— *Administration of foreign effects granted by foreign court.*]—*In the Goods of WOODRICH*, No. 753, *ante*.

764. *In case of loss at sea—Whether dispensed with—Special circumstances necessary.*]—Where a sailor is supposed to have been lost at sea, the ct. will only grant probate of his will, without the usual advertisement in the public papers, under peculiarly strong circumstances.—*In the Goods of DUNCAN* (1844), 3 L. T. O. S. 140; 8 J. P. 362.

765. ——— *Existence of deceased traced up to supposed cause of death.*]—N., a settler in New Zealand, embarked July 1, 1856, in a vessel bound for Sydney, on his way to England. The vessel never reached Sydney; & no intelligence, after inquiries had been instituted, having been obtained as to the vessel or any of those on board, she was supposed to have foundered at sea in some heavy gales which occurred at the time she was making the voyage in question:—*Held*: the death of N. was to be presumed; & advertisements in newspapers for persons supposed to be dead might be dispensed with, when their history was known & traced to within a short period of their being last heard of.

Advertisements in newspapers are very well, if nothing has been heard of a person for some time. Here, as you trace the history of deceased up to a certain time, & then lose sight of him, I think they may be dispensed with (SIR C. CRESSWELL).—*In the Goods of NORRIS* (1858), 1 Sw. & Tr. 6; 27 L. J. P. & M. 4; 30 L. T. O. S. 294; 6 W. R. 261.

(c) *Evidence.*

766. *Inquiries near scene of loss—Provisional grant preceding inquiries.*]—On Nov. 15, 1857, S.

ments required to be published in San Francisco, stating that inquiries were being made, & that administration of W.'s estate would be granted if no communication regarding him was received.—*Re WALLER* (1904), 24 N. Z. L. R. 623.—N.Z.

PART II. SECT. 2, SUB-SECT. 1.—C. (c).

1. *Certificate of belief in death or report of court of inquiry—Soldiers serving with Expeditionary Force.*]—The ct. will accept a certificate by the Defence Department, certifying on the authority of the Adjutant-

sailed from Barcelona to Constantinople, the average duration of the voyage being thirty days. The vessel had never arrived at her destination, nor had anything been since heard of her or the crew, & the insurers of the ship had paid as upon a total loss. The ct. refused to grant administration to the effects of S., as it did not appear that any inquiries had been made for the crew at Barcelona; but allowed administration to pass conditionally on an affidavit of such inquiries having been made without result being filed in the registry.—*In the Goods of SMYTH* (1858), 28 L. J. P. & M. 1.

767. Loss of ship already proved—Whether further proof necessary.—When it has been proved to the satisfaction of the ct. in one case that a ship has been lost with all on board, it is not necessary to apply to the ct. in the case of each person lost with the ship, as the decision in the first case will be sufficient authority to the registry to act on the assumption that every one who sailed in the ship is dead.—*In the Goods of WILLS* (1859), 23 J. P. 328.

768. Presence of deceased on board ship—Certificate of Registrar-General of Shipping.—Upon motion to presume the death of a man who sailed from this country for Western Australia on board a small vessel which called at Cape Town & was never heard of after leaving that port, the certificate of the Registrar-General of Shipping & Seamen was produced, which stated (*inter alia*), that the person in question was returned as serving upon the vessel as second mate at the time when she was last heard of, & that he was "supposed drowned." The certificate was furnished in pursuance of the provisions of Merchant Shipping Act, 1894 (c. 60), & two members of deceased's family swore to their belief in his death. The underwriters of the vessel had paid the insurance money, as upon a total loss, & notice had been given to the office with whom deceased's life was insured. The ct. presumed the death as having occurred on or since the date when the vessel was last heard of.—*In the Goods of DODD* (1897), 77 L. T. 137.

769. — Admiralty certificate.—*In the Goods of BURNS* (1902), 46 Sol. Jo. 634.

770. Affidavit as to advertisements—Form.—*In the Goods of BOOTH* (1859), Sea. & Sm. 23.

771. Affidavit of belief in death—Necessity for.—On an application for leave to presume the death of a person who has disappeared, the affidavit of the appct. should contain a statement of belief that the death occurred at the alleged date.—*In the Goods of HURLSTON*, [1898] P. 27; 67 L. J. P. 69.

772. — Corroborative affidavit—By member of family.—*In the Goods of PRISICK* (1902), 46 Sol. Jo. 464.

773. — — — — ——Although it may not be an invariable rule, it certainly is the practice of this ct. to require these motions to be supported by affidavits of two members of the family deposing of their belief in the death. If there are two members of the family who can depose to the facts they should always do so. The amount of the estate should also be sworn & whether or not the presumed deceased was insured & where. Moreover, notice of the motion should be given to the insurance cos. (JEUNE, P.).—*In the Goods of PEACOCK* (1902), 46 Sol. Jo. 603.

— Allowed without application for leave to presume.]—See No. 829, *post*.

(d) *Where Deceased Insured.*

774. Necessity for notice to insurers.—*In the Goods of MORIVIAN* (1902), 46 Sol. Jo. 587.

775. ——*In the Goods of PEACOCK* (1902), 46 Sol. Jo. 603.

776. ——*In the Goods of LORD* (1903), 47 Sol. Jo. 299.

See, also, Nos. 743, 768, *ante*.

777. Necessity for consent of insurers.—*In the Goods of PRISICK* (1902), 46 Sol. Jo. 464.

778. Consent of insurers to be filed.—On a motion for a grant of probate & for leave to depose as to the death of testator, although the only proof of his death was by presumption from his disappearance, it appeared that notice of the motion had been given to a co. with whom testator had insured his life, & that a letter had been written in reply stating that the company did not intend to interfere in the proceedings. The ct. granted the application subject to the letter being filed.—*In the Goods of SAUL*, [1896] P. 151; 65 L. J. P. 101.

SUB-SECT. 2.—PERSONS OTHER THAN TESTATORS AND INTERESTES.

779. Person primarily entitled to administration of deceased's estate.—*In the Goods of SMITH*, No. 1823, *post*.

780. ——Upon application by the next of kin of a married woman for a grant of administration to her estate, the ct. was asked to allow an affidavit to be made of the death of her husband, on the ground that his death might be presumed from the lapse of time since he was last heard of:—*Held*: having regard to the fact that the person whose death was to be presumed was not the intestate, such leave should not be given, but that administration might be granted if appct. was prepared to make an affidavit that intestate had died a widow.—*In the Goods of CLARK* (1889), 15 P. D. 10; 59 L. J. P. 6; 61 L. T. 653; 38 W. R. 448.

781. Legatee—Whether dying before or after testator.—A legatee under a will who had not been heard of since the year 1848 was presumed to be dead at the expiration of seven years, but there being no evidence to fix the death at any particular period, it was held that he had died subsequently to the death of testator in 1851, & that his representatives were entitled to the legacy.—*DUNN v. SNOWDEN* (1862), 2 Drew. & Sm. 201; 32 L. J. Ch. 104; 7 L. T. 558; 11 W. R. 160; 62 E. R. 598.

Annotations:—*Expld. Thomas v. Thomas* (1864), 2 Drew. & Sm. 298. *Consd. Re Phen's Trusts* (1870), 5 Ch. App. 139. *Reid. Re Bonham's Trust* (1867), L. R. 4 Eq. 416; *Re Lewes' Trusts* (1870), 23 L. T. 692.

782. ——*A. was not heard of after 1850. B., in whose will he was named a legatee, died in Sept. 1851. The ct., in granting administration of the goods of A., allowed the death to be stated as having occurred subsequently to the death of B.*—*In the Goods of SCAIFE* (1868), 18 L. T. 696; 32 J. P. 631.

783. ——*A legatee under a will left England before the date of the will, & one year after such date, being at Melbourne, left his wife, & had never since been heard of. Testator died three years & a half after such disappearance, &*

General that official information has been received at headquarters that deceased has been killed in action, has died of wounds, or otherwise has died

on active service.—*Re GRANT* (1915), 34 N. Z. L. R. 641.—N.Z.

m. — — —.—*Re JAMESON*, [1916]

N. Z. L. R. 526.—N.Z.

n. — — —.—*Re TOTHILL*, [1916] N. Z. L. R. 527.—N.Z.

Sect. 2.—Presumption of death and survivorship:
Sub-sect. 2, 3 & 4.]

there was evidence that the legatee, who was thirty-five years of age when he disappeared, had been for some years addicted to habits of intoxication, but none as to his then state of health:—*Held*: the *onus* of proof of the death of the legatee lay on those seeking to prove that he predeceased testator; & that, in the absence of evidence of the legatee's state of health, he must be presumed to have lived seven years after his disappearance.—*THOMAS v. THOMAS* (1864), 2 Drew. & Sm. 298; 11 L. T. 471; 13 W. R. 225; 62 E. R. 635.

Annotations:—*Consd. Re Phené's Trusts* (1870), 5 Ch. App. 139. *Reid. Re Benham's Trust* (1867), L. R. 4 Eq. 416; *Re Lewes' Trusts* (1870), 23 L. T. 692.

784. ———. *—F.*, by his will, bequeathed the residue of his estate to his nephews & nieces, share & share alike. F. died on Jan. 5, 1861. N. P. M., one of the nephews, left his home in Germany on Aug. 19, 1853, & always wrote home regularly until Aug. 1858. The last letter received from him was addressed to his mother from on board the United States frigate Roanoke, Aug. 15, 1858. He was never directly heard of again by any of his family. In 1867, upon inquiries being made of the United States naval authorities, information was received that N. M., a sergeant of marines in the service of the United States, deserted June 16, 1860, while on leave, & had not since been heard of. This information was in answer to a letter of inquiry which stated the letter of N. P. M. of Aug. 15, 1858, to his mother. A petition was, in 1869, presented by the administrator of N. P. M. for payment to him of a share of the residue of the estate of F., which was in ct. to an account entitled "The account of the share intended for N. P. M."—*Held*: the administrator of N. P. M., not having proved that N. P. M. survived testator, had not established any title to the fund.—*Re PHENÉ'S TRUSTS* (1870), 5 Ch. App. 139; 30 L. J. Ch. 316; 22 L. T. 111; 18 W. R. 303, C. A.

Annotations:—*Fold. Re Lewes' Trusts* (1871), 6 Ch. App. 356. *Consd. Re Rhodes, Rhodes v. Rhodes* (1887), 36 Ch. D. 586; *Re Aldersey, Gibson v. Hall*, [1905] 2 Ch. 181. *Reid. Hickman v. Upsall* (1875), L. R. 20 Eq. 136; *Re Corbishley's Trusts* (1880), 49 L. J. Ch. 266. *Mentd. Wills v. Palmer* (1904), 53 W. R. 169.

785. ———. *Evidence inconclusive—Legacy carried to separate account.*—Where the evidence that a legatee did not survive testator is not conclusive, & it appears that better evidence might possibly be obtained, the ct. will not draw an inference in law that the legatee is dead, but direct the amount of the legacy to be carried to a separate account.—*Re RHODES, FRASER v. RENTON* (1873), 28 L. T. 392.

786. ———. *Onus of proof.*—Testator & two of the legatees of his will perished in a ship, which was supposed to have foundered. There being no evidence of survivorship:—*Held*: the bequest failed.

You must prove that they survived testator in order that they may be entitled to take (*ROMILLY, M.R.*)—*BARNETT v. TUGWELL* (1862), 31 Beav. 232; 31 L. J. Ch. 629; 7 L. T. 121; 8 Jur. N. S. 787; 10 W. R. 679; 51 E. R. 1127.

Annotation:—*Mentd. Oocleston v. Fullalove* (1874), 9 Ch. App. 147.

PART II. SECT. 2, SUB-SECT. 3.

a. Presumption apart from evidence—Relative—Drowning.—Where two or more persons, & especially where relatives, perish in the same calamity, the law recognises no pre-

sumption of survivorship; but in the total absence of all evidence respecting the particular circumstances of the calamity, the matter will be treated as if all of them had perished at the same moment, & consequently none of the parties will be held to have

787. ———. *—*—*—*.]—*THOMAS v. THOMAS*, No. 783, *ante*.

788. ———. *—*—*—*.]—Where a legatee has not been heard of for seven years, his death will be presumed, & the *onus* of proving that he survived testator lies upon those who claim under him. In the absence of such proof, the legacy will be paid to the residuary legatee or the next-of-kin of testator, as the case may be.—*Re LEWES' TRUSTS* (1871), 6 Ch. App. 356; 40 L. J. Ch. 602; 24 L. T. 533; 19 W. R. 617, L. J.J.

Annotations:—*Consd. Re Corbishley's Trusts* (1880), 49 L. J. Ch. 266; *Re Rhodes, Rhodes v. Rhodes* (1887), 36 Ch. D. 586. *Reid. Hickman v. Upsall* (1875), L. R. 20 Eq. 136.

789. ———. *Dying in common disaster with testator.*—Testator, by his will, appointed an exor., & bequeathed the residue of his personal estate to A. Testator & A. were lost in the same ship, & there was nothing to show which of them was the survivor. The exor. renounced:—*Held*: as the bequest to A. did not take effect, & therefore was not transmissible to his personal representative, the widow of testator was entitled to administration with the will annexed.—*In the Goods of CARMICHAEL* (1863), 4 Sw. & Tr. 224; 1 New Rep. 377; 32 L. J. P. M. & A. 70; 27 J. P. 264; 11 W. R. 462; 164 E. R. 1502.

SUB-SECT. 3.—SURVIVORSHIP IN COMMON DISASTER.

See Law of Property Act, 1925 (c. 20), s. 184.

790. Presumption apart from evidence—Husband, wife & child—Drowning.—With respect to the priority of death, it has always appeared to me more fair & reasonable in these unhappy cases [husband, wife & child drowning] to consider all the parties as dying at the same instant of time, than to resort to any fanciful supposition of survivorship on account of the degrees of robustness (*SIR W. WYNNE*).—*WRIGHT v. NETHERWOOD* (1793), 2 Salk. 593, n.; 91 E. R. 497; *sub nom. WRIGHT v. SARMUDA*, 2 Phillim. 266, n.

Annotation:—*Mentd. Johnston v. Johnston* (1817), 1 Phillim. 447.

791. Husband & wife—Drowning.—(1) A husband appoints his wife extrix. & residuary legatee; he & his wife are drowned at the same time; administration with the will annexed granted to the next of kin of the husband.

I assume that they both perished at the same moment, & therefore I shall grant the administration to the representatives of the husband (*SIR JOHN NICHOLL*).

(2) There is nothing to take away the ordinary presumption that a man was likely to survive a woman in a struggle of this description (*SIR JOHN NICHOLL*).—*TAYLOR v. DIPLOCK* (1815), 2 Phillim. 261; 161 E. R. 1137.

Annotations:—*As to* (1) *Fold. In the Goods of Thompson* (1854), 22 L. T. O. S. 292; *Underwood v. Wing* (1854), 19 Beav. 459. *Reid. Doe d. Knight v. Nepean* (1833), 5 B. & Ad. 86.

792. ———. *—*—*—*.]—The husband & wife having been drowned together, the ct., the wife's next of kin not opposing, granted probate, in common form, of the husband's will to exors. substituted in the event of her dying in his lifetime, the will appointing her extrix. if living at his

transmitted any rights to the other.—*HARTSHORNE v. WILKINS* (1866), 2 Old. 276.—*CAN.*

p. ———. *—*—*—*.]—Testator, a mother, with her two daughters, sole beneficiaries under the will, perished

decease.—*In the Goods of SELWYN* (1831), 3 Hag. Ecc. 748; 162 E. R. 1331.

793. ———.] —Where husband & wife are drowned by the same accident the presumption is that they died at the same time; & in order to entitle the next of kin of the husband to the wife's property, it must be shown that he survived the wife.

Where a party dies possessed of property the right to that property passes to his next of kin, unless it be shown to have passed to another by survivorship (SIR HERBERT JENNER).—*SATTERTHWAITE v. POWELL* (1838), 1 Curt. 705; 163 E. R. 246.

Annotations:—Folld. *Underwood v. Wing* (1854), 19 Beav. 459. *Held.* *In the Goods of Nichols* (1872), 41 L. J. P. & M. 88.

794. ———.] —There is no presumption of law arising from age or sex as to survivorship among persons whose death is occasioned by one & the same cause. Nor is there any presumption of law that all died at the same time. The question is one of fact, depending wholly on evidence, & if the evidence does not establish the survivorship of any one the law will treat it as a matter incapable of being determined. The *onus probandi* is on the person asserting the affirmative.

Two persons, husband & wife, made their separate wills. In the husband's will the property was given to his wife, " & in case my wife shall die in my lifetime," then to W. in trust for the children on their coming of age, & in case all of them should die under age then to W. for his absolute use & benefit. In the wife's will, made under a power given by her deceased father, in default of the exercise of which the property was to go to relatives specifically named, the property was given to the husband, subject to interests in the children, " & in case my husband should die in my lifetime " then to W. absolutely. The husband & wife & two children perished at sea, being all swept off the deck by one wave, & all disappearing together:—*Held*: there was no presumption that the husband had survived the wife, or the wife the husband.—*WING v. ANGRAVE* (1860), 8 H. L. Cas. 183; 30 L. J. Ch. 65; 11 E. R. 397, H. L.; *affg.* S. C. *sub nom.* *UNDERWOOD v. WING*, 4 De G. M. & G. 633, L. C.

Annotations:—Folld. *Barnett v. Tugwell* (1862), 31 Beav. 232. *Consd.* *Re Phené's Trusts* (1870), 5 Ch. App. 139. *Folld.* *In the Goods of Alston* (1892), 66 L. T. 591. *Held.* *Re Green's Settlements* (1865), L. R. 1 Eq. 288; *In the Goods of Nichols* (1872), 41 L. J. P. & M. 88. *Mentd.* *Tennant v. Heathfield* (1855), 21 Beav. 255; *Hall v. Warren* (1861), 9 H. L. Cas. 420; *Evans v. Stratford* (1864), 2 Hem. & M. 142; *Re Tredwell, Jeffray v. Tredwell*, [1891] 2 Ch. 640; *Saccharin Corp'n. v. Quincey*, [1900] 2 Ch. 246.

795. ———.] —Where the bodies of a husband & wife were found in a river tied together in such circumstances that a verdict of suicide was returned at the coroner's inquest, the ct. gave leave to swear the death of the wife on or since the day she was last seen, & that there was no reason to believe that her husband had survived her.—*In the Goods of GOOD* (1908), 24 T. L. R. 493.

796. ———.] *Shipwreck.*—G., with his wife & three children, perished in a shipwreck. There being no evidence as to survivorship, & no will, the ct. granted administration of the estate of G., as having died a widower, to the maternal grandfather of the surviving children, & directed that the administrator's oath, instead of being in the

usual form, should state that there was no reason for believing that the wife had survived her husband.—*In the Goods of GRINSTEAD* (1870), 21 L. T. 731; 34 J. P. 152.

797. ———.] *Collapse of house.*—*In the Goods of THOMPSON* (1854), 22 L. T. O. S. 292.

798. ———.] —Husband & wife perishing together, where no evidence to the contrary, presumed to have died at the same moment.—*In the Goods of UNDERWOOD* (1853), 22 L. T. O. S. 292.

799. ———.] —Where a husband & wife perished in the same disaster, the ct. allowed the form of oath to be varied by the insertion of a statement that the husband & wife perished at the time named, & that there was no reason to believe that the wife survived her husband.—*In the Estates of BRUCE & BRUCE* (1910), 26 T. L. R. 381.

800. ———.] *Brothers—Ship not heard of.*—Two brothers sailed in the same vessel in 1896, but nothing had been heard of them, or anyone else on board, from that time. The ct., in giving leave to swear that both the brothers died on or about May 14, 1896, added a declaration, & permitted the same to be included in the oath in each case, to the effect that there was no reason to suppose that either died before the other.—*In the Goods of JOHNSON* (1897), 78 L. T. 85.

801. *Evidence favouring survivorship.*—*In the Goods of PAGE* (1902), 46 Sol. Jo. 634.

—— *Form of oath.*—*See* Nos. 832–834, *post*.

—— *To whom administration granted.*—*See* Nos. 1763, 1764, *post*.

Effect of death in common disaster—Testator & legatee.—*See* No. 789, *ante*.

SUB-SECT. 4.—AT WHAT DATE DEATH PRESUMED.

802. *On or after date last heard of.*—*In the Goods of WHEELER* (1902), 46 Sol. Jo. 432.

803. ———.] —*Re WATKINS* (1902), 46 Sol. Jo. 359.

804. ———.] —*In the Goods of BOWD* (1903), 47 Sol. Jo. 319.

805. ———.] —*In the Goods of CURRIE* (1903), 47 Sol. Jo. 516.

806. ———.] —*In the Goods of LAMBERT* (1903), 47 Sol. Jo. 493.

807. ———.] —*In the Goods of COLLINGWOOD* (1903), 47 Sol. Jo. 204.

808. ———.] —*In the Goods of LAKE* (1903), 47 Sol. Jo. 279.

809. ———.] —*In the Goods of WORSTER* (1903), 47 Sol. Jo. 515.

810. *On or after date ship last heard of.*—*In the Goods of PARROTT* (1902), 46 Sol. Jo. 603.

811. ———.] —*In the Goods of MORIVIAN* (1902), 46 Sol. Jo. 587.

812. ———.] —*In the Goods of TRANCHANT* (1902), 47 Sol. Jo. 31.

813. ———.] —*Re DAVIES* (1902), 46 Sol. Jo. 338.

814. ———.] —*In the Goods of HENNAH* (1902), 46 Sol. Jo. 451.

815. ———.] —*In the Goods of HAMBLBY* (1902), 46 Sol. Jo. 602.

816. ———.] —*In the Goods of SCLATER* (1902), 46 Sol. Jo. 486.

817. ———.] —*In the Goods of BURNS* (1902), 46 Sol. Jo. 634.

in a shipwreck:—Held: there was no presumption of law either that they survived, & the mother's estate should be administered by her exor. as if she had died intestate, & should go to the next-of-kin.—*REID v. REID* (1909), 29 N. Z. L. R. 124.—N.Z.

Sect. 2.—Presumption of death and survivorship: Sub-sect. 4. Sect. 3: Sub-sects. 1 & 2, A., B. & C.]

818. —[—*In the Goods of PRISICK (1902), 46 Sol. Jo. 464.*

819. —[—*In the Goods of PEACOCK (1902), 46 Sol. Jo. 603.*

820. —[—*In the Goods of LORD (1903), 47 Sol. Jo. 299.*

821. —[—*In the Goods of HUTCHINSON (1903), 47 Sol. Jo. 728.*

822. On or after date wreckage found.]—*In the Goods of BURTON (1903), 47 Sol. Jo. 672.*

823. Bodies found together—Evidence of survivorship.]—*In the Goods of PAGE (1902), 46 Sol. Jo. 634.*

824. Legatee—After death of testator.]—*In the Goods of SCAIFE, No. 782, ante.*

Compare No. 780, ante; Nos. 829, 831, 1823, post.

825. In absence of evidence.]—A. R. went to Australia in 1850. He never wrote to his family, but from time to time, at irregular intervals, sent them Australian newspapers. The last of such newspapers was received by his mother in 1873. A. R. was not heard of afterwards. A. R. was at the time of his emigration entitled, under the will of his father, J. R., who died in 1838, to a share of J. R.'s residuary estate, subject to the interest of his mother during her life. In 1867 the shares of the children under the said will were ascertained & A. R.'s share was left in the hands of his mother till it should be ascertained whether he was alive. The mother died in 1877. The trustees of her will received the funds she had set apart for A. R.'s share, & finally in the year 1883, paid them into ct., under Trustee Relief Act. F. R., the nephew of A. R., afterwards took out administration to A. R.'s estate, & the fund in ct. was paid out to him. An order was made on an originating summons taken out by F. R., directing an inquiry when A. R. died, & who were his next of kin. The chief clerk's certificate found that A. R. was last heard of in 1873, & was dead in 1880, but there was no evidence when he died; that if he was held to have died in 1873, when last heard of, his next of kin were his mother & three brothers, all since deceased; but that if he was held to have died at any time during 1880, his next of kin were the six children of a deceased brother. The property was claimed on behalf of both sets of a possible next of kin:—*Held*: in the absence of evidence, the ct. could not make any presumption whatever as to the date of A. R.'s death, & unless all the parties who would be entitled as next of kin in the event of his death at any time between 1873 & 1880 could come to some arrangement, the matter must be referred back to the chief clerk to answer the inquiries.—*Re RHODES, RHODES v. RHODES (1887), 36 Ch. D. 586; 56 L. J. Ch. 825; 57 L. T. 652.*

SECT. 3.—THE EXECUTOR'S OR ADMINISTRATOR'S OATH.

SUB-SECT. 1.—IN GENERAL.

See Probate Rules (Non-Contentious), 1862, r. 47.

826. Whether affirmation sufficient—Affirmation abroad—Foreign law prohibiting oath—No allegation of conscientious scruple.]—The exemption from taking an oath in Common Law Procedure Act, 1854 (c. 125), s. 20, is in favour of

scruples of conscience only. The ct. therefore declined to receive an affirmation, which did not allege a conscientious scruple, in lieu of an affidavit from a natural-born subject of the Emperor of Germany, although by the laws of Germany voluntary oaths are forbidden, & he was domiciled in Germany & was actually residing there at the time he was required to make such affidavit.—*In the Goods of PRINCE HENRY THE SIXTY-NINTH OF RUSS-KÖSTRITZ (1880), 49 L. J. P. 67; 41 L. T. 803; 28 W. R. 398.*

827. —[—]—Upon application by three German exors., all resident in Germany, for probate of a will, one of the exors. declined to take the usual oath, on the ground that he was not allowed to do so by the laws of his place of residence, & the registrar of the Principal Probate Registry declined to accept his declaration in lieu of the usual oath, but the ct. accepted the declaration, & ordered that probate should issue in favour of all three executors.

R. S. C. do not apply to non-contentious probate business.—*In the Goods of CASPARI (1896), 75 L. T. 663.*

828. —[—]—Leave to vary usual form—To what court application made.]—Where there is no evidence, or where it is clear that there is not sufficient evidence, of survivorship, in cases of husband & wife dying at the same time, the practice in future will be to apply in the Principal Probate Registry & not, as heretofore, by motion to the ct., for grants of probate or administration & for leave to vary the usual form of oath. Where, however, there is any doubt as to survivorship, the registrar will refer the case to the ct., to be dealt with on motion.—*In the Estate of ROBY, [1913] P. 6; 82 L. J. P. 21; 107 L. T. 655; 29 T. L. R. 95; 57 Sol. Jo. 98.*

See, generally, EVIDENCE, Vol. XXII., pp. 451 et seq.

SUB-SECT. 2.—FORM OF OATH.

See Non-Contentious Probate Rules, 1925, rr. 116, 119, 121.

A. Death of Testator or Intestate.

829. Leave to swear to belief in death—Deponent unable to swear positively to death.]—The ct. will, under certain circumstances, modify the usual oath in common form without expressly giving leave to presume the death.

In a case where the appct. for a grant of administration felt unable by reason of the facts of the case (deceased, a passenger on a cross-channel steamer, having been missed when within about four miles from the port of arrival in France) to swear positively to the death in the usual form, liberty was given to swear to belief in the death, stating the circumstances so far as known, without giving leave to swear to the death in the form usual in cases of presumption of death.—*In the Estate of WALKER, [1909] P. 115; 78 L. J. P. 50; 25 T. L. R. 278.*

Leave to swear death—Where death presumed.]

—*See Sect. 2, sub-sect. 1, ante.*

830. At what date—Bodies found together—Probability of survivorship.]—*In the Goods of PAGE (1902), 46 Sol. Jo. 634.*

831. —[—]—Body found after short disappearance.]—The dead body of a lady who had disappeared on Dec. 23, 1909, was found in a river

PART II. SECT. 3, SUB-SECT. 1.

a. Grant to corporation—Necessity for appointment of person to take oath.] —Letters may be issued direct to a corp., but the corp. must first appoint some person to take the executor's oath & swear to the administration of the estate by the co.—*Re COMER (1914), 20 B. C. R. 432.—CAN.*

on Dec. 29, 1909. Upon a motion for presumption of death, the ct. made no order on the motion, intimating at the same time that, upon the appct. swearing that deceased died on Dec. 23 or 29, 1909, or on some day between those dates, a grant would be made in the Probate Registry.—*In the Estate of LONG-SUTTON*, [1912] P. 97; 81 L. J. P. 28; 106 L. T. 648; 56 Sol. Jo. 293.

— **Where death presumed.**—See Sect. 2, sub-sect. 4, *ante*.

832. Survivorship doubtful — Commorientes — Declaration that no reason to presume survivorship — Husband & wife — Massacre.—W., perished with his wife & only child, an infant, in the Cawnpore massacre, leaving no will. There being no evidence as to survivorship, the ct. granted administration of the personal estate of W., as having died a widower, to his mother, as his next of kin. The administrator's oath, instead of being in the usual form, may state that there is no reason to believe that the wife survived the husband.—*In the Goods of WAINWRIGHT* (1858), 1 Sw. & Tr. 257; 28 L. J. P. & M. 2; 164 E. R. 718. *Annotations:—Reid. In the Goods of Nichols* (1872), 41 L. J. P. & M. 88.

833. —————With regard to the form of oath to be taken, it may state that deceased & his wife perished [by massacre] at the time named, & that there is no reason to believe that the wife survived her husband (SIR C. CRESWELL).—*In the Goods of EWART* (1859), 1 Sw. & Tr. 258; 164 E. R. 718.

Annotations:—Folld. In the Goods of Beynon, [1901] P. 141. *Reid. In the Goods of Nichols* (1872), 41 L. J. P. & M. 88.

834. —————Where a husband & wife with all their children were said to have perished in a massacre, the ct., upon affidavits that they were believed to have died intestate & uninsured, granted letters of administration to the respective next-of-kin of the husband & wife; & further, gave leave to vary the usual form of oath to lead the grants, by allowing the administrator & administratrix to swear that the husband & wife perished at the same time, named, & that, after due inquiries, there was no reason to believe that either survived the other.—*In the Goods of BEYNON*, [1901] P. 141; 70 L. J. P. 31; 84 L. T. 271; 65 J. P. 246; 17 T. L. R. 324.

835. —————**Loss of ship.**—*In the Goods of GRINSTEAD*, No. 796, *ante*.

836. —————*In the Estates of BRUCE & BRUCE*, No. 799, *ante*.

837. —————**Joint suicide.**—*In the Goods of GOOD*, No. 795, *ante*.

838. —————**Brothers — Shipwreck.**—*In the Goods of JOHNSON*, No. 800, *ante*.

B. Amount at which Estate Sworn.

839. Whether court will determine.—(1) Where the unadministered estate of testator had been transferred to the Accountant-General of the Ct. of Ch., & a bill had been filed praying for it to be administered by that ct., the ct. decreed a grant *de bonis non* to the residuary legatee for life, without requiring her to find sureties to the administration bond.

(2) The ct. will not determine the amount under which an estate is to be sworn.—*CLEVERLY v. GLADDISH*, *In the Goods of CLEVERLY* (1862), 2 Sw. & Tr. 335; 31 L. J. P. M. & A. 53; 5 L. T. 689; 10 W. R. 265; 164 E. R. 1025.

Annotations:—As to (1) Apld. In the Goods of Stelfox (1894), 70 L. T. 814. *Reid. In the Goods of Leach* (1899), 80 L. T. 170.

840. Will proved abroad — Assets remitted to

England—Whether remitted assets included.—*In the Goods of MURRAY*, No. 2928, *post*.

Calculation of gross value—For estate duty.—See ESTATE & OTHER DEATH DUTIES, Vol. XXI., pp. 24 *et seq.*

For succession duty.—See ESTATE & OTHER DEATH DUTIES, Vol. XXI., pp. 107 *et seq.*

For probate duty.—See ESTATE & OTHER DEATH DUTIES, Vol. XXI., pp. 124 *et seq.*

For purpose of administrator's bond.—See Sect. 18, sub-sect. 3, C., *post*.

C. Death of Person Entitled to Grant.

See Non-Contentious Probate Rules, 1925, r. 37.

841. Person entitled to grant missing — Belief that applicant sole next of kin.—The mother of intestate was the sole forthcoming next-of-kin, & as no positive intelligence had been received of the father's death, though he had been missing since 1852, the ct. allowed the administratrix to swear that she believed herself to be the sole next of kin.—*In the Goods of REED* (1874), 29 L. T. 932; 38 J. P. 169.

Annotations:—N.F. In the Goods of Fridham (1889), 61 L. T. 302. *Folld. In the Goods of Callicott*, [1899] P. 189. *Consd. In the Goods of Jackson* (1902), 87 L. T. 747. *Folld. In the Goods of Chapman*, [1903] P. 192. *Reid. In the Goods of Loveday*, [1900] P. 154.

842. —————*In the Goods of CALICOTT*, No. 1820, *post*.

843. —————The ct. granted administration to the daughter of intestate under Court of Probate Act, 1857 (c. 77), s. 73, without citing the widow, appct.'s mother, who had not been heard of since 1884, appct. swearing that she believed herself to be the sole next of kin & giving security.—*In the Goods of LOVE* (1901), 17 T. L. R. 721.

844. —————*In the Goods of CHAPMAN*, No. 1779, *post*.

845. —————**Belief that intestate died a widow.**—A. died in 1887, intestate, without child or parent, leaving her surviving S., her natural & lawful brother & one of her next-of-kin. Intestate, who was about sixty-three years of age at the time of her death, was married in 1800, & her husband, a sailor, of about the same age as herself, shortly afterwards left her, & at the date of this motion it was upwards of twenty years since he was last heard of. Intestate left personality, amounting to £1,011 15s. 2d., the result of her personal earnings & savings. S., now resident in America, appointed as his attorney J., a solr., & the latter applied for administration. The ct. was moved on his behalf to modify the working of the oath, & that he might have leave to swear that "he believed that A. was a widow at the time of her death." The ct. refused the application, stating that the practice in such cases was either to swear the oath in the regular form, & so to get the grant, or, in the alternative, to cite the next of kin.—*In the Goods of FRIDHAM* (1889), 61 L. T. 302.

Annotations:—Consd. In the Goods of Jackson (1902), 87 L. T. 747. *Expld. In the Goods of Chapman*, [1903] P. 192.

846. —————*In the Goods of CLARK*, No. 780, *ante*.

847. —————**Belief that person missing dead.**—It is not the practice of the ct. to presume death under any circumstances. It merely gives appct. for letters of administration, or other appct., leave to swear the death, & appct. has to swear to the fact.

The true principle in such cases was for appct. to obtain the leave of the ct. to swear in his or her belief that a person is dead (BARNES, J.).—*In the Goods of JACKSON* (1902), 87 L. T. 747; 19 T. L. R. 74; 47 Sol. Jo. 93.

SECT. 3.—The executor's or administrator's oath:
Sub-sect. 2, D. Sects. 4 & 5: Sub-sect. 1.]

D. Whether Deceased died Testate or Intestate.

848. Death of lunatic testator—Will not propounded—Belief that deceased left no will.]—Testator while of unsound mind made a will disposing of large sums of money, although at the time of making the will he was possessed of no property whatever & was dependent upon his relatives for support:—*Held*: administration might be granted as in case of an intestacy to the sister of deceased as attorney for his widow, who was resident in Australia, & the oath of the administratrix should be to the effect that deceased, so far as she knew & believed, had left no will.—*In the Goods of RICH*, [1892] P. 143; 61 L. J. P. 94; 65 L. T. 352; 55 J. P. 760.

SECT. 4.—NECESSITY FOR PROBATE.

849. As evidence of will.]—The will of a *feme covert*, authorised by a power in her marriage settlement, cannot be given in evidence, to show a title to personal property, till it has been proved in the ecclesiastical ct.—*STONE v. FORSYTH* (1781), 2 Doug. K. B. 707; 99 E. R. 450.

Annotations:—Consd. Tainall v. Hankey (1838), 2 Moo. P. C. C. 342. *Refd.* Stevens v. Bagwell (1808), 15 Ves. 139; Bird v. Higginson (1836), 5 Ad. & El. 83; Spencer v. Hamerton (1836), 4 Ad. & El. 413.

850. —.]—A. occupied a tenement of £10 a year & died, leaving three children, to two of whom he bequeathed 5s. each, & to the latter, whom he made extrix., the residue of his property. The pauper, who had before married the extrix., resided on the tenement above 40 days, & paid rent for it; this was held to gain him a settlement, though the wife never proved the will.

Nothing but the probate, or letters of administration with the will annexed, are legal evidence of the will in all questions respecting personality (LORD KENYON, C.J.).—*R. v. NETHERSEAL (INHABITANTS)* (1791), 4 Term Rep. 258; 100 E. R. 1006.

Annotations:—Consd. R. v. South Lynn (1794), 5 Term Rep. 604. *Mentd.* R. v. Helsham (1831), 2 B. & Ad. 620.

851. —.]—Where the title to property under contract of sale was derived through a devise contained in a will, made before Wills Act, 1837 (c. 20), & a codicil republishing the will, the property having been purchased by testator after the date of his will, which codicil had not been propounded for probate, & was only proved by a declaration of the attesting witnesses that it was duly executed by testator:—*Held*: this was not sufficient proof of the validity of the document as a codicil; & the purchaser was entitled to the same amount of proof as would be necessary to establish it against the heir; & it ought to be propounded for probate.—*WEDDALL v. NIXON* (1853), 17 Beav. 160; 22 L. J. Ch. 939; 21 L. T. O. S. 147; 17 Jur. 642; 1 W. R. 250; 51 E. R. 994.

852. —.]—*PINNEY v. HUNT*, No. 859, *post*.

853. —.]—**Order for probate alone not sufficient.]**—A creditor of a deceased debtor cannot sue a person named as exor. in the will of deceased unless he has either administered or obtained a grant of probate; & a sale in execution of a judgment obtained against such person does not

bind deceased's estate:—*Held*: (1) an order for probate without an actual grant thereof does not prove the will; & an application for probate does not show an exor.'s acceptance of its trusts. (2) Letters of administration, even if irregularly granted, are valid till revoked.—*MOHAMIDU MOHIDEEN HADJIAR v. PITCHAY*, [1894] A. C. 437; 63 L. J. P. C. 90; 71 L. T. 99; 6 R. 510, P. C.

Whether document testamentary in character.]—*See, generally, WILLS.*

854. Will appointing testamentary guardians.]—Probate not necessary for a will appointing testamentary guardians.—*GILLIAT v. GILLIAT & HATFIELD* (1820), 3 Phillim. 222; 161 E. R. 1307.

Compare Nos. 898, 899, post.

855. Will of personal estate abroad.]—A. died beyond sea & made a nuncupative will. B. took administration here, & brought his bill for a discovery of supposed intestate's personal estate. Deft. pleaded the will & that he was exor., & that A. left no assets, but what were beyond sea. Plea allowed. A will of a personal estate which lies in a foreign country may be proved there, & need not be proved here.—*JAUNCY v. SEALEY* (1680), 1 Vern. 397; 23 E. R. 541, L. C.

Annotations:—Refd. A.-G. v. Hope (1834), 4 Tyr. 878; Hervey v. Fitzpatrick (1854), Kay, 421.

Compare cases in Sect. 1, sub-sect. 2, ante.

856. Will passing interest under will of Scottish testator—Assets of Scottish testator in England.]—

W. died possessed of property of small value in this country, & entitled under the will of J. to large assets in Scotland, which were being duly administered there. The exors. of W. proved his will in Scotland only. G., a legatee under W.'s will, applied for a grant of administration of the estate of W. in this country, which application was opposed by the exors.:—*Held*: (1) the ct. was not bound to make such a grant, but its powers were discretionary; (2) it not having been shown that the exors. were not doing their duty there was no necessity for any grant in this country. Application refused.—*In the Goods of EWING* (1881), 6 P. D. 19; 50 L. J. P. 11; 44 L. T. 278; 45 J. P. 376; *sub nom.* HOPE v. EWING, 29 W. R. 474.

Annotations:—As to (1) Consd. A.-G. v. Sudeley, [1896] 1 Q. B. 354. *Generally, Mentd.* Laidlay v. Lord Advocate (1890), 15 App. Cas. 468; Stamp Duties Comr. v. Salting, [1907] A. C. 449; Bradbury v. English Sewing Cotton Co., [1923] A. C. 744; Swedish Central Ry. v. Thompson, [1924] 2 K. B. 255.

857. Will in exercise of power—By married woman.]—*STONE v. FORSYTH*, No. 849, *ante*.

858. —.]—**Though already proved abroad.]**—A petitioner asked for payment out of ct. of money to which he was entitled under an appointment by will:—*Held*: probate of the will in the Supreme Ct. of New Zealand was not sufficient for this ct. to act upon, but the will must be proved in England.

The Ct. of Ch. does not know what a will is except by probate of the Ecclesiastical Ct. (PEARSON, J.).—*Re VALLANCE, Ex p. LIMEHOUSE BOARD OF WORKS* (1883), 34 Ch. D. 177; 52 L. J. Ch. 791; 48 L. T. 941; 32 W. R. 387.

859. Will alleged to be suppressed—As condition precedent to proceedings in Chancery.] Pltf. claiming a share of leaseholds, partly in the occupation of deft., under an alleged will, which he charged was being fraudulently suppressed by

PART II. SECT. 4.

r. Before registration of executors as owners of testator's land.]—Before exors. can apply for registration as

owners of testator's land they must prove the will.—*Re BANNERMAN* (1885), 2 Man. L. R. 377.—*CAN.*

s. —.]—P., the registered pro-

prietor of land under Land Transfer Act, 1885, devised it to his wife, & appointed her sole extrix., & died after Administration Act, 1879. She applied to have a transmission to her as devisee,

deft., brought an action claiming partition or sale, & to have the will established & directions given for probate. Deft. denied all knowledge of the alleged will:—*Held*: (1) before pltf. could obtain any relief upon the will, it must first be proved, or probate must be admitted by deft.; (2) a judge of the Ch. Div. had, under the Jud. Acts, jurisdiction to grant probate, but it would not be using a sound discretion to exercise the jurisdiction. Action accordingly ordered to stand over for probate proceedings to be taken in the Probate Div.

(3) The only evidence of a will of personal estate is the probate (JESSEL, M.R.).—PINNEY v. HUNT (1877), 6 Ch. D. 98; 26 W. R. 69.

Annotations:—As to (2) *Fold*. Bradford v. Young (1884), 26 Ch. D. 658. *Reid*. Victoria Mutual Assoc. Soc. v. Smith (1889), 5 T. L. R. 182; Scott v. Scott, [1912] P. 241.

Wills of foreign property referred to in English will.—Whether incorporated in probate of English will.—*See* Sect. 10, sub-sect. 7, B. (a), *post*.

860. Sealed packets.—Directed to be delivered to legatees unopened.]—Testatrix directs her exors. to deliver certain sealed up parcels unopened to certain persons named. The ct. decreed these parcels to be opened in the presence of the register, a schedule to be made of the contents, & to be proved as a codicil.—PELHAM v. NEWTON (1754), 2 Lee, 46.

Incorporation of documents referred to in will.—*See, generally*, Sect. 10, sub-sect. 4, *post* & *generally*, WILLS.

Effect of foreign grants generally.—*See* Sect. 15, sub-sect. 6, *post*.

861. As evidence of executor's title.—In trover for a chattel claimed by pltf. as vendee of an exor., the will is not evidence of the title of the exor. The probate must be produced.—PINNEY v. PINNEY (1828), 8 B. & C. 335; 2 Man. & Ry. K. B. 436; 6 L. J. O. S. K. B. 353; 108 E. R. 1067.

862.—[In an action on a promissory note, payable "to the exors. of the late W." the proper proof that pltf. are the exors. of W., is the production of the probate of his will, & the reading in evidence of so much of it as shows that he appointed pltf. his exors., & the giving in evidence the grant of administration, annexed to the probate, is not sufficient for this purpose.—HAMILTON v. ASTON (1845), 1 Car. & Kir. 679, N. P.

Powers of executor before grant.—*See* Part I., Sect. 10, *ante*.

although she had not proved the will:—*Held*: the Registrar was justified in requiring probate to be obtained before registering.—*Re* PETERSEN (1890), 9 N. Z. L. R. 538.—N.Z.

PART II. SECT. 5, SUB-SECT. 1.

866 i. Will in form of deed.—Grant of administration with the will annexed made in respect of a testamentary document in the form of a power of attorney.—*Re* McDONALD (1911), 30 N. Z. L. R. 896.—N.Z.

t. When several testamentary instruments.—Where a will was not duly executed but a subsequent codicil duly executed referred to a previous will:—*Held*: parol evidence might be admitted to connect the unattested will with the will spoken of in the codicil, & probate granted of the will & codicil.—*In the Goods of* HILL (1864), 1 W. W. & A.B. 63.—AUS.

a.—[Testator left a will & three codicils. The second revoked certain legacies, confirmed another & appointed two additional exors. The third did not notice the second but revoked the legacies previously revoked & also that previously confirmed, &

confirmed the will in every particular not thereby altered or revoked:—*Held*: the third codicil in no way affected the appointment of exors. by the second codicil, & probate of the will & three codicils granted.—*In the Goods of* STEPHENSON (1864), 1 W. W. & A.B. 73.—AUS.

b.—[A document purporting to be a will was imperfectly executed, but the witnesses to a codicil swore that testator at the time of the execution of the latter held it & the will in his hand, & declared them to be his last will & testament:—*Held*: the exor. named in the will were entitled to probate both of the will & the codicil.—*Re* SIDEBOTTOM'S WILL (1877), 3 V. L. R. 40.—AUS.

c.—[Where there are in existence two inconsistent wills, the later not expressly revoking the earlier, & a codicil reviving the earlier, & not referring to the later, probate should be granted to the three documents.—*Re* WATSON (1887), 13 V. L. R. 599.—AUS.

d.—[Two or more documents, each purporting to be the last will of the deceased, will be admitted

SECT. 5.—OF WHAT PROBATE MAY BE GRANTED.

SUB-SECT. 1.—IN GENERAL.

863. Document must operate as will.—A married woman in exercise of a power made a will which was dependent on an event which never happened. No exor. was appointed, & the only persons beneficially interested under the will died during the lifetime of testatrix:—*Held*: the will, being inoperative, was not entitled to probate.—*In the Goods of* GRAHAM (1872), L. R. 2 P. & D. 385; 41 L. J. P. & M. 46; 26 L. T. 529; 30 J. P. 408; 20 W. R. 614.

864. Title to probate & operative effect of will distinguished.—*In the Goods of* BAILEY, No. 908, *post*.

865. Will declaring intestacy.—Property to go as on intestacy.]—BRENCHLEY v. LYNN, No. 2079, *post*.

866. Will in form of deed.—Probate granted of a will executed in the form of a deed, although the attesting witnesses had no precise recollection of the circumstances of the execution.—*In the Goods of* COLYER (1889), 14 P. D. 48; 60 L. T. 368; 53 J. P. 134; 37 W. R. 272.

867. Document appointing executors.—In Feb. 1859, L. duly executed a testamentary paper, whereof he appointed W., E., & J., exors. In Oct. 1860, he made another testamentary paper, disposing in a different manner of his personal property, but not affecting realty, which was dealt with by the first paper; & of the second paper he appointed W. & T. exors.:—*Held*: the second appointment of exors. was no revocation of the first appointment, & as the bare nomination of exors. entitles a paper to probate, leave should be reserved, on the second set of exors. taking probate of the two papers as together containing the last will & testament of deceased, to the first set of exors. to come in & prove.—*In the Goods of* LEESF (1862), 2 Sw. & Tr. 442; 31 L. J. P. M. & A. 169; 5 L. T. 848; 26 J. P. 232; 164 E. R. 1068.

Annotations:—*Fold*. *In the Goods of* Andrew (1873), 42 L. J. P. & M. 38. *Reid*. *In the Goods of* Griffith (1872), L. R. 2 P. & D. 457.

868.—Though no property passes.—Will of married woman.]—Where a married woman dies leaving a duly executed will & appointing an exor., if the exor. survive testatrix, although no property passes under the will, the exor. must take probate, & an application by the husband for administration

to probate, if properly executed, where the ct. is satisfied that they together contain the full wishes of the deceased.—*Re* CULLEN'S WILL (1907), 7 S. R. N. S. W. 29.—AUS.

e.—[Testator executed a will on the front page of a double sheet of foolscap, leaving his property "as per enclosed my last will & testament." Across the second & third pages testator had, in a writing, called "my last will & testament," made a complete disposition of his property:—*Held*: both the will & the writing should be admitted to probate.—*Re* WILKINSON, [1915] V. L. R. 77.—AUS.

f.—[The deceased executed two wills, of which some of the provisions were similar & some inconsistent:—*Held*: as the two wills could be read together they should both be admitted to probate.—*Re* COOMBES (1917), 13 Tas. L. R. 79.—AUS.

g.—[Where a codicil was legally executed & the will (imperfectly attested) was identified by parol evidence to be the document referred to in the codicil as the last

Sect. 5.—Of what probate may be granted: Sub-sects. 1, 2, 3, 4 & 5.]

must be refused.—*In the Goods of DODSWORTH* (1895), 73 L. T. 315.

See, also, Nos. 872–877, *post*.

869. Will of domiciled testator made in foreign form.]—Where a domiciled Englishwoman, while temporarily residing in Scotland, executed a valid will in Scots form, probate of it was granted in England.—*In the Goods of BATHO, BATHO v. CROSS* (1908), 52 Sol. Jo. 318.

Validity of will—Formalities of execution.]—See WILLS.

Will in execution of power.]—See POWERS.

Will executed abroad.]—See WILLS.

Document referred to & incorporated in wills.]—See No. 860, *ante*; Nos. 1373, 1388, *post*; &, generally, WILLS.

870. Codicil incorrectly describing will.]—A. made a will in Sept. 1854, another in Feb. 1855; in a codicil of Feb. 12, 1857, the latter will was referred to as of Sept. 1854:—*Held*: in the circumstances set forth, to be an error of the clerk who drew the codicil, & probate of the will of Feb. 1855, granted.—*In the Goods of WELCH* (1857), Dea. & Sw. 314; 29 L. T. O. S. 235; 104 E. R. 587.

871. —.]—Where a codicil recited the date of a will incorrectly, the will itself having been executed neither on the day on which it purported to bear date nor at the date by which it was described in the codicil, but the contents of the will were recited correctly:—*Held*: the will was sufficiently identified by the recital of the contents, & probate of it with the codicil would be granted.—*In the Goods of BRACKENBURY* (1861), 25 J. P. 280.

SUB-SECT. 2.—WILLS DISPOSING OF REALTY ONLY.

See, now, Land Transfer Act, 1897 (c. 65), s. 1 (3) (repealed by Law of Property Act, 1922 (c. 10), s. 150 (11)); Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 155.

872. Where executor appointed—With direction to convert.]—A will limited to the disposition of real property only is not entitled to probate, although it contains the appointment of an exor., & the real estate is given to such exor., with directions to convert the same into personal estate.—*In the Goods of BARDEN* (1867), L. R. 1 P. & D. 325.

Annotations:—Reid. In the Goods of Tomlinson (1881), 6

will of testator, the will & codicil will be admitted to probate.—*LAFOND v. LAFOND* (1914), 19 B. C. L. 287.—**CAN.**

h. —.]—When the second of two testamentary writings is *prima facie* a codicil both documents must be admitted to probate; but when the second covers the same ground as & was intended to be in substitution for the first, the second will be regarded as the “dominating document,” & will alone be admitted to probate.—*In the Goods of ADAMS* (1911), 45 I. L. T. 93.—**IR.**

k. —.]—Testator made a will, & afterwards made another which contained the usual clause revoking all prior wills. Subsequently he executed a codicil, which, by mistake, was endorsed on & referred to the earlier will:—*Held*: all three documents must be admitted to probate.—*In the Goods of CARLETON*, [1915] 2 I. R. 9.—**IR.**

l. —.]—Two sisters executed

a mutual will, leaving everything belonging to the first to die to the survivor, & appointing the survivor exor. Subsequently they executed, & also a further trust disposition, to take effect on the death of the survivor, dealing with property in Scotland, but expressly saving the original will. The ct. gave the survivor liberty to apply for probate of the original will, with liberty to the persons interested in the trust disposition to apply to have the original will & indorsement thereon handed over to the proper Registry Office in Scotland.—*In the Goods of COTTON*, [1923] 2 I. R. 52.—**IR.**

m. Will in foreign language.]—Probate of a will in a foreign language should be granted of a duly authenticated translation of it, & the original should be included in the grant.—*Re SCHNEIDER'S WILL* (1880), 6 V. L. R. 8.—**AUS.**

n. Document revoking former will—Without making disposition.]—In the

P. D. 209; *In the Goods of Gunn* (1884), 9 P. D. 242; *In the Goods of Hornbuckle* (1890), 63 L. T. 464; *Re Lyne's Settltmt. Trusts, Re Gibbs, Lyne v. Gibbs*, [1919] 1 Ch. 80.

873. — But renounces.]—Where a will, disposing of realty, appointed an exor., who afterwards renounced, the ct. granted administration with the will annexed, to the next of kin.—*In the Goods of JORDAN* (1868), L. R. 1 P. & D. 555; 37 L. J. P. & M. 22; 32 J. P. 631; 16 W. R. 407.

Annotations:—Reid. In the Goods of Tomlinson (1881), 6 P. D. 209. *Reid. In the Goods of Miskelly* (1869), 18 W. R. 215; *In the Goods of Gunn* (1884), 9 P. D. 242; *In the Goods of Hornbuckle* (1890), 15 P. D. 149.

874. — With direction for sale & payment of legacies.]—By his will deceased ordered his debts to be paid & a portion of his real estate to be sold, & out of the proceeds thereof certain legacies to be paid. All his other tenements or hereditaments whatsoever, in remainder or expectancy, he gave & devised unto his son & daughters in equal proportion. No direct reference was made therein to personal estate:—*Held*: the Ct. of Probate has no jurisdiction to grant probate of such a will.—*In the Goods of BOOTLE* (1874), L. R. 3 P. & D. 177; 43 L. J. P. & M. 41; 31 L. T. 273; 38 J. P. 791.

Annotations:—Reid. Re Lyne's Settltmt. Trusts, Re Gibbs, Lyne v. Gibbs, [1919] 1 Ch. 80.

875. — Execution of power by married woman.]—In the Goods of TOMLINSON, No. 686, *ante*.

876. —.]—A married woman having exercised a power of appointment of real estate in her own favour, afterwards executed her will by which, amongst other things, she directed that portion of such real estate should be sold to pay legacies, & erect a memorial window. She also appointed an exor. There were arrears of rent due to her at the time of her death & subsequently:—*Held*: as she possessed the property so appointed as separate estate, & had named an exor. whom she had directed to pay the legacies, & as the arrears of rent were part of her personal estate, the will, though dealing with realty, was entitled to probate.—*BROWNIGG v. PIKE* (1882), 7 P. D. 61; 51 L. J. P. 29; 46 L. T. 821; 46 J. P. 360; 30 W. R. 567.

Annotations:—Consd. Re Lambert's Estate, Stanton v. Lambert (1888), 39 Ch. D. 626. *Reid. In the Goods of Gunn* (1884), 9 P. D. 242; *In the Goods of Hornbuckle* (1890), 63 L. T. 464.

877. — Previous grant of administration to personalty as on intestacy.]—Testatrix, a married woman, made a will disposing of realty only, & appointing three exors. Testatrix under the provisions of a deed had a power of appointment over

Goods of IRVINE, [1919] 2 I. R. 485.—**IR.**

o. Copy of will—Attached to codicil confirming original.]—Held: a copy of a will attached to a codicil could not be admitted to probate, inasmuch as the codicil referred to & confirmed not the copy, but the original will.—*Re BRIGGS'S WILL* (1895), 15 N. Z. L. R. 547.—**N.Z.**

p. Contingent will.]—Probate of a contingent will refused.—*Re MACKAY* (1911), 30 N. Z. L. R. 441.—**N.Z.**

q. Will of domiciled testator made abroad.]—Where a testatrix, domiciled in the Transvaal, & owning immovable property there situated, had executed a will in the Cape Colony which had been attested insufficiently according to the requirements of that country, but sufficiently according to the law of the Transvaal:—*Held*: the Master of the Transvaal was bound to grant probate of the will.—*Re ELLIASHOF'S ESTATE* (1903), T. S. 833.—**S. AF.**

the realty, & in default of such appointment it was declared that the realty should be vested in her for her sole & separate use. She never exercised the power; & after her death her husband took out letters of administration to her personal estate on the ground that she had died intestate except as to realty:—*Held*: testatrix must be regarded as in the position of a *feme sole* with regard to the real estate, & that the will therefore might be admitted to probate; but the ct. declined to make a grant until the existing grant of administration had been revoked.—*In the Goods of HORNBUCKLE* (1890), 15 P. D. 149; 59 L. J. P. 78; 63 L. T. 464; 39 W. R. 80.
See, also, No. 867, *ante*.

878. Realty subject to equitable conversion.]—The Probate, Divorce, & Admly. Div. of the High Ct. is not bound by the practice of the Ct. of Probate before the passing of the Jud. Acts.

Freehold property, which is by the doctrine of equitable conversion to be considered as personalty, is chargeable with probate duty, & a will which disposes of such property under a power of appointment is entitled to probate.—*In the Goods of GUNN* (1884), 9 P. D. 242; 53 L. J. P. 107; 49 J. P. 72; 33 W. R. 169.

Annotations:—*Consd.* A.-G. v. Dodd, [1894] 2 Q. B. 150. *Reid*, A.-G. v. Ailesbury (1887), 12 App. Cas. 672; *Re* Berchtold, Berchtold v. Capron, [1923] 1 Ch. 192.

See, generally, EQUITY, Vol. XX., p. 222.

SUB-SECT. 3.—WILLS DISPOSING OF PROPERTY ABROAD.

Where no assets within the jurisdiction dealt with.]—*See* Sect. 1, sub-sect. 1, A. (b), *ante*.

Separate wills of English & foreign property.—Whether foreign will incorporated in English probate.]—*See* Sect. 10, sub-sect. 7, B., *post*.

SUB-SECT. 4.—WILLS OF PERSONS DOMICILED ABROAD.

879. General rule.]—MEYAPPA CHETTY v. SUPRAMANIAN CHETTY, No. 721, *ante*.

See, further, CONFLICT OF LAWS, Vol. XI., pp. 380, 381.

880. Probate granted by court of country of domicile.—Informal paper.—Possibility of probate in solemn form being required.]—The ct. at Madras, the competent jurisdiction, having granted probate to the widow as universal legatee & constructive extrix. of an informal paper, in which character no security is required; this ct., considering that under the circumstances the widow may be called on to prove the paper *per testes*, or that the grant may be appealed from, will only decree administration with the paper annexed to her, as relic & principal legatee, on giving security.—*In the Goods of READ* (1828), 1 Hag. Ecc. 474; 162 E. R. 649.

Annotations:—*Appl.* *In the Goods of Mackenzie* (1856), Dea. & Sw. 17. *Reid*, Price v. Dewhurst (1835), 4 My. & Cr. 76; *In the Goods of Earl* (1867), L. R. 1 P. & D. 450.

PART II. SECT. 5, SUB-SECT. 4.

879 i. General rule.]—Where a testator, resident in the colony, but domiciled abroad at the date of his death, has made a will, valid according to the law of domicile, probate will be granted on proof that the will is valid according to the law of domicile.—*Re ROLLAND* (1893), 14 N. S. W. B. 102.—*AUS.*

PART II. SECT. 5, SUB-SECT. 5.

i. Evidence required.—Will proved abroad.]—Although the act of a ct. within the province of that ct. proves itself, yet the act of a foreign ct. must be proved, & probate of a will rejected where no witness was adduced to prove the correctness of the document, the signatures & seal.—*FOWLER v. PAUL* (1821), 2 Murr. 431.—*SCOT.*

881. ———.]—Deceased, domiciled in Mauritius had left a will & codicil, but not executed in accordance with 1 Vict. c. 26. Probate was allowed to pass, the ct. in Mauritius having already treated the papers as valid.—*In the Goods of SMITH* (1850), 2 Rob. Eccl. 332; 7 Notes of Cases, 376; 16 L. T. O. S. 177; 14 Jur. 1100; 163 E. R. 1336.

SUB-SECT. 5.—WILLS PROVED ABROAD.

See, generally, CONFLICT OF LAWS, Vol. XI., pp. 377 *et seq.*

882. Evidence of foreign law.]—I must have a further certificate upon oath of the law of France, & that this is a good will according to that law (SIR H. JENNER JUST).—*In the Goods of LYNAM* (1845), 4 Notes of Cases, 697, n.

See, generally, EVIDENCE, Vol. XXII., pp. 618, *et seq.*

883. Evidence required.—Will proved abroad.—Certified copy.]—A will, proved abroad & retained there, established on production of a copy certified under the hand & seal of the proper officer, etc., which had been admitted to probate in the Ecclesiastical Ct. here.—*PULLAN v. RAWLINS* (1841), 4 Beav. 142; 49 E. R. 292.

Annotation:—*Reid*, Rand v. Macmahon (1842), 12 Sim. 553.

884. ——— Will proved in France.]—A British subject, resident in France, made his will & died there, having appointed A. & B., who were resident in France, & C. & D., who were resident in England, his exors. The will was translated into French, & the translation was registered by A. & B. in the proper ct. in Paris. A duly authenticated copy of the translation was then procured, & translated into English by a notary public in London; & that translation was proved by C. & D. in the Prerogative Ct.—*BAIN v. LESCHER* (1840), 11 Sim. 397; 59 E. R. 926.

Annotations:—*Mentd.* Holloway v. Collier (1853), 1 W. R. 266; Leigh v. Leigh (1854), 17 Beav. 605; *Re* Seyton, Seyton v. Satterthwaite (1887), 34 Ch. D. 511.

885. ———.]—Where the original will of a British subject was in the hands of a French notary in Paris, who was not allowed his the practice of the French cts. to let it out of by custody, the ct. granted probate of a duly authenticated copy of the same.—*In the Goods of LEMME*, [1892] P. 89; 61 L. J. P. 123; 66 L. T. 592.

Annotation:—*Follid.* *In the Goods of Von Linden*, [1896] P. 148.

886. ——— Will proved in West Indies.]—A will was proved in the West Indies, & a duly authenticated copy of it was sent to this country, accompanied by an affidavit, made by one of the attesting witnesses when the will was proved, showing that the will had been executed & attested pursuant to the Stat. Frauds; & that copy was admitted to probate in this country, & was produced in the Ct. of Ch., with the affidavit annexed to it. The V.-C., however, refused to establish the will, without full proof of its due execution & attestation. The Ct. of Ch. will establish a will made & proved in the colonies, on

a. ——— Validity recognised abroad.]

—M. E. G., a spinster, made a will in Tasmania appointing M. G. & X. exors. She then went to N. Rhodesia where she married & died, leaving her husband, W., & an infant son. The High Ct. of N. Rhodesia granted administration with the will annexed to M. G., who was then in Rhodesia, as "extrix. testamentary." M. G. returned to Tasmania & applied for

Sect. 5.—Of what probate may be granted: Sub-sects. 5, 6, 7, 8, 9, 10 & 11.]

the production of a duly authenticated copy of it, provided the due execution & attestation of the original are proved by the attesting witnesses.—**RAND v. MACMAHON** (1842), 12 Sim. 553; 6 Jur. 450; 59 E. R. 1245.

887. — Will proved in Spain.]—Where a British-born subject, who had resided in Spain for forty-two years, made his will in the Spanish form, a notarial copy of the will was admitted to probate in this ct., without proof upon oath of the law of the domicile.—*In the Goods of GAYNER* (1846), 4 Notes of Cases, 696.

888. — Will proved in Jamaica.]—A certified copy of a will & codicil which had been proved in Jamaica were sent to this country by the secretary of the island, but by mistake the probate was not sent. The ct. being satisfied by the certificate of the secretary that the copy sent was a true copy of the will & codicil, granted probate until a more authentic copy should be brought into the registry.—*In the Goods of TURNER* (1866), 36 L. J. P. & M. 82; 15 L. T. 446; 31 J. P. 41.

889. — Will proved in Russia.]—Where a will has been proved in the proper ct. of the domicile of deceased, it is the ordinary practice of the Ct. of Probate in England to grant probate on a copy of the will authenticated by the authorities of the place of domicile; in the case of a Russian probate, however, as the original will forms part of such probate, it will accept a certified copy of the will made in this country.—*In the Goods of CLARKE* (1867), 36 L. J. P. & M. 72; 16 L. T. 366; 15 W. R. 881.

890. — Will proved in Germany.]—The will of a German subject domiciled in the kingdom of Wurtemberg at his death had been proved in Wurtemberg in accordance with the requirements of local law & deposited with a notary, who by the law of the country was forbidden to allow it to leave his custody. It contained a direction that during her lifetime the widow should have the unrestricted right of administration & usufruct of testator's estate without giving security, which according to the local law was equivalent to appointing her extrix. & entitled her to collect the personal estate as though she were the owner thereof. Part of the personal estate was in England:—**Held**: probate might be granted to the widow of a copy of the original will properly proved, limited to such time as might elapse before the original will itself should be brought in.—*In the Goods of VON LINDEN*, [1896] P. 148; 65 L. J. P. 87; 44 W. R. 448.

Annotation:—Consd. In the Goods of Grewe (1922), 127 L. T. 371.

891. — Extracts relating to English property.]—Where the will of a foreigner resident abroad was proved by exor. in the foreign ct., & testatrix died possessed of property in England, the ct. refused to make a grant to the exor. of administration with extracts from the will annexed,

probate of the will:—**Held**: evidence was necessary to prove that the Rhodesian Ct. by appointing M. G. "extrix. testamentary" recognised the will as valid.—*Re WILLIAMSON* (1912), 8 Tas. L. R. 33.—**AUS.**

t. Will proved in colonial court.]—Probate having been granted at the Cape of Good Hope of a will & an unattested codicil thereto made there, by an officer in the East India Co.'s service; probate of both papers also

allowed to pass here.—*In the Goods of Foy* (1839), 2 Curt. 328.—**S. AF.**

a. —.]—A will made in Queensland, & attested by witnesses resident there, was proved & lodged in the Supreme Ct. of New South Wales, at Sydney. The exor. having applied for probate in Ireland:—**Held**: probate should be granted; it being assumed, in the absence of evidence to the contrary, that Queensland was outside the jurisdiction of the cts. of

such extracts relating to the English property & being furnished by the foreign ct. to enable the application to be made.—*In the Goods of VON FABER* (1904), 20 T. L. R. 640.

892. — Original will in English—Translation proved abroad—Translation of foreign translation.]—R., domiciled in Mexico, made a will according to the law of Mexico. The proper ct. there decreed probate of a Spanish translation & not of the original:—**Held**: the grant in this country must be made upon the production of an English translation of the Spanish copy, & not of a certified copy of the original.—*In the Goods of RULE* (1878), 4 P. D. 70; 47 L. J. P. 32; 39 L. T. 123; 42 J. P. 776; 26 W. R. 357.

Annotation:—Distd. In the Goods of Petty (1879), 41 L. T. 529.

893. — Original will in foreign language—Copy in foreign language.]—P., domiciled in Brazil, made a will according to the law of that country. The will was written in Portuguese, & probate granted of such will as written in that language. The ct. refused to grant probate of an English translation of the will made in Brazil, & certified to in that country by the British Consul. The only document on which it can act is the document which was before the foreign ct., & which must be translated after it has been brought into the registry here.—*In the Goods of PETTY* (1879), 41 L. T. 529.

894. — Will filed in colonial court for probate—But not yet proved—Certified copy.]—Where a later will confirms an earlier will dealing only with assets out of the jurisdiction, both wills must be proved. Where a will has been filed in a ct. in the colonies for probate, but has not yet been proved, a certified copy issuing from that ct. will be admitted to probate.—*In the Goods of WESTERN* (1898), 78 L. T. 40.

SUB-SECT. 6.—WILL OF DECEASED SOVEREIGN.

See Sect. 1, sub-sect. 1, A. (a), ante.

SUB-SECT. 7.—WILL NOT APPOINTING EXECUTORS.

895. Appointment of universal legatee—Not executor according to the tenor.]—(1) The universal legatee under a will which does not appoint an exor. is, by the invariable practice of the registry, entitled to administration with the will annexed, & not to probate as exor. according to the tenor. *Semble*: (2) Ct. of Probate Act, 1857 (c. 77), s. 29, applies only to procedure. (3) In the case of foreign wills which do not appoint an exor., the practice is to grant probate to an universal heir, & administration with the will annexed to an universal legatee.—*In the Goods of OLIPHANT* (1860), 1 Sw. & Tr. 525; 30 L. J. P. M. & A. 82; 1 L. T. 446; 24 J. P. 231; 6 Jur. N. S. 256; 164 E. R. 843.

Annotation:—As to (1) Consd. In the Goods of Pryse, [1904] P. 301.

See, generally, Part I., Sect. 3, sub sect. 2, A.

New South Wales.—WILSON v. COLLUM (1881), 9 L. R. Ir. 150.—**IR.**

b. Will proved in court of domicile—Executors out of jurisdiction.]—Probate of a will executed abroad, & proved in the ct. of domicile, could not be granted to exors. resident out of the jurisdiction of the Supreme Ct.—*Re NORTH'S WILL*, 3 J. R. N. S. 60.—**N.Z.**

896. Foreign will.]—*In the Goods of OLIPHANT*, No. 895, *ante*.

897. Executor appointed by former will—Subsequent will with identical bequests—Omitting appointment of executors.]—*In the Goods of ALLEN*, No. 2056, *post*.

898. Will not disposing of property—Will appointing testamentary guardians.]—CHESTER'S (LADY) CASE (1672), 1 Vent. 207; 86 E. R. 140; *sub nom.* CLEVELAND (DUTCHES) v. COVENTRY (BP.) & CHESTER (LADY), 3 Keb. 30.

*Annotation:—*Fold. *In the Goods of Morton* (1864), 3 Sw. & Tr. 422.

899. ———.]—A paper purporting to be a last will & testament duly executed, but containing simply an appointment of a guardian of his children by a father, & not disposing of personal property, nor appointing an exor., is not entitled to probate.—*In the Goods of MORTON* (1864), 3 Sw. & Tr. 422; 33 L. J. P. M. & A. 87; 9 L. T. 809; 12 W. R. 320; 164 E. R. 1338.

Compare No. 2089, *post*.

900. ——— Memorandum on will cancelling will—Duly attested.]—At the foot of his will deceased wrote a memorandum to the effect, "This will was cancelled this day"; & he duly executed such memorandum in the presence of two witnesses:—*Held*: such memorandum was not a will or codicil, but only a writing, which could not be admitted to probate.—*In the Goods of FRASER* (1869), L. R. 2 P. & D. 40; 39 L. J. P. & M. 20; 21 L. T. 680; 34 J. P. 264; 18 W. R. 263.

Document revoking will & not appointing executors.]—*See* Sect. 12, sub-sect. 1, A. (a) ii., *post*.

Whether document testamentary, *see, generally*, WILLS.

Administration with will annexed.] *See, generally*, Sect. 12, sub-sect. 1, *post*.

SUB-SECT. 8.—PRIVILEGED AND NUNCUPATIVE WILLS.

See WILLS.

SUB-SECT. 9.—JOINT WILLS.

901. Death of survivor without altering or revoking will.]—B. & C., sisters, living together, executed a testamentary paper to the effect that the survivor should have all that remained of their property at the death of the first deceased, & that at the death of survivor it should be divided amongst certain relations. C. survived B., & died without having altered or revoked such paper, & the ct. granted administration with the will annexed, as the last will & testament of C.—*In the Goods of LOVEGROVE* (1862), 2 Sw. & Tr. 453; 31 L. J. P. M. & A. 87; 6 L. T. 131; 26 J. P. 375; 8 Jur. N. S. 442; 164 E. R. 1072.

*Annotation:—*Refd. *In the Estate of Heys*, Walker v. Gaskill, [1911] P. 192.

SUB-SECT. 10.—LOST WILLS.

See Sect. 6, sub-sect. 5, *post*.

PART II. SECT. 5, SUB-SECT. 9.

a. Appointment of fresh executors by survivor's will.]—Testators, husband & wife, executed a mutual will wherein the survivor was appointed exor., & after the death of such survivor the secretary of a Trust Co., but the

survivor was given the right to alter the terms of the will in any way. Testator died leaving the will unrevoked, & the survivor executed a new will wherein fresh exors. were appointed:—*Held*: letters of administration should be issued to

the exors. named in the will of the survivor.—*DUNCAN'S ESTATE v. THE MASTER* (1908), 25 S. C. 971.—S. AF.

PART II. SECT. 5, SUB-SECT. 11.
d. General rule.]—Probate can be granted of a portion only of a will to

SUB-SECT. 11.—PART OF WILL.

902. Will in printed form—Revocation clause omitted—Clause not filled up.]—Testatrix by her will constituted her illegitimate son her universal legatee & one of her exors. After the execution of the will, & shortly before her death, she expressed a wish to bequeath part of her furniture & other personal effects to her sister, her sole next of kin & heiress-at-law, & proceeded to write out a bequest giving effect to such a wish on a printed form of will, which was duly executed. The form commenced by a clause of revocation; but testatrix did not fill up the blanks in this part of the form; & the clause was not read over to her at the time of execution, though the rest of the will was, & there was no evidence that she knew of such clause:—*Held*: under the circumstances, probate might be granted of the paper, omitting the clause of revocation as a codicil to the original will.—*In the Goods of MOORE*, [1892] P. 378; 62 L. J. P. 9; 1 R. 451.

903. ———.]—Testator executed a will, drawn by a lawyer, disposing of his real estate, but leaving some personal property undisposed of. He expressed an intention of disposing of the latter by a future instrument. Subsequently he bought a printed form, & without legal advice, disposed of his personal property, inserting a clause revoking all former dispositions:—*Held*: the second document was intended to be supplemental to the prior one, that the revocatory clause did not represent testator's wishes, & that both documents would be admitted to probate, the revocatory clause in the second being omitted.—*MARBLEY v. TURNER* (1900), 17 T. L. R. 10.

904. Will revoked by marriage—Except as to exercise of power.]—(1) P. made a will which exercised a general power of appointment in favour of his son, but in such a manner as to make the appointed fund part of his estate, for payment of debts, & also disposed of his general estate. He afterwards married & died without having made a fresh will. It was admitted that by virtue of Wills Act, 1837 (c. 20), s. 18, the will was revoked as to general estate, but was not revoked so far as it was an exercise of the power. Testator's son was a person of unsound mind not so found, & a receiver of his estate had been appointed in Lunacy. This action was brought by testator's widow, claiming administration. The son, who was his sole next of kin, was made deft. & appeared by the receiver. The receiver claimed that the administration should be granted to him for the use of the son:—*Held*: the grant must be made to the widow, but must be a general grant of administration with so much only of the will annexed as related to the appointed fund, not a grant of administration limited to the appointed fund.

(2) The costs of all parties were ordered to be paid out of the whole estate, including the appointed fund.—*In the Estate of POOLE*, *POOLE v. POOLE*, [1919] P. 10; 88 L. J. P. 77; 35 T. L. R. 143; 63 Sol. Jo. 170.

905. Documents forming part only of will—Other documents abroad.]—Under special circumstances the ct. will grant probate of certain papers forming part of the will of deceased, the other papers or authentic copies thereof not being

Sect. 5.—Of what probate may be granted: Sub-sects. 11, 12, 13 & 14. Sect. 6: Sub-sect. 1, A. & B.]

in this country at the time, reserving power to the exor. to prove the other papers or authentic copies thereof when they arrive, & on an undertaking on his part that he will do so.—*In the Goods of ROBERTS* (1878), L. R. 3 P. & D. 110; 42 L. J. P. & M. 63; 28 L. T. 913; 21 W. R. 824; *sub nom. In the Goods of ROBERTS*, 37 J. P. 632. *Annotation*.—*Apld.* *Wainwright v. Wainwright* (1894), 6 R. 562.

Correction of will by court.]—See Sect. 10, sub-sect. 2, *post*.

SUB-SECT. 12.—CODICILS.

906. Intended to operate at an interval after testator's death.]—A., by will, disposed of the whole of his personal & of certain real property, & appointed exors. He subsequently executed another testamentary paper in which was the clause—"If my wife survives me, in two years after my wife's death my second cousin B., & next-of-kin, to take possession of all my real & personal property, & to pay all my just debts, according to my will. . . . I give B. this written document, as I am afraid my exors. will not put my will into effect." The exors. died in the lifetime of deceased.—*Held*: as the paper was testamentary, & duly executed, although not to operate until some time after the death of testator, it was entitled to probate, & B. was exor. according to the tenor thereof, but he must take probate of the will as well as of that paper.—*In the Goods of NEWNS* (1861), 7 Jur. N. S. 688.

907. To revoked will.—Intended to operate apart from will.]—Where a will & codicil have been in existence, & the will has been revoked, the ct. will not grant probate of the codicil unless it is satisfied that testator intended it to operate separately from the will.—*In the Goods of GREIG* (1866), L. R. 1 P. & D. 72; 35 L. J. P. & M. 113; 13 L. T. 081; 14 W. R. 349.

SUB-SECT. 13.—WILLS OF MARRIED WOMEN.

See, generally, Sect. 7, sub-sect. 2, *post*.

the extent to which the contents are proved where the other portion is lost.—*KEDAR NATH MITTER v. SAROJINI DAS* (1899), I. L. R. 26 Calc. 634; 3 C. W. N. 617.—**IND.**

PART II. SECT. 5, SUB-SECT. 12.

a. Will deposited abroad.—Codicils dealing with whole of testator's estate in colony.]—Two documents purporting to be codicils to a will deposited in Scotland, dealing with land there, the codicils dealing with the whole of testator's real & personal estate in Victoria, admitted to probate as codicils without the will being proved.—*In the Will & Codicils of WISE* (1869), 6 W. W. & A. B. 39.—AUS.****

1. Subject to production of missing will.]—Testator executed a codicil by which he devised his property to his wife for life, & subject thereto directed that it should devolve according to the terms of his will made ten years before, & appointed his wife sole exrix. By a further codicil he confirmed the previous codicil. The ct. granted probate of the two codicils to the widow as sole exrix, subject to any previous will which might be found.—*In the*

Estate of HENTY (1878), 4 V. L. R. 54.—**AUS.**

g. Codicil confirming will.—Will missing.]—Testator added a codicil to his last will, by which he altered certain provisions of the will, & used the words "in all other respects I confirm my said will." Only the codicil was forthcoming at his death. The exors. propounded the draft of the will approved by testator & the codicil.—*Held*: the draft could not be admitted to probate, but the codicil could be so admitted.—*RUSSELL v. MATCHETT* (1903), S. R. Q. 98.—AUS.****

h. Documents together forming a codicil.]—An action was brought to compel exrix. to include in the probate of a will duplicate documents, each signed by testatrix & witnessed by two witnesses.—*Held*: the documents, being testamentary, should be added to the probate as forming together a single codicil to the will of testatrix.—*PATHE v. FRY* (1911), 30 N. Z. L. R. 581.—N.Z.****

k. Second will found after grant of probate.—Not revoking former will.]—Probate was granted of a will of testator. Afterwards another will was

SUB-SECT. 14.—WILLS OF SUICIDES.

908. General rule.]—The exor. of the will of a person found *felo de se* by the verdict of a coroner's inquest is entitled to probate thereof, though the effect of the verdict is to work a forfeiture of the personal property of deceased to the Crown. There is a distinction between the operative effect of a testamentary paper & its title to probate.—*In the Goods of BAILEY* (1861), 2 Sw. & Tr. 156; 31 L. J. P. M. & A. 178; 4 L. T. 477; 7 Jur. N. S. 712; 164 E. R. 953.

As to suicide generally.]—See CRIMINAL LAW, Vol. XV., p. 814.

As to forfeiture.]—See, *now*, Forfeiture Act, 1870 (c. 23), s. 2.

SECT. 6.—HOW PROBATE IS OBTAINED.

SUB-SECT. 1.—WHO MAY OBTAIN PROBATE.

A. In General.

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), ss. 160, 161; Non-Contentious Probate Rules, 1925, rr. 114, 117, 118, 122, 124.

909. Executor appointed by the will.]—(1) No one can prove the will but who is named exor. in the will (HOLT, C.J.).

(2) Though an exor. has administered, yet an immediate administration is committed if he die before probate, & not an administration *de bonis non* (HOLT, C.J.).—*WANKFORD v. WANKFORD* (1704), 1 Salk. 299; 3 Salk. 162; Holt, K. B. 311; 91 E. R. 265; *sub nom.* *WANGFORD v. WANGFORD*, 1 Freem. K. B. 520; 11 Mod. Rep. 38.

Annotations.—*Generally*, *Mentd.* *Hudson v. Hudson* (1737), 1 Atk. 460; *Thrustout d. Levick v. Coppin* (1771), 2 Wm. Bl. 801; *Doe v. Knight* (1826), 8 Dow. & Ry. K. B. 348; *Doe d. Wood v. Toes* (1826), 8 Dow. & Ry. K. B. 63; *Freakley v. Fox* (1829), 9 B. & C. 130; *Brazier v. Hudson* (1836), 8 Sim. 67; *Pringle v. Crooks* (1839), 3 Y. & C. Ex. 666; *Toumlin v. Toumlin* (1841), 1 Hare, 236; *Harrison v. Harrison* (1846), 1 Rob. Eccl. 406; *Ford v. Beech* (1848), 11 Q. B. 852; *Ryalls v. Bramall* (1848), 1 Exch. 734; *Venables v. East India Co.* (1848), 2 Exch. 633; *Belshaw v. Bush* (1851), 11 C. B. 191; *Lowe v. Pesket* (1855), 25 L. T. O. S. 146; *Seagram v. Knight* (1867), 2 Ch. App. 628; *Re Bourne, Davey v. Bourne*, [1906] 1 Ch. 697; *Hewson v. Shelley*, [1913] 2 Ch. 384.

910. — Or codicil.]—An extrix. named in a codicil has a right to propound the will as well as the codicil, inasmuch as the codicil was a part of the will & gave her an interest in it.—*MILLER v. SHIFFPARD* (1758), 2 Lee, 506; 161 E. R. 421.

911. — As substituted executor.—Person first named having been cited.]—A substituted

found which disposed of part only of testator's property, & did not purport to revoke the former will.—*Held*: the second will should be admitted to probate as a codicil of the will already proved.—*Re BARRY* (1911), 30 N. Z. L. R. 1192.—**N.Z.**

PART II. SECT. 6, SUB-SECT. 1.—A.

909 i. Executor appointed by the will.]—Probate should be granted to every exor. named in a will if he desires probate, & this without reference to his conduct either during testator's life or since.—*MARSH v. PATTEN & AUR* (1868), 7 N. S. W. S. C. R. (Eq.) 18.—AUS.****

1. — Discretion of court as to grant.]—Although under Probate & Administration Act, 1881, s. 85, it is within the discretion of the ct. to refuse to grant an application for letters of administration, no such discretion is given in regard to an application for probate by a person selected by a testator for the administration of his estate.—*PRAN NATH GHOSH v. JADO NATH BHATTACHARJ* (1897), I. L. R. 20 All. 139.—IND.****

m. — Married woman.]—The

exor. cannot propound a will till the person first named as exor. has been cited to accept or refuse letters of administration.—SMITH v. CROFTS (1758), 2 Lec, 557; 161 E. R. 439.

—.]—See, generally, Part I., Sect. 5, ante.

912. Surviving executor — After administration with will annexed granted to attorney.]—Two exors. gave a letter of attorney to a third person to take administration *cum testamento annexo*. If one of the exors. dies, the other has a right to call in the letter of attorney, & to take a probate of the will.—PIPON v. WALLIS (1753), 1 Lec, 402; 161 E. R. 148.

913. Whether representative of executor not proving—Executor dying & leaving executor.]—An exor. dies before probate, his exor. is not exor. to the first testator; yet if the residue was bequeathed to his testator, he shall have administration with the will annexed, else such person shall, to whom it is bequeathed, or in default thereof the next of kin to the first testator.—*ESTED v. STANLEY* (1580), 3 Dyer, 372 a; 73 E. R. 834.

Annotations:—**Fold.** Heden v. Wolfe (1621), 1 Palm. 153; Day v. Chatfield (1683), 1 Vern. 200. **Refd.** Smith v. Tracy (1677), 3 Keb. 776. **Mentd.** Wankford v. Wankford (1704), 1 Salk. 299.

914. ————] — HEDEN v. WOLFE (1621),
Palm. 153; 81 E. R. 1023; *sub nom.* HAYTON v.
WOLFE, Cro. Jac. 614; previous proceedings,
sub nom. WOLFE v. HEYDON (1618), Ill. 30.
Annotation.—**Mentd.** Wankford v. Wankford (1704), 1
Salk. 299.

915. ———.] — If an exor. dies before probate of the will, his exor. cannot prove it, but administration *cum testamento*, etc., must be granted to the residuary legatee, if any, or to the next of kin. — *PAY v. CHATFIELD* (1683), 1 Vern. 200; 23 E. R. 412.

918. — **Trust coupled with executorialship.]—**Where a trust is coupled in a will with an executorialship & the exor. does not prove the will, the representative of that exor. cannot take probate of it.

A mere trustee has no right by law to claim an administration.--*COUSSMAKER v. CHAMBERLAYNE* (1755), 2 Lee, 243; 161 E. R. 328.

Devolution of the representative office.]—See Part I., Sect. 8, *ante*, & compare Part II., Sect. 12, sub-sect. 1. A. (b), *post*.

Who may be appointed.]—*See* Part I., Sect. 2, *ante.*

917. Executor according to the tenor of foreign will.—Whether entitled to grant as of right.] *In the Goods of GREWE, No. 1770, post.*

Whether English court follows foreign court.]—
See CONFLICT OF LAWS, Vol. XI., pp. 378, 379,
Nos. 570-580.

B. Where Testator leaves more than one Will.

918. Whether to all executors named in wills.] —Testator duly executed on the same day, three

Married Women's Property Protection Act, 1880, is retrospective, & a married woman deserted by her husband before Act came into operation can acquire a right to sue for probate of a will in which she is named extrix.—DAVIES v. PUBLIC TRUSTEE (1883), 2 N. Z. L. R. 72 (S. C.).—N.Z.

testator, all of whose estate except one debt due to her was in New Zealand, & who was domiciled in Australia at the time of her death, appointed four exors., three of whom were residents of the Commonwealth, & one of whom was a resident of New Zealand, probate as regards the estate in New Zealand was granted to all the exors. on their

testamentary papers. By the first, he disposed of certain property in Canada, & appointed A. & B. exors. By the second, he disposed of certain property in England, & appointed C. & D. exors. The third, which was substantially the same as the second, appointed no exors. The second & third papers purported to dispose of the residue, & did not expressly state that they were intended to dispose of the residue in England only. It was proved by parol evidence that testator intended them to dispose of the residue in England only. Probate was granted of the three papers, as together containing the last will of deceased, to the exors. named in the first & second papers.—*In the Goods of NICKALLS* (1865), 4 Sw. & Tr. 40; 34 L. J. P. M. & A. 103; 29 J. P. 455; 13 W. R. 1047; 164 E. R. 1430.

1919. —J.—Where probate is granted of two or more testamentary papers, as together containing the last will of deceased, it is the practice to make the grant to all the exors. named in the several papers.—*In the Goods of MORGAN* (1867), L. R. 1 P. & D. 323; 36 L. J. P. & M. 61; 16 L. T. 181.

Annotation :—**Reld.** *In the Goods of Bailey* (1869), 17 W. R. 401.

920. ———.]—*In the Goods of BRIDGES, No. 1377,*
post.

921. ——. J.—Where a testatrix possessed of property in England & in Italy made separate wills, dealing with the property in each country exclusively, & appointing separate sets of exors., but in the Italian will, which was later in date, confirmed the English will:—*Held*: the confirmatory clause rendered necessary the incorporation of all the testamentary documents of deceased in the probate to be granted to the English exors. The ct. granted probate of all the documents to the English exors.—*In the Goods of LOCKHART* (1893), 69 L. T. 21; 57 J. P. 313; 1 R. 481.

922. — Power reserved to foreign executor.] A testatrix made a will dated Jan. 31, 1888. By a subsequent codicil dated Aug. 1, 1893, & headed: "Memorandum for my trustee G.," the sole surviving exor. & trustee of the will, she disposed of the whole of her property without any specific appointment of an exor. By another will made abroad she confirmed her will, made in England in or about the year 1889, & thereby disposed only of her property situate abroad, of which latter will she appointed another exor.:—*Held*: probate of all three documents might be granted to G. as exor., with liberty to the foreign exor. to come in.—*In the Goods of GREEN* (1899), 79 L. T. 738.

923. — English will dealing with English realty only.]—The ct. may, if it think fit, depart from the usual practice of refusing a limited grant to a person entitled to a general grant of probate. A testator, domiciled abroad, left an English

A testator, domiciled abroad, left an English

joint application.—*Re* MASTERUS (1914),
33 N. Z. L. R. 1439.—N.Z.

§ 913.1. Whether representative of *error* not *omitting* *Executors dying & leaving* *executor*.]—L. appointed M. & K. exors. & trustees of his will, & afterwards added a memorandum as follows: "If anything should happen to the trustees, I appoint R. to be one of the trustees." M. proved the will; after his death K. renounced.—*Held*: M.'s exor. did not present R. as executor, but as trustee entitled to probate.—*Re De LARONDE* (1872), 19 Gr. 118.—*CAN.*

PART II. SECT. 6, SUB-SECT. 1.—B.
9181. *Whether to all executors named*

in wills.]—Testatrix by one will disposed of all her estate & appointed A. exor. By a later will she specifically devised certain realty to B., & appointed B. sole exor. thereof. By a codicil testatrix recited the appointment of A. as exor. & that he had died, & she appointed C. & D. exors. in place of A. *Held*: C. & D. were not entitled to probate of all the testamentary instruments, but only of the will of testatrix, who appointed exors. by the codicil. *Re CLARK'S WILL* (1903). 4 S. R. N. S. W. 249; 20 N. S. W. N. N. 239.—AUS.

o. — Will appointing minors.—Where there were two wills of same date, appointing separate exors. &

Sect. 6.—How probate is obtained: Sub-sect. 1, B. & C.; sub-sects. 2 & 3, A. & B.]

will dealing exclusively with realty in England & appointing English exors.; & he left also a foreign will, appointing a foreign exor. & dealing with all the rest of his estate, which included personalty in England. The ct. granted to the English exors. probate of the English will, & made a *cæterorum* grant in favour of the foreign exor.—*In the Estate of VON BRENTANO*, [1911] P. 172; 105 L. T. 78; 27 T. L. R. 395; *sub nom. In the Goods of BRENTANO*, 80 L. J. P. 80.

Whether subsequent appointment revokes former appointment.]—See Part I., Sect. 6, *ante*.

Whether foreign will incorporated in English probate.]—See Sect. 10, sub-sect. 7, B. (a), *post*.

Limited for particular or limited purposes generally.]—See Part I., Sect. 3, sub-sect. 1, A., *ante*.

C. Disqualification of Executor.

See, also, Part I., Sect. 7, *ante*.

924. When court will interfere.]—If a testator, when he makes his will, is aware of the circumstances & position of his exors. & trustees, the ct. will not lightly interfere with their discretion; & although the circumstance of an exor. being an insolvent may be a reason for appointing a receiver, yet, if testator was aware of his insolvency, the ct. will not, on that ground alone, take the property out of his hands.—*STANTON v. CARRON CO.* (1854), 18 Beav. 146; 2 Eq. Rep. 466; 23 L. J. Ch. 299; 22 L. T. O. S. 299; 18 Jur. 137; 2 W. R. 176; 52 E. R. 58.

Annotation:—*Mentd.* *Yeatman v. Yeatman* (1877), 7 Ch. D. 210.

925. Grounds for interference—Natural disability of executor.]—The bkpcy. of an exor. is no cause of granting administration to another. Where there is a natural disability, there is a necessity of doing it, but it must be *ad usum et commodum* of the exor.; so the last granting of administration is a nullity, & *ipso facto* void.—*HILL v. MILLS* (1691), 12 Mod. Rep. 9; Comb. 185; Holt, K. B. 305; 1 Show. 293; 1 Salk. 36; 88 E. R. 1130; *sub nom. MILL'S CASE*, Skin. 299. **Annotations:—***Reid.* *Marriot v. Marriot* (1725), 11 B. Ch. 203; *Evans v. Tyler* (1849), 7 Notes of Cases, 296. **Mentd.** *Ex p. Evelyn* (1833), 2 My. & K. 3.

926. —Insolvency of executor.]—*HILL v. MILLS*, No. 925, *ante*.

927. ——]—The Spiritual Ct. cannot refuse to grant the probate of a will to an exor., because indigent or insolvent, or compel him to give security.—*R. v. RAINS* (1698), 12 Mod. Rep. 205; 1 Ld. Raym. 361; 1 Salk. 299; 88 E. R. 1265.

Annotations:—*Reid.* *Marriot v. Marriot* (1725), 1 Stra. 666; *Harrison v. Harrison* (1846), 4 Notes of Cases, 434. **Mentd.** *R. v. Litchfield (Bp.)* (1734), Ridg. temp. H. 73.

928. ——]—Exors. being insolvent, administration should be granted to some solvent

person.—*R. v. SIMPSON* (1764), 3 Burr. 1463, 1 Wm. Bl. 456; 96 E. R. 263.

Annotations:—*Reid.* *Arnold v. Blencowe* (1788), 1 Cox, Eq. Cas. 426 c; *Creswick v. Woodhead* (1842), 12 L. J. C. P. 111; *Harrison v. Harrison* (1846), 1 Rob. Ecol. 406.

—As ground for appointment of receiver.]—*See* Nos. 211–219, *ante*, & generally, RECEIVERS.

929. —Poverty of executor.]—*R. v. RAINS*, No. 927, *ante*.

930. ——]—It is no ingredient to take the assets out of the hands of an exor., that he is not of an affluent fortune, as long as testator himself has placed this confidence in him without regarding his circumstances.—*HATHORNTHWAITE v. RUSSEL* (1740), 2 Atk. 126; Barn. Ch. 334; 26 E. R. 480, L. C.

—As ground for appointment of receiver—Before probate.]—*See* No. 8, *ante*.

—After probate.]—*See* No. 210, *ante*.

931. —Misconduct of executor—Fraudulent mutilation of will.]—Fraudulent mutilation of a will by an exor. & trustee. The ct. not at liberty to exclude such party from probate.—*In the Goods of ILETT* (1842), 1 Notes of Cases, 410.

932. —Conviction of executor for felony—After testator's death.]—An exor. after testator's death convicted of felony, is not thereby disentitled to maintain a suit in a ct. of probate with a view of establishing the validity of the will by which he is appointed exor.—*SMETHURST v. TOMLIN & BANKES* (1861), 2 Sw. & Tr. 143; 30 L. J. P. M. & A. 269; 4 L. T. 712; 25 J. P. 777; 7 Jur. N. S. 763; 104 E. R. 947.

SUB-SECT. 2.—THE EXECUTOR'S OATH.

See Sect. 3, *ante*.

SUB-SECT. 3.—PROOF OF EXECUTION OF WILL.

A. In General.

933. Necessity for.]—When the substance of a will is propounded, the first point to be ascertained is whether such a will was duly executed; if that is established, the next point is, whether it was in existence at the death of deceased, if it was not, then the *prima facie* presumption that it was destroyed by deceased, with intention to revoke, arises, which may be rebutted by further evidence. In the present case the ct. was satisfied, on the evidence, that deft., who had taken out letters of administration, had possessed himself of the will after the death of deceased, & had suppressed or destroyed it, & therefore decreed letters of administration with the will annexed, as contained in a draft.—*PODMORE v. WHATTON* (1864), 3 Sw. & Tr. 449; 33 L. J. P. M. & A. 143; 10

those appointed by the second were minors, probate was granted to the exor. of full age appointed by the first will.—*In the Goods of HOANI WETKERE KORAKO*, 1 J. R. 143.—N.Z.

p. —Will not appointing executor.]—Testator died leaving two wills, the earlier of which contained an appointment of two exors., one of whom had died in testator's lifetime. The later will contained no appointment of exors., & did not revoke the previous will.—*Held:* probate of both wills should be granted to the surviving exor. named in the first will.—*Re FERGUS* (1914), 34 N. Z. L. R. 48.—N.Z.

PART II. SECT. 6, SUB-SECT. 1.—C.

q. Grounds for interference—Foreign corporation.]—The ct. will not make a grant of probate to a foreign corp.—*Re FINN'S WILL* (1908), 8 S. R. N. S. W. 32.—AUS.

r. —Executors also beneficiaries attesting will.]—At the end of an attestation clause in a will both exors., who were also beneficiaries, signed their names above those of two independent witnesses. Each of the exors. swore that he had signed the will at the request of testatrix as one of the exors. only & not as an attesting witness. The public trustee applied

for an order consenting to his appointment as exor., declaring that the exors. had not signed as attesting witnesses:—*Held:* even if the exors. signed as attesting witnesses, their appointment as exors. was valid, an order might be made consenting to the appointment of the public trustee as exor. & granting probate to him.—*Re DUNN*, [1919] N. Z. L. R. 685.—N.Z.

PART II. SECT. 6, SUB-SECT. 3.—A.

a. Necessity for.—In case of lost will.]—The ct., in the absence of all proof of the execution of a will which has become lost, will not admit the

L. T. 754; 28 J. P. 503; 10 Jur. N. S. 756; 13 W. R. 106; 164 E. R. 1349.

Annotation.—*Apld.* Finch v. Finch (1867), L. R. 1 P. & D. 371.

934. Circumstances giving rise to suspicion—Testamentary act in last stage of life.—Probate granted of unfinished instructions. In all testamentary acts in the last stage of life, the ct. looks with vigilance & jealousy to the evidence by which they are supported (*per* CUR.).—MUSTO v. SUTCLIFFE (1818), 3 Phillim. 104; 161 E. R. 1271.

—**Of fraud or undue influence.**—See Sect. 9, sub-sect. 7, *post*.

935. — Appearance of document.—The appearance of the paper is calculated in some degree to excite the jealousy of the ct., for it is not executed as such papers usually are, deceased's name is not opposite to the seal, where, indeed, there is not room for it, & the name of one witness is above the seal & the names of the two other witnesses are below it, & the ink in which the name & date are written is of a very different description from that in which the body of the will is written. This is a circumstance calculated to raise a suspicion that it is not a *bonâ fide* transaction (SIR H. JENNER).—NOBBS v. NOBBS (1841), 1 Notes of Cases, 126.

936. — State of document — Document crumpled.—WYATT v. BERRY, No. 3186, *post*.

937. Proof of making & proof of capacity distinguished.—A codicil, forthcoming after the death of testator from the possession of the party benefited, the execution proved by one of the attesting witnesses, the other being disqualified by interest, resisted on the ground of fraud, pronounced against. Where the question is, not as to the sanity or capacity of deceased, but whether the act was done or not, all the circumstances, probable & improbable, are to be taken into consideration before the ct. can make up its mind; & the *onus probandi* is *primâ facie* on the party who sets up the paper, to prove, as far as the case admits, that it is the act of deceased, & not on the party opposing it to show that it is not his act (SIR H. JENNER FUST).—MACKENZIE v. YEO (1842), 3 Curt. 125; 1 Notes of Cases, 516; 163 E. R. 612.

Annotation.—*Reid.* Farmer v. Brock (1856), Dea. & Sw. 187.

938. Whether declarations of testator admissible.—Declarations made by testator after the date of an alleged will are not admissible to prove the execution of the will, & they are equally inadmissible to prove that the will was executed in duplicate.

In order to prove that testatrix had executed her will in duplicate, & that she had revoked the will by destroying one of the parts, evidence was tendered of oral declarations to that effect, made by testatrix after the date of the will:—*Held*: these declarations were inadmissible.—ATKINSON v. MORRIS, [1897] P. 40; 66 L. J. P. 17; 75 L. T. 440; 45 W. R. 293; 13 T. L. R. 83; 41 Sol. Jo. 110, C. A.

Annotations.—*Reid.* Eyre v. Eyre, [1903] P. 131 *In the Estate of Jessop* (1924), 40 T. L. R. 800.

See, also, No. 1007, *post*.

Statutory requirements as to execution.—See WILLS.

same to probate.—*Re* HENNEBURY'S WILL (1859), 4 Nfld. L. R. 288.—NFLD.

PART II. SECT. 6, SUB-SECT. 3.—B.

9451. Evidence to rebut—One witness

unable to depose to due execution—One witness supporting due execution.—Where one witness swore that testator's signature was affixed after execution, & the other swore that the will was properly executed & there were two

signatures to the will, one on the first page & the other at the end:—*Held*: the presumption *omnia rite esse acta* should be applied & probate granted.—*Re* IRWIN, [1920] N. Z. L. R. 440.—N.Z.

B. Presumption of Due Execution.

939. General rule.—Where a will appears to be duly signed & witnessed, it is a presumption of law that the execution was duly carried out according to the requirement of Wills Act, 1837 (c. 26), even though the witnesses may afterwards be in doubt as to what took place at the time of its execution.—WHITING v. TURNER (1903), 80 L. T. 71; 47 Sol. Jo. 470.

940. Evidence to rebut—All witnesses discrediting due execution—All witnesses conflicting—Lapse of nine years.—WINSTON v. WINSTON (*circa* 1894), cited 71 L. T. p. 703.

Annotation.—*Apld.* Dayman v. Dayman (1894), 71 L. T. 699.

941. — — — — — Defective attestation.—FLEETWOOD'S CASE (1844), 3 Notes of Cases, 643, n. *Annotation*.—*Reid.* In the Goods of Kraus (1845), 3 Notes of Cases, 642.

942. — — — — — Former inconsistent evidence by one witness.—In a suit for revocation of probate on the ground of undue execution, both the attesting witnesses swore that the will was not signed by them in testator's presence, but their evidence did not coincide upon other matters:—*Held*: the presumption of law, *omnia præsumuntur rite esse acta*, must prevail.—DAYMAN v. DAYMAN (1894), 71 L. T. 699.

943. — — — — — Evidence of witness not attesting admitted in support of will.—Where two subscribed witnesses to a will deposed, after the lapse of more than a year & a half, one positively, the other not positively, that testator had signed after they affixed their names to the attestation clause, the ct. admitted, after publication, the evidence of another witness, present at the transaction, who deposed that testator signed before the witnesses; & probate granted. The ct. will not in such cases trust to the recollection of the witnesses, but will look at their acts, & at the probabilities of the case.—BAYLISS v. SAYER (1844), 3 Notes of Cases, 22.

944. — — — — — Solicitor.—The will of a single lady was prepared by B., a solr., from written instructions; & by it she appointed B. & his partner exors., with a legacy to each, & gave a large reversionary bequest to the daughter of B., with a contingent interest therein to B. himself. The will was signed by testatrix, & an attestation clause in the usual form was subscribed by two witnesses. One of the witnesses in her evidence stated that she did not recollect seeing testatrix sign, & the other said that she did not see testatrix sign; they both said that she did not acknowledge her signature, or declare the paper signed by them to be her will; & that they did not know that it was a will. B., by his evidence, deposed that the will was signed by testatrix in the presence of the two witnesses:—*Held*: to be a good execution of the will.—BENNETT & FIELD v. SHARP (1855), 25 L. T. O. S. 10; 1 Jur. N. S. 456.

945. — One witness unable to depose to due execution—One witness supporting due execution.—A paper attested by two witnesses, one of whom was unable to depose that the signature was made in his presence, admitted to probate.

One of the witnesses deposes that testatrix signed the will in the presence of both, & they subscribed their names in her presence. The

Sect. 6.—How probate is obtained: Sub-sect. 3, B.

requisites of Wills Act, 1837 (c. 26), were complied with (SIR H. JENNER FUST).—*In the Goods of HARE* (1842), 3 Curt. 54; 1 Notes of Cases, 359; 163 E. R. 653.

946. — One witness discrediting due execution.]—Where one of the attesting witnesses to a will negatived its due execution, & the other could remember nothing of the matter, the ct., upon presumption, admitted the will to probate.—*SHIELD v. SHIELD* (1846), 4 Notes of Cases, 647.

947. — Others dead.]—A will, dated before Wills Act, 1837 (c. 26), was produced on a trial in ejectment. It was signed with the name of the alleged deviser; but there was no proof that the signature was in his handwriting, or made by his authority. It was attested by two witnesses, deceased, whose handwriting was proved; & between their names was that of another witness, J. P., who appeared to sign by his mark. A man in extreme old age, named J. P., was called, who was supposed to be the witness, but he had no memory on the subject. The will had not been disputed for sixteen years after the death of the deviser:—*Held*: upon this evidence, a jury might infer a due execution of the will under Stat. Frauds, s. 5.—*DOE d. DAVIES v. DAVIES* (1846), 9 Q. B. 648; 16 L. J. Q. B. 97; 8 L. T. O. S. 136; 11 Jur. 182; 115 E. R. 1421.

Annotation:—Mentl. Plant v. Taylor (1861), 31 L. J. Ex. 289.

948. — Attesting witness subsequently contradicting own evidence—Other witness not called.]—Case in which probate of a will which had been originally granted on the evidence of the two attesting witnesses was confirmed, notwithstanding that one of them retracted his evidence & in effect swore to the signatures of testator & witnesses having been forged, & the other witness was not called:—*Held*: in the circumstances, the later evidence of the one was incredible, & the absence of the other could be satisfactorily explained.—*PILKINGTON v. GRAY*, [1899] A. C. 401; 68 L. J. P. C. 63, P. C.

949. — All witnesses unable to depose to due execution.]—*WHITING v. TURNER*, No. 939, *ante*.

950. — Discrepancy between attestation clause & witness's evidence.]—In the case of a holograph will, the whole operative portion of which was written on the first page of a sheet of paper, the attestation clause containing the signature of testator was written on the second page & stated that the will was signed by testator in the presence of the witnesses. An affidavit, made by one witness only, stated that they did not see the first page at all & set forth facts pointing to acknowledgment only in the presence of the witnesses:—*Held*: the will was entitled to probate without notice to the next of kin.—*In the Goods of MOORE*, [1901] P. 44; 70 L. J. P. 16; 84 L. T. 60.

951. — One of two witnesses incapacitated

949 i. — All witnesses unable to depose to due execution.]—Ex p. HENDERSON (1887), 10 L. N. 91.—*GAN*.

949 ii. ——[Testator wrote out a document purporting to be his will, with an attestation clause containing his name in his own handwriting. The witnesses did not see testator's name, nor did he acknowledge that he had signed the will:—

Held: the will was not properly executed.—*PATTERSON v. BENBOW* (1889), 7 N. Z. L. R. 673.—*N.Z.*

PART II. SECT. 6, SUB-SECT. 3.—
C. (a).

954 i. General rule.]—It is only where a testator has written his will with his own hand & has distributed his property among all his children

by subsequent interest—Circumstances of will suspicious.]—*MACKENZIE v. YEO*, No. 937, *ante*.

See Wills Act, 1837 (c. 26), s. 14.

952. — One of two witnesses discredited—Circumstances favouring validity of will.]—The two subscribing witnesses were the only witnesses produced in support of a will. One of them was discredited. There was no evidence of instructions. Will pronounced for on the evidence of the single witness, corroborated by the probabilities of the case.—*FARMER v. BROCK* (1856), *Dea.* & *Sw.* 187; 27 L. T. O. S. 240; 2 Jur. N. S. 670; 4 W. R. 676; 164 E. R. 544.

953. — Handwriting of supposed witnesses same as that of testator—Witnesses undiscoverable.]—G. L. wrote out a draft will, which on his death was found completed, with the names of two attesting witnesses. On inquiry no such persons could be traced, & the writing of the names was sworn to be that of deceased himself. The ct. granted administration of the goods of deceased, as having died intestate, without the parties interested under the draft will having been first cited to propound it.—*In the Goods of LEW* (1858), 4 Jur. N. S. 790.

C. By Calling Attesting Witnesses.

(a) Whether Necessary.

See Probate Rules, 1862 (Non-contentious), rr. 4–7.

Cases relating to the former practice for establishing a will in Equity are omitted.

As to proof of wills relating to real estate, see Court of Probate Act, 1857 (c. 77), ss. 62–64, & see, now, Land Transfer Act, 1897 (c. 65), s. 2 (2); Administration of Estates Act, 1925 (c. 23), s. 2 (2); Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), Sched. V., Part II.

954. General rule.]—A party propounding a will is bound to call one at least of the attesting witnesses, if he can be produced, to prove the due execution, & if such witness fails to prove the due execution, he is bound to call the other, although he may know him to be an adverse witness. If an attesting witness called by a party propounding a will gives evidence against the will, the party calling him may produce evidence to disprove such of the facts stated by him as are material to the issue, & to prove that he has made statements inconsistent with his evidence, although he has denied having made such statements & he is not a hostile witness.—*COLES v. COLES & BROWN* (1866), L. R. 1 P. & D. 70; 35 L. J. P. & M. 40; 13 L. T. 608; 14 W. R. 290.

955. ——[The party propounding a will is bound to call one of the attesting witnesses to prove its due execution.—*BOWMAN v. HODGSON* (1867), L. R. 1 P. & D. 362; 36 L. J. P. & M. 124; 16 L. T. 392; 31 J. P. 678.

Annotation:—Consd. Griffiths v. Griffiths (1884), 1 T. L. R. 3.

956. ——[A will being an instrument required by law to be attested must be proved by the evidence of an attesting witness when such evidence is available.—*GRIFFITHS v. GRIFFITHS* (1884), 1 T. L. R. 3.

957. — Evidence of witness present at

witnesses may be dispensed with.—*Re MCCALGAN* (1893), 10 S. C. 277.—*S. AF.*

957 i. — Evidence of witness present at execution—Though not attesting witness.]—A will contained an attestation clause, & purported to be witnessed by H. & R. Probate was granted in Mar. 1881, an affidavit of due execution being executed by H., who died in 1887. On trial as to due

execution—Though not attesting witness.]—A will may be proved without calling an attesting witness, by calling a witness who was present at the execution.—*MACKAY v. RAWLINSON* (1910), 35 T. L. R. 223; 63 Sol. Jo. 229.

958. — When dispensed with—Non-appearance of parties cited.]—In an action brought for the purpose of proving a will in solemn form, where none of the parties cited had appeared, the ct. declined to order the execution & attestation of the will to be proved by affidavit under R. S. C., Ord. 37, r. 1.—*COOK v. TOMLINSON* (1870), 24 W. R. 851; 3 Char. Pr. Cas. 326.

959. — Refusal of witnesses to give evidence.]—Where all the three attesting witnesses to a will, of which the attestation clause was defective refused to make an affidavit under Non-contentious Probate Rules, 1862, r. 4, as to the execution, but the exor. made an affidavit under r. 7, stating that the signatures of testator & attesting witnesses were in their handwriting & that no other persons were present at the execution:—*Held*: (1) the evidence was insufficient for grant of probate under r. 7; (2) an order might be made under Court of Probate Act, 1857 (c. 77), s. 24, requiring the attesting witnesses to attend for examination as to the execution of the will.—*In the Goods of SWEET*, [1891] P. 400; 61 L. J. P. 15.

Annotation:—*Folld. Re Bays* (1910), 54 Sol. Jo. 200.

Witness unavailable.]—See Sub-sect.

3, D., *post*.

Attestation clause absent or defective.]—See Sub-sect. 3, E., *post*.

(b) *Whether All Witnesses must be Called.*

960. General rule.]—To prove the execution of a will in the Ct. of Probate, it is not necessary to examine both the attesting witnesses.—*BELBIN v. SKEATS* (1858), 1 Sw. & Tr. 148; 27 L. J. P. & M. 50; 164 E. R. 669.

961. — One witness negating due execution.]—The attestation to a will of lands purported that the will had been signed by testator in the presence of three witnesses, who, in his presence, & in the presence of each other, signed the attestation. To prove the execution of the will, one of the three witnesses was called, & he stated that he & one of the other witnesses saw testator sign the will, but that the third witness was not then present, though the signature to the attestation was in his handwriting:—*Held*: this was not sufficient proof of the will, without either calling the third witness, or accounting for his absence.—*DOE d. HARBORNE v. LEWIS* (1836), 7 C. & P. 574, N. P.

962. — —.]—Where the party propounding a will in a contested suit, the only issue being due execution, & notice having been given, called one of the attesting witnesses, who gave evidence against the due execution:—*Held*: he was bound to call the other attesting witness.—*OWEN v. WILLIAMS* (1863), 4 Sw. & Tr. 202; 32 L. J. P. M. & A. 159; 9 L. T. 86; 11 W. R. 808; 164 E. R. 1494.

Annotations:—*Consd. Forster v. Forster* (1864), 33 L. J. P. M. & A. 113. *Expld. Croft v. Croft* (1865), 4 Sw. & Tr. 10.

execution R. swore that testator did not sign or acknowledge the will in his presence. Another witness, R., beneficially interested, & in testator's house at the time, gave evidence that the will must have been signed in the presence of both H. & R.

The ct. followed the principle *omnia presumuntur rite esse acta*, & decided in favour of the will.—*Re Goodie &*

TIBBITS v. MACLEAN (1891), 12 N. S. W. Eq. 41.—*AUS.*

PART II. SECT. 6, SUB-SECT. 3.—
C. (b).

960i. General rule.]—A party setting up a will is not bound to produce the second subscribing witness unless ordered by the ct. so to do.—*JAMESON v. LEITCH* (1842), Milw. 683.—*IR.*

963. — One witness failing to prove due execution.]—*COLES v. COLES & BROWN*, No. 954, *ante*.

964. — Corroborating circumstances.]—*FARMER v. BROCK*, No. 952, *ante*.

965. — Document containing also attested non-testamentary matter.]—A party, propounding a paper as testamentary, containing on the face of it various memoranda of the property attested by witnesses, is not bound to examine more than those witnesses who attest that portion of the paper which is testamentary.—*TAPLEY v. KENT* (1846), 1 Rob. Eccl. 400; 4 Notes of Cases, 292; 9 Jur. 1041; 163 E. R. 1080.

(c) *Other Cases.*

966. Refusal of witness to make affidavit—Whether affidavit by executor sufficient.]—*In the Goods of SWEET*, No. 959, *ante*.

967. Cross-examination of witnesses—Whether allowed.]—Where on the trial of an issue *devisavit vel non*, from the Ct. of Ch., plff., in obedience to the rule of that ct., calls the second attesting witness who gives evidence adverse to plff., the counsel of plff. may put questions to him in the nature of a cross-examination.—*BOWMAN v. BOWMAN* (1843), 2 Mood. & R. 501, N. P.

968. — —.]—Attesting witnesses to a will or codicil may be cross-examined by the party calling them, as they are the witnesses of the ct.—*Re BROCK, JONES v. JONES* (1908), 24 T. L. R. 839; 52 Sol. Jo. 609.

969. Rebutting evidence—Whether allowed—Attesting witnesses swearing testator insane.]—Subscribing witnesses to a will, who swear to testator's insanity, may be contradicted by other evidence.—*LOWE v. JOLIFFE* (1702), 1 Wm. Bl. 365; 96 E. R. 204.

Annotations:—*Consd. Jordaine v. Lashbrooke* (1798), 7 Term Rep. 601; *Tatham v. Wright* (1831), 2 Russ. & M. 1; *The Lochlibo* (1850), 14 Jur. 792. *Reid. Bent v. Baker* (1780), 3 Term Rep. 27; *Jay v. Ballard* (1790), 3 Esp. 173, n.; *Adams v. Lingard* (1792), Peake, 169; *Doe d. Stephenson v. Walker* (1801), 4 Esp. 50; *Phillips v. Par.* (1808), 1 Camp. 412; *Alexander v. Gibson* (1811), 2 Camp. 555; *Edinburgh v. Crindel* (1817), 2 Stark. 284; *Bradley v. Ricardo* (1831), 8 Bing. 57; *Wright v. Beckett* (1834), 1 Mood. & R. 414; *Doe d. Mudd v. Suckemore* (1836), 5 Ad. & El. 703. *Mentd. Boyce v. Rosborough* (1854), 23 L. J. Ch. 305.

970. — To discredit witness.]—If the subscribing witnesses negative compliance with Wills Act, 1837 (c. 26), s. 9, the will cannot be pronounced for, unless their evidence be rebutted, by showing, (a) that the witnesses cannot be credited, or (b) that upon the statement of facts, their memories are defective.—*BURGOYNE v. SHOWLER* (1844), 1 Rob. Eccl. 5; 3 Notes of Cases, 201; 8 Jur. 814; 163 E. R. 945.

Annotations:—*Reid. In the Goods of Leach* (1848), 6 Notes of Cases, 92; *Re Attridge* (1849), 12 L. T. O. S. 881; *Loech v. Bates* (1840), 1 Rob. Eccl. 714; *In the Goods of Irem* (1865), 29 J. P. 290; *Harris v. Knight* (1890), 15 J. P. 170; *In the Goods of Philbin* (1917), 86 L. J. P. 81. *Mentd. Wright v. Sanderson* (1884), 9 P. D. 149.

971. — Evidence of character of an attesting witness to a will is receivable in evidence to discredit his testimony to the execution.]—*DOE d. MARKHAM v. WARD* (1848), 11 L. T. O. S. 227.

972. — Right of propounder to call.]—*COLES v. COLES & BROWN*, No. 954, *ante*.

964i. — Corroborating instances.]—Where three persons witnessed the execution of a will, two of them signed by their marks & were unable to identify the will produced, but the third did so & also proved the marks of the others:—*Held*: proof was sufficient to entitle to probate.—*Re HANLON'S WILL* (1874), 2 Pug. 136.—*CAN.*

Sect. 6.—How probate is obtained: Sub-sect. 3, D. & E.]

D. Where Attesting Witness cannot be Called.

973. Where attesting witness dead—Proof of handwriting.]—A will shall not be read on proof of a witness's hand, unless there be positive proof that he is dead.—**BISHOP v. BURTON** (1738), 2 Com. 614; 2 Eq. Cas. Abr. 705; 92 E. R. 1235.

974. ——[One of the witnesses [of a will] being beyond sea & no other proof as to him:—*Held*: there should have been a commission to examine him, & the same credit is not given to his handwriting as if dead.—**GRAYSON v. ATKINSON** (1752), 2 Ves. Sen. 454; 28 E. R. 291; *sub nom.* **GRAYSON v. WILKINSON**, 1 Dick. 158, L. C.

Annotations:—Mentd. **Killis v. Smith** (1754), 1 Ves. 11; **Grimmett v. Grimmett** (1754), Amb. 210; **Widmore v. Woodroffe** (1766), Amb. 636; **Smith v. Coffin** (1795), 2 Hy. Bl. 444; **Morison v. Turnour** (1811), 18 Ves. 175; **Hott v. Gengo** (1842), 3 Curt. 160; **Casement v. Fulton** (1845), 5 Moo. P. C. C. 130; **Boysse v. Rossborough** (1854), 3 De G. M. & G. 817; **Body v. Halse**, **Hunt v. Halse**, **Fenning v. Halse** (1891), 61 L. J. Q. B. 57; **Shamu Patter v. Abdul Kadir Ravathan** (1912), 28 T. L. R. 583.

975. ——[A will of 1823, executed by a mark, the drawer & attesting witness being dead, admitted to probate on proof of the death & handwriting of the attesting witness.—*In the Goods of FASSNIDGE* (1843), 2 Notes of Cases, 316.

976. ——[Where a will is executed abroad, & attested by three witnesses, one of whom is dead, & the other two are out of the jurisdiction of the ct., proof of the handwriting of the parties is sufficient proof of the attestation of the will.—**PLATEL v. STERT** (1843), 2 L. T. O. S. 210, Ex. Ch. *Annotation:—Mentd.* **Nicholson v. Wilson** (1845), 9 Jur. 389.

977. ——[*Semble*: where the attestation clause of a will more than thirty years old recites a compliance, with the requisite ceremonies in respect of all the witnesses, it is enough, in order to make out a *prima facie* case, to prove the death of all & the handwriting of one of them; because it will be presumed that everything that he thus declared by his attestation to have been done was rightly done.—**ANDREW v. MOTLEY** (1862), 12 C. B. N. S. 526; 32 L. J. C. P. 128; 142 E. R. 1248.

978. — Evidence as to character.]—Where a will is contested between the heir-at-law & a stranger, the execution of it must be proved by the most clear & unequivocal evidence, but, if contested at the end of some years, when the subscribing witnesses are dead, evidence may be called to their character.—**DOE d. WALKER v. STEPHENSON** (1801), 3 Esp. 284, N. P.; *subsequent proceedings, sub nom.* **DOE d. STEPHENSON v. WALKER**, 4 Esp. 50, N. P.

Annotations:—Consd. **Durham (Bp.) v. Beaumont** (1808), 1 Camp. 207. *Reid.* **Provis v. Reed** (1829), 5 Bing. 435.

979. ——[On the trial of an issue *devisavit vel non*, all the subscribing witnesses must be examined, except in cases of necessity; as death, insanity, absence abroad; or the heir waives his right.—**BOOTLE v. BLUNDELL** (1815), 19 Ves. 494; **Coop. G. 136**; 34 E. R. 600, L. C.

Annotations:—Consd. **Tatham v. Wright** (1831), 2 Russ. & M. 1. *Expld.* **McGregor v. Topham** (1850), 3 H. L. Cas. 132. *Reid.* **Pulley v. Hilton** (1823), 12 Price, 625; **Slaney** (1836), 7 Sim. 595. *Mentd.* **Gittins v. Steele** (1818), 1 Swan. 24; **Collis v. Robins** (1847), 1 De G. & Sm.

131; **Cunningham v. Murray** (1847), 1 De G. & Sm. 366; **Boughton v. Boughton**, **Boughton v. James** (1848), 1 H. L. Cas. 406; **Waters v. Waters** (1848), 2 De G. & Sm. 591; **Paterson v. Scott** (1852), 1 De G. M. & G. 531; **Plenty v. West** (1852), 16 Beav. 173; **Boys v. Bradley** (1853), 4 De G. M. & G. 58; **Key v. Key** (1853), 4 De G. M. & G. 73; **Boysse v. Rossborough** (1854), 3 De G. M. & G. 817; **Smith v. Smith** (1861), 3 Giff. 263; **Mellish v. Vallins** (1862), 2 John. & H. 194; **Mollish v. Vallins** (1862), 6 L. T. 215; **Vernon v. Manvers** (1862), 31 Beav. 623; **Eno v. Tatham** (1863), 4 Giff. 181; **Gilbertson v. Gilbertson** (1865), 34 Beav. 354; **Honsman v. Fryer** (1867), 3 Ch. App. 420; **Allan v. Gott** (1872), 7 Ch. App. 439; **Metcalf v. Hutchinson** (1875), 1 Ch. D. 591; *Re Simpson, Ex p. Morgan* (1876), 34 L. T. 329; **Howard v. Dryland** (1877), 88 L. T. 24; **Patching v. Barnett** (1880), 49 L. J. Ch. 665; **Kilford v. Maney** (1885), 31 Ch. D. 56.

980. Where attesting witness abroad—Whether proof of handwriting allowed.]—**GRAYSON v. ATKINSON**, No. 974, *ante*.

981. ——[**PLATEL v. STERT**, No. 976, *ante*.

982. ——[**BOOTLE v. BLUNDELL**, No. 979, *ante*.

983. — Whether certificate of British Consul as to affidavits sufficient.]—Where a British subject executed a will in Paris & a codicil referring to the will by date at Buenos Ayres & the attestation clause to both will & codicil being imperfect, evidence of due attestation became necessary, the ct. only required evidence as to the codicil, as that set up the will by reference. It refused, however, to be satisfied with the certificate of the British Consul at Buenos Ayres, to the effect that the attesting witnesses had sworn before him to their due attestation of the codicil; & the ct. required their affidavit & also an affidavit as to testator's domicile of origin being English.—*In the Goods of LATHAM* (1864), 4 New Rep. 253; 33 L. J. P. M. & A. 186; 28 J. P. 712; 10 Jur. N. S. 620.

984. — Will annexed to commission for examination.]—Where the attesting witness, whose evidence was necessary to prove the due execution of a will, was abroad, the ct. under the circumstances ordered the original will to be sent out of England to the attesting witness; but directed it to be annexed to the commission under which the witness was to be examined.—**FORSTER v. FORSTER** (1864), 4 New Rep. 252; 33 L. J. P. M. & A. 113; 28 J. P. 376; 10 Jur. N. S. 594.

985. Where attesting witness cannot be found—Proof of handwriting.]—Proof of the handwriting of an attesting witness to a will received under particular circumstances [witness not heard of for many years] in order to found a decree establishing the will.—**JAMES v. PARNELL** (1823), Turn. & R. 417; 37 E. R. 1162.

986. — Affidavit made on proof in common form admitted.]—In a suit for revocation of probate on the grounds of undue execution, & incapacity, where it appeared that every effort had been made to find one of the attesting witnesses but without success, the ct. allowed the affidavit made by him eight years before, at the time of proving the will at the district registry, to be admitted as evidence of execution & capacity.—**GORNALL v. MASON** (1887), 12 P. D. 142; 56 L. J. P. 86; 57 L. T. 601; 51 J. P. 663; 35 W. R. 672.

987. Where attesting witness insane.]—**BOOTLE v. BLUNDELL**, No. 979, *ante*.

PART II. SECT. 6, SUB-SECT. 3.—D.

9731. Where attesting witness dead—Proof of handwriting.]—Where a document purporting to be a will & in the handwriting of the person signing it as testator has no attestation clause, but the two persons whose names are subscribed in writing apparently differ-

ing from that of testator & from each other, as witnesses, are dead, such document may be capable of proof as a valid will.—*Re BUCKLEY* (1899), 24 V. L. R. 933.—AUS.

t. — Joint will—Proof by survivor.]—Where a Scottish will is made jointly by two persons in favour

of the survivor, & the witnesses are dead, the evidence of the survivor is sufficient to prove compliance with the formalities of execution in accordance with the requirements of English law.—*Re LACH'S WILL* (1884), 3 N. Z. L. R. 308 (S. C.).—N.Z.

E. Attestation Clause Absent or Defective.

988. No attestation clause—General rule.]—A paper, appearing on the face of it to be the original will, duly executed, without a form of attestation, upon an affidavit being required from the attesting witnesses, according to the rule of the ct. turned out not to be the original will, but a copy, the names of the witnesses not being of their writing. Motion for administration with the paper rejected.—*In the Goods of KRAUS* (1845), 3 Notes of Cases, 642.

989. — Attesting witnesses out of England.]—A will executed in a British colony in Africa, without an attestation clause, the witnesses being absent from England, allowed to be taken probate of without the usual affidavit.—*In the Goods of SEAGRAM* (1844), 3 Notes of Cases, 436.

990. — Witnesses dead—Presumption of due execution.]—Testator executed a holograph will in 1874 & died in 1886. There was no attestation clause to the will, & one of the witnesses predeceased testator; the other died in 1887. The signature of one attesting witness appeared above that of testator himself. The handwriting of testator & of one witness to the will was proved by oral evidence & by comparison of samples of handwriting; but the only sample of writing of the other witness, apart from his signature on the will, was a signature in the register of his own marriage in the year 1822. Evidence was given to show that every possible effort had been made to prove the handwriting of this witness, & evidence was also given to show that the person who purported to have signed the will as a witness was the same who was married in 1822, & who purported to have signed the marriage register in that year. Evidence was also given to show that the two witnesses & testator had lived together in the same institution at the date of the will, & that testator had stated that the document in question was his will, & that the two persons whose names appeared upon it, had witnessed it:—*Held*: the will was entitled to probate, as there was sufficient to support the presumption of law *omnia rite esse acta*, & the position of the signatures was covered by 15 & 16 Vict. c. 24.—*BYLES v. COX* (1896), 74 L. T. 222.

991. — — — — —.]—*Omnia præsumuntur rite esse acta* extended to the case of an informal holograph document containing no attestation clause whatever, & in regard to which there was no evidence to prove the handwriting of one of the persons, both of whom were dead, whose names appeared near the signature of testatrix at the foot or end of the document.—*In the Goods of PEVERETT*, [1902] P. 205; 71 L. J. P. 114; 87 L. T. 143.

Annotation:—*Distd. In the Estate of Strong, Strong v. Hadden*, [1915] P. 211.

992. — What court may consider—Surrounding circumstances.]—In the absence of conclusive evidence as to the execution of a testamentary paper containing no attestation clause, the ct. is entitled to have regard to the surrounding circumstances both in connection with the docu-

ment itself & outside of it.—*In the Estate of STRONG, Strong v. Hadden*, [1915] P. 211; 84 L. J. P. 188; 112 L. T. 997; 31 T. L. R. 256.

993. Defective attestation clause—General rule.]—*In the Goods of LATHAM*, No. 983, *ante*.

994. — Attesting witnesses not to be found.]—A will of 1844, subscribed by two witnesses, the attestation clause imperfect; the witnesses, notwithstanding diligent inquiry, not being forthcoming, the rule of ct., requiring an affidavit from them, in the circumstances, dispensed with.

No form of attestation is necessary, & probate would have passed but for the rule of the ct., that, where there is an imperfect attestation clause there should be an affidavit by the attesting witnesses as to the due execution. The paper being in the form of a will, & having the names of two witnesses subscribed to it, & notwithstanding all possible steps have been taken to obtain their evidence, they are not forthcoming, the ct. cannot refuse to grant probate of the paper. The ct. must accept this as proof *prima facie* of the due execution of the will (*SIR H. JENNER FUST*).—*In the Goods of LUFFMAN* (1847), 5 Notes of Cases, 183; 8 L. T. O. S. 478; 11 Jur. 211.

995. — — — — —.]—Where one of the attesting witnesses to a will was dead, & it appeared that it would be difficult, if not impossible, to discover the other, & the only parties interested in the estate consented, the ct. granted probate of the will, though in the attestation clause it did not appear in what circumstances the attestation had been made.—*In the Goods of NICKS* (1864), 34 L. J. P. M. & A. 30.

996. — — — — —.]—Where a will is found, upon the death of testator, which is imperfectly attested, but in other respects is on the face of it a good instrument, the ct. will, if satisfied of the *bona fides* of appet., grant probate of the will, & will dispense with the affidavit of execution if, after every attempt being made, it is impossible to find either of the persons whose names appear on the face of the will as attesting witnesses.—*In the Goods of HUX* (1877), 46 L. J. P. 39; 35 L. T. 909; 41 J. P. 185; 25 W. R. 273.

997. — Witnesses dead—Delay in application for probate.]—Probate was sought of a will made before 1846. It was insufficiently attested, & the witnesses were dead:—*Held*: the delay must be accounted for by affidavit.—*Re DIAPER* (1863), 3 New Rep. 215.

998. — Execution below attestation—Presumption of due execution.]—The will of deceased had an imperfect attestation clause, & the name of deceased appeared written beneath the signatures of the attesting witnesses, both of whom were dead. No evidence could be given of the order in which the signatures were made. The ct. nevertheless decreed probate of the will.—*In the Goods of PUDDIPHATT* (1870), L. R. 2 P. & D. 97; 39 L. J. P. & M. 84.

Annotations:—*Consd. In the Goods of Peverett* (1902), 87 L. T. 143. *Reid. In the Goods of Jones* (1877), 46 L. J. P. 80.

999. — What evidence sufficient—Whether

evidence of person who drew the will.—*Re HALL'S WILL*, [1910] V. L. R. 14.—*AUS.*

d. — Witnesses out of jurisdiction

where the attestation clause was insufficient & attesting witnesses out of the jurisdiction, the estate being small, & the probate required merely for a family arrangement.—*Re FENTON* (1899), 18 N. Z. L. R. 128.—*N.Z.*

PART II. SECT. 6, SUB-SECT. 3.—E.

a. Defective attestation clause—Witnesses dead—Execution in attestation—Presumption of due execution.]—The ct. will grant probate of a will signed by testator in the attestation clause, where both witnesses are dead & no evidence is forthcoming to explain why signature was in attestation clause.—*Re MEIKLE'S WILL* (1899), 25 V. L. R. 309.—*AUS.*

b. — What evidence sufficient.]—

Where it is sufficiently shown that the initial of attesting witnesses to a testamentary paper were placed opposite the attestation clause with the object of attesting its execution,

z. s. — AUS.

a. — — — — —.]—Will written on first, third, & second pages of folded sheet of paper, & signed at foot of second page, admitted to probate on

), 12 V. L. R.

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certificate of British Consul of oath by witnesses.]—In the Goods of LATHAM, No. 983, ante.

F. Where Will Unattested.

1000. Attestation clause without witnesses—Will before Wills Act, 1837.]—An allegation propounding a will having an attestation clause, but no witnesses, admitted; the Judicial Committee in affirming the sentence of the ct. below, being of opinion that sufficient was alleged to entitle the party propounding to produce his proofs to repel the presumption of law against such an instrument. —*STEWART v. STEWART* (1838), 2 Moo. P. C. C. 193; 12 E. R. 977, P. C.

See, now, Wills Act, 1837 (c. 26), s. 9.

1001. Soldier's will.]—Where a will made by an officer whilst engaged on active military service was signed by him, but not attested, the ct. required, in accordance with the practice of the registry, that there should be an affidavit of two disinterested persons, stating in terms the signature to be in his handwriting, & that the form for an affidavit given in the Rules should be strictly followed.—*In the Goods of NEVILLE* (1859), 4 Sw. & Tr. 218; 28 L. J. P. & M. 52; 164 E. R. 1500.

See, generally, WILLS.

G. Where Testator under Disability.

1002. Testator deaf & dumb.]—Where a testator, who was deaf & dumb, made his will by communicating his testamentary instructions to an acquaintance by signs & motions, who prepared a will in conformity with such instructions, which was afterwards duly executed by testator, the ct. required an affidavit from the drawer of the will, stating the nature of the signs & motions by which the instructions were communicated to him, & ultimately refused to grant probate on motion.—*In the Goods of OWSTON* (1862), 2 Sw. & Tr. 461; 31 L. J. P. M. & A. 177; 6 L. T. 368; 26 J. P. 728; 10 W. R. 410; 164 E. R. 1075.

Annotation:—Consd. In the Goods of GEALE (1864), 3 Sw. & Tr. 431.

1003. — & Illiterate.]—Where probate was sought of the will of a testator who was deaf, dumb, & illiterate, the ct. required evidence on affidavit of the signs by which testator had signified that he understood & approved of the provisions of the will, before making the grant.—*In the Goods of GEALE* (1864), 3 Sw. & Tr. 431; 4 New Rep. 349; 33 L. J. P. M. & A. 125; 28 J. P. 630; 12 W. R. 1027; 164 E. R. 1342.

1004. Testator incapable of signing—Subsequent confirmation.]—Testator at the time of the execution of his will was in such a weak state as to be

unable to affix his signature, & it was signed for him by the person who drew it. The ct., on affidavits that testator had frequently afterwards confirmed the will, & that the next of kin did not object, granted probate of the will.—*In the Goods of ELCOCK* (1869), 20 L. T. 757; 33 J. P. 535.

H. Onus of Proof.

1005. General rule.]—*MACKENZIE v. YEO*, No. 937, ante.

See, generally, EVIDENCE, Vol. XXII., pp. 35 et seq.

SUB-SECT. 4.—PROOF OF RE-EXECUTION OF WILL.

1006. Will several times re-executed—Witnesses unable to identify signature of testator.]—Testator, having, in 1840, duly executed his will, wherein he declared “that all codicils added, if signed by him, after executing that will, should be equally valid as if placed in the body of that same will,” wrote, on the fourth side of the paper, & signed, two testamentary papers, entitled Codicil No. 1, & Codicil No. 2, the first dated two days after the will; in 1843, re-signed & re-executed the will, assigning, in a memorandum written thereon, & to the subscribing witnesses, as his reason for such re-execution, that “two of the former witnesses were dead”; & having made certain alterations in the will, in 1844, again re-signed & re-executed the will, in the presence of the same subscribing witnesses, who deposed to their strong impression & belief that, upon both occasions of re-execution, testator signed the will in their presence after they had subscribed it, & who could not identify any one of the several signatures of deceased appearing on the will, as made or acknowledged in their presence, or depose to the existence of the codicils on the back of the will at the time of either re-execution:—*Held*: there was not sufficient proof of re-execution, & the will alone pronounced for as originally executed.—*OLLIVE v. WEALE* (1847), 5 Notes of Cases, 486; 10 L. T. O. S. 69; *sub nom.* *OLIVER v. WEALE*, 11 Jur. 852.

Annotation:—Refd. Wade v. Nazer (1848), 6 Notes of Cases, 46.

SUB-SECT. 5.—WHERE ORIGINAL WILL IS NOT AVAILABLE.

A. Where Will cannot be Found.

1007. Existence of original will must be proved.]—A. being resident in India, sent in 1850 to England, in a letter to his solr., a copy of a will which he stated he had made there. In Feb. 1857, he transmitted in the same way a copy of a

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e. Testator incapable of Instructions for a will were given by C. to T., & by T. to a solicitor. The solicitor having prepared a will from the instructions so given, read it over to the testatrix, who was dying, & able merely to assent to questions asked by the solicitor. T. was appointed an extrix. C. was an intemperate person, & had previously given different instructions to other persons, & executed another will:—*Held*: probate should be granted.—*BENJAMIN & TWEEDIE v. STEWART*, [1904] S. R. Q. 35.—*AUS.*

f. Testator dying—While dictating will.]—Testator declared verbally to a notary the testamentary dispositions which he wished to make. The notary began to write them down, but before

he had finished, & before any execution, the testator died. The dispositions written down would not have been varied by the subsequent dispositions:—*Held*: the verbal declarations of testator, coupled with the unfinished writing, constituted a good written will.—*MIGNEAULT v. MALO*

g. being blind, had executed his will by affixing his mark in the presence of two attesting witnesses, one only of whom had been present when the will was read over to testator. There was a third person present, the exor., but he did not sign, believing the exor. was incompetent to witness:—*Held*: the will was not valid for want of due execution, not having been read over to testator in the presence of the attesting witnesses.—*Re MENCHINTON*

(1866), 5 Nfld. L. R. 159.—*NFLD.*

h. Testator insane—Subsequent to execution.]—A testatrix having duly made a will became insane, & while in that condition erased her signature to it:—*Held*: the will should be admitted to probate.—*Re ODENDAAL* (1899), 16 S. C. 271.—*S. AF.*

PART II. SECT. 6, SUB-SECT. 3.—H.

1005 i. General rule.]—The onus upon the party who seeks to have ... interlineation or alteration in a will admitted to probate to show by some evidence that it was made before execution.—*Re LAWSON* (1893), 25 N. S. R. (13 R. & G.) 454.—*CAN.*

PART II. SECT. 6, SUB-SECT. 5.—A.

k. Evidence of existence of original will—Statement of testator—Draft copy.]

codicil stated by him to have been made at D. A. lost his life in May, 1857, in the mutiny at D., & the will & codicil were not forthcoming. On motion for probate of the will & codicil as contained in the copies sent to England:—*Held*: there being no proof of the original will & codicil except the statement of deceased himself, made after their execution, the copies were not entitled to probate.—*In the Goods of RIPLEY* (1858), 1 Sw. & Tr. 68; 31 L. T. O. S. 26; 4 Jur. N. S. 342; 6 W. R. 460; 164 E. R. 632.

Annotations:—*Consd.* Sugden v. St. Leonards (1876), 1 P. D. 154. *Apprvd.* Atkinson v. Morris, [1897] P. 40. *Refd.* Quick v. Quick & Quick (1864), 3 Sw. & Tr. 442.

1008. — At death of testator.]—*PODMORE v. WHATTON*, No. 933, *ante*.

Statement of testator—& alleged copy by him.]—*In the Goods of RIPLEY*, No. 1007, *ante*.

1010. — Affidavit of attesting witness.]—A. made his will in 1855. In May, 1857, when the Indian Mutiny broke out, he escaped from D., leaving his will, among other property, behind him, he died at K. in June, 1857. On the affidavit of one of the attesting witnesses as to due execution, & of the same witness & of his widow as to the contents, probate was granted to the widow as sole extrix.—*In the Goods of GARDNER* (1858), 1 Sw. & Tr. 109; 27 L. J. P. & M. 55; 31 L. T. O. S. 89; 22 J. P. 309; 164 E. R. 651.

Annotations:—*Distd.* Wharram v. Wharram (1864), 28 J. P. 312. *Refd.* *In the Goods of Cliff* (1873), 29 L. T. 249.

1011. — Deposit with solicitor.]—Deceased, an officer in Her Majesty's service, executed a will & codicil previous to leaving England with his regiment. The original will & codicil were deposited with his solr. in England, but he took with him copies of these documents, which were found at his death enclosed in a sealed envelope in his desk. He never returned to England. The original will & codicil could not be found amongst

which to infer that they had not returned into the possession of deceased, or been destroyed at his request. Probate was therefore granted of the copies, limited until such time as the originals were produced.—*In the Goods of PECHILL* (1860), 6 Jur. N. S. 406.

1012. — Parol evidence—Must be stringent & conclusive.]—Where the execution of a will, its contents, & the fact of its existence, unrevoked at the time of the death of testator, have to be proved by parol evidence only, that evidence must be stringent & conclusive. Where a will was not forthcoming at the time of testator's death, & was not found in the repositories of a deceased attesting witness in whose custody it was stated to have been last seen, & where the account given by the witnesses as to its existence at that time was confused & conflicting, the ct. refused probate to the contents propounded seven years after testator's death.—*SILVER v. SILVER* (1872), 27 L. T. 766; 37 J. P. 134.

1013. — Application seven years after death.]—The ct. refused to admit the contents of a lost will, to probate on the mere oral evidence of

parties interested, & in the absence of any draft or other documentary evidence of the contents or existence of the will, the death of the alleged testator having occurred nearly seven years before the hearing.—*WHARRAM v. WHARRAM* (1864), 3 Sw. & Tr. 301; 4 New Rep. 117; 33 L. J. P. M. & A. 75; 10 L. T. 163; 28 J. P. 312; 10 Jur. N. S. 499; 12 W. R. 889; 164 E. R. 1290.

Distd. Burls v. Burls (1868), L. R. 1 P. & D. 412. *Consd.* Silver v. Silver (1872), 27 L. T. 766. *Refd.* Quick v. Quick & Quick (1864), 3 Sw. & Tr. 442; Whiteley v. King (1864), 17 C. B. N. S. 756; Sugden v. St. Leonards (1876), 1 P. D. 154.

1014. — Evidence conflicting.]—*SILVER v. SILVER*, No. 1012, *ante*.

1015. — Statement by person making copy—Attestation alleged to be copied from earlier will.]

Deceased left a will dated 1861, & the copy of a will dated 1847, of which the original was not forthcoming. The person who made the copy deposed that testator had signed it, but that he had copied the attestation clauses & the names of the attesting witnesses from the original will produced to him. He could not swear to the handwriting of testator, nor to the handwriting of the attesting witnesses:—*Held*: there was not sufficient proof of the existence of the later will, & therefore the anterior will was not revoked.—*In the Goods of GRAY* (1870), 39 L. J. P. & M. 42; 22 L. T. 489; 34 J. P. 377; 18 W. R. 900.

1016. — Statement by testator to witness.]—*Qu.*: if a lost will is propounded for probate upon parol evidence alone, with evidence of a residuary bequest, but no sufficient evidence as to the rest of the will whether probate ought to be granted of the residuary bequest alone, unless the ct. is satisfied that it has before it substantially the testamentary intentions of testator.

Qu.: also, whether post-testamentary declarations of testator as to the contents are admissible in evidence.

If upon mere loose statements of the recollection

some time or other, you were to grant probate of, & to establish as the will of testator, something which no one had ever seen or purported to be able to depose to from recollection, it seems to me that you would be doing that which would be in the highest degree dangerous, & the more so when those statements are statements of witnesses & one knows how fallible human memory is even when there is no interest to bias it who have the strongest possible interest in remembering what they remember & in forgetting what they forget. I think, therefore, that in order to support a will propounded, when it is proved by parol evidence only, that evidence ought to be of extreme cogency, & such as to satisfy one beyond all reasonable doubt that there is really before one substantially the testamentary intentions of testator (LORD HERSHELL, C.).—*WOODWARD v. GOULSTONE* (1886), 11 App. Cas. 469; 56 L. J. P. 1; 55 L. T. 790; 51 J. P. 307; 35 W. R. 337, H. L.; *affg.* S. C. *sub nom.* *In the Goods of MORGAN*, *GOULSTON v. WOODWARD* (1885), 1 T. L. R. 590, C. A.

Annotations:—*Consd.* Atkinson v. Morris, [1897] P. 40. *Refd.* Young v. Holloway, [1895] P. 87. *Mentd.* Falle v.

—A will duly executed could not be found on death of testatrix. On proof that the draft contained a true copy of the will, & that testatrix had a few hours prior to her death spoken of the existence of the will, the ct. granted probate, although the same did not carry out the instructions given by testatrix for the preparation of the will.—*Re COTTERILL'S WILL* (1904), 4

S. R. N. S. W. 617; 21 N. S. W. W. N. 145.—*AUS.*

1016 l. — Statement by person making copy—Statement by testator to witness.]—A will prepared & sent to testator was subsequently seen, signed by him, in the hands of his wife, by the father of the residuary legatee & devisee, who read it over, & made a pencil jotting of the names of the

exors., & of the several bequests. Five days before his death testator told him that his will was still in existence. After testator's death no trace of the will could be discovered. The ct. made a decree establishing the will, & directing probate to be granted to the exors. named therein.—*DISSLEY v. BOSTWICK* (1867), 13 Gr. 278.—*CAN.*

Sect. 6.—How probate is obtained: Sub-sect. 5, A. & B.]

Godfray (1888), 14 App. Cas. 70; *James v. Kerr* (1889), 40 L. T. 212.

1017. — Alleged will produced by widow at funeral—Not proved by widow—Not discoverable at death of widow.]—Pltf. asked that probate might be pronounced for a non-existent document as the last will of her father, who died in 1877. At his funeral his wife produced a written paper in the form of a will, stating that it was the will of her deceased husband. By it she took a life interest in her husband's property, which at her death was to be divided among the children of the marriage. The document was subscribed with three names, one of which purported to be that of deceased, written in his own handwriting. The two other names were signatures of the attesting witnesses. The widow continued to occupy the freehold house & land where deceased had lived, & which was the only property left by him, until her own death, which occurred in July, 1885. She never took any steps to prove what she had alleged to be the will of her late husband, & at her death the paper produced at the funeral was not forthcoming. Pltf. propounded that document, & pleaded that, although it had disappeared, the ct. ought to grant probate of it. No attempt had been made to show that the paper bore any date whatever, or that it contained an attestation clause to the names of the two witnesses:—*Held*: the contents of the paper had been proved in the course of the trial.—*HARRIS v. KNIGHT* (1890), 15 P. D. 170; 62 L. T. 507; 6 T. L. R. 234, C. A.

Annotation:—*Reid. In the Estate of Phibbs*, [1917] P. 93.

1018. Evidence of contents—Secondary evidence admissible.]—(1) A. executed a will, & afterwards executed a second will, which he took away with him. On his death the earlier will was found; but the second will could not be found. The solr., who prepared the second will, gave evidence, from recollection, of its contents, which were inconsistent with the first will, & revoked it. On a case where the ct. had power to draw inferences of fact:—*Held*: secondary evidence might be given of the contents of the last will, & the evidence given sufficiently showed that it revoked the first will.

(2) The facts that the second will was last seen in the custody of deceased, & could not be found, raised a presumption that he had destroyed it, *animo cancellandi*, & cast on those seeking to establish the will the *onus* of rebutting that presumption; & this not being done:—*Held*: A. died intestate.—*BROWN v. BROWN* (1858), 8 E. & B. 876; 27 L. J. Q. B. 173; 30 L. T. O. S. 273; 4 Jur. N. S. 163; 120 E. R. 327.

Annotations:—*As to* (1) *Consd. In the Goods of Gardner* (1858), 1 Sw. & Tr. 109; *Wharram v. Wharram* (1864), 3 Sw. & Tr. 301; *Burks v. Burks* (1868), 1 L. R. 1 P. & D. 472; *Homerton v. Hewitt* (1872), 25 L. T. 854. *Apprvd.* *Sugden v. St. Leonards* (1876), 1 P. D. 154. *Reid. Wood v. Wood* (1867), 1 L. R. 1 P. & D. 309. *As to* (2) *Reid. Whiteley v. King* (1864), 17 C. B. N. S. 756; *Homerton v. Hewitt* (1872), 25 L. T. 854. *Generally, Reid. In the Goods of Brown* (1858), 1 Sw. & Tr. 32. *Mentd. Read Price*, [1909] 2 K. B. 724.

1019 I. Evidence of contents—Secondary evidence admissible.]—Testator executed a will & codicil disposing of his estate, to his wife for life, & after her death to his children in equal shares.

the following: "I altered my will in my pay-book leaving everything to you absolutely." The pay-book was never

—*Held*: the evidence did not satisfy the ct. that the will propounded was ever made, or, if made,

that the passage in the letter was sufficient evidence of the terms of such will.—*GOONWIN v. GOONWIN*, [1921] N. Z. L. R. 565.—N.Z.

1021 I. — Copy.]—In 1864, B. executed a will, which was handed for safe keeping to his attorney, who died before date of action. At the date of execution a correct copy was made by testator & handed to his brother-in-law, an exor. under the will. The testator became insane in 1873 & died in 1881. Proper search for the

1019. — —.]—(1) The contents of a lost will, like those of any other lost instrument, may be proved by secondary evidence.

(2) Declarations, written or oral, made by a testator, both before & after the execution of his will, are, in the event of its loss, admissible as secondary evidence of its contents.

(3) The contents of a lost will may be proved by the evidence of a single witness, though interested, whose veracity & competency are unimpeached.

(4) When the contents of a lost will are not completely proved probate will be granted to the extent to which they are proved.

(5) When a cause in the Probate Div. has been heard before a judge without a jury, the evidence being given *viâ voce*, the parties may, if they please, apply for a re-hearing under Probate Ct. Orders, July, 1862, r. 60, or they may, without doing so, appeal from the decision of the judge, on the facts as well as the law, to the Ct. of Appeal.—*SUGDEN v. ST. LEONARDS* (LORD) (1876), 1 P. D. 154; 45 L. J. P. 49; 34 L. T. 369, 372; 24 W. R. 479, 860, C. A.

Annotations:—*As to* (1) *Reid. Harris v. Knight* (1890), 15 P. D. 170; *Allan v. Morrison*, [1900] A. C. 604; *Gill v. Gill*, [1909] P. 157; *Read v. Price*, [1909] 2 K. B. 724; *In the Goods of Phibbs* (1917), 86 L. J. P. 81. *As to* (2) *Consd. Woodward v. Goulstone* (1886), 11 App. Cas. 469; *Atkinson v. Morris*, [1897] P. 40; *Re Sykes, Drake v. Sykes* (1907), 23 T. L. R. 747. *Reid. Gould v. Lakes* (1880), 6 P. D. 1; *Re Jessop*, [1924] P. 221. *As to* (4) *Reid. Gardiner v. Courthope* (1886), 12 P. D. 14; *Clark v. Dixon* (1891), 8 T. L. R. 11. *As to* (5) *Reid. Krehl v. Burrell* (1878), 10 Ch. D. 420.

1020. — —.]—Where a will proved to have existed has been lost or accidentally destroyed, & there is satisfactory evidence of the contents, & that the will appeared to be duly executed & attested, the ct. will pronounce for the will according to its tenor as given in evidence, notwithstanding that the attesting witnesses cannot be found or identified.—*In the Estate of PHIBBS*, [1917] P. 93; 86 L. J. P. 81; 116 L. T. 575; 33 T. L. R. 214.

1021. — — Copy.]—Will lost, or stolen; copy admitted to probate.—*In the Goods of COUSINS* (1841), 1 Notes of Cases, 236; 6 Jur. 40.

1022. — — Press copy—Original copy destroyed.]—Testatrix died in 1872, & her estate being valueless probate of her will was not applied for. Pltf., her exor., locked the will in his safe, & in 1873, caused his clerk to make a copy of the contents of the will in copying ink from which a number of copies were made, & the original copy, having become spoilt, was destroyed. In 1883 a fire occurred at pltf.'s premises, & the safe & its contents including the will of testatrix, were destroyed. Pltf. stated that he had a clear recollection of the original will & its contents, & he was able to speak with certainty as to the handwriting of testatrix & of one of the attesting witnesses, & that the signature of the second attesting witness was not in the same handwriting as that of the other two names. Both of the attesting witnesses were dead. Certain property having fallen into testatrix's estate, it became necessary to propound her will. The ct. granted

original will was made, but it could not be found.—*Held*: copy of will was admissible for purpose of probate, as evidence of the contents of the original. *BERKSFORD, Ex p. GRAHAM* (1883), 2 S. C. 303.—S. AF.

1. — Destruction by mistake—Draft copy.]—An illiterate testator executed & retained in his possession two wills. After his death the first will was found, but the second could not be found, & it was presumed he had by mistake destroyed the second

probate of a press copy of the copy of the will, subject to certain clerical errors which had been made by pltf.'s clerk in copying.—*LAFONE v. GRIFFIN* (1909), 25 T. L. R. 308.

1023. — *Parol evidence—Statements by testator to witness.*—Evidence of the declarations of an alleged testator as to the contents of a will not forthcoming, made after its execution, is not admissible to prove the contents.—*QUICK v. QUICK & QUICK* (1864), 3 Sw. & Tr. 442; 4 New Rep. 347; 33 L. J. P. M. & A. 146; 10 L. T. 619; 28 J. P. 455; 10 Jur. N. S. 682; 12 W. R. 1119; 164 E. R. 1347.

Annotations:—Overd. Sugden v. St. Leonards (1876), 1 P. D. 154. *Conad.* Woodward v. Goulstone (1886), 11 App. Cas. 469. *Reid.* Johnson v. Lyford (1868), L. R. 1 P. & D. 546; Atkinson v. Morris (1896), 75 L. T. 440.

1024. — — — — — *]*—The verbal & written declarations or statements made by testator in & about the making of his will when accompanying acts done by him in relation to the same subject, are admissible as evidence of the contents of the will.

Testator wrote out a will in the presence of M., & read it aloud to him, & gave him a paper enclosed in an envelope, which he stated was a copy of the will. On the same evening he wrote a letter to M. stating that he had executed the will & had appointed him exor. It was proved that a will was executed by testator about that time. The will could not be found at his death, & it was held that the declarations of testator at the time when he made the will & the letter written by him, were admissible as evidence of its contents.—*JOHNSON v. LYFORD* (1868), L. R. 1 P. & D. 546; 37 L. J. P. M. & A. 65; 18 L. T. 769; 32 J. P. 663; 16 W. R. 1130.

1025. — — — — — *]*—*WOODWARD v. GOULSTONE*, No. 1016, *ante*.

instead of the first. Upon evidence of his intentions & of the similarity of appearance of the two papers, probate granted of a fair copy draft of the second will.—*Re HEALEY'S WILL* (1883), 9 V. L. R. 43.—*AUS.*

1023 i. — *Parol evidence—Statements by testator to witness.*—Statements of a testator as to the provisions of his will are admissible in evidence in an action to establish a lost will.—*STEWART v. WALKER* (1903), 23 C. L. T. 320; 6 O. L. R. 495; 1 O. W. R. 489; 2 O. W. R. 990.—*CAN.*

m. — — — — — *Proof of copy by disinterested witnesses.*—Where it was proved that a deceased made a will, that it existed after his death, & that it was now lost or destroyed, a copy made from memory & well proved by disinterested witnesses to correspond in effect with the lost will was admitted & administration with will annexed granted.—*Re CULLEN'S ESTATE* (1852), 3 Nfld. L. R. 308.—*NFLD.*

n. — — — — — *Recollection of party preparing will.*—Notwithstanding that the only witness called to support the contents of a lost will was the principal legatee under the will, he being the party who drew the will & afterwards mislaid it, the ct. held the will to be sufficiently proved, & admitted the same to probate.—*Re CALAHAN'S WILL* (1859), 4 Nfld. L. R. 276.—*NFLD.*

o. — — — — — *What corroboration is sufficient.*—Testatrix some years previous to her death had made & executed her last will, which was lost. Proof of its contents was given by the party having custody of it previous to its loss, which was corroborated by another witness who swore to having heard of its contents from testatrix.—*Held*: not necessary in order to establish a lost will that its contents should have been read & remembered by two

witnesses: one witness is sufficient if corroborated on material points.—*Re HAYE'S WILL* (1858), 4 Nfld. L. R. 227.—*NFLD.*

p. — — — — — *Evidence sufficient to rebut presumption of wilful destruction.*—Where a will duly executed, & last seen in testator's possession, is not forthcoming at his death, the presumption is that it was destroyed by testator *animus revocandi*. This presumption may be rebutted by proof of circumstances which raise a higher degree of probability to the contrary. The nature of the provisions of the will itself, the custody in which it was kept, the opportunities testator had for losing the will & a statement by testator to the medical attendant shortly before his death that his affairs were all fixed up are all material to determining between the presumptions of revocation & loss of the will.—*McCAULEY v. McCAULEY* (1910), 10 C. L. R. 434.—*AUS.*

q. — — — — — *]*—A will was made by pltf.'s deceased husband, whereby he gave all his property to her. The will had been placed in her custody, but diligent search for the will did not produce it. The contents of the will were well proved, & oral evidence was given sufficient to rebut the presumption that the husband had destroyed the document *animus revocandi*.—*Held*: the strength of the presumption is weakened if testator did not have the custody of the document, & the will, as established by the evidence, was admitted to probate.—*UNWIN v. UNWIN* (1914), 29 W. L. R. 279; 6 W. W. R. 1186; 20 B. C. R. 77.—*CAN.*

r. — — — — — *]*—Testator took his will just executed from his solr.'s office, & left by steamer. The following day he was drowned, & the will

1026. — — — — — *Must be stringent & conclusive.*—*SILVER v. SILVER*, No. 1012, *ante*.

1027. — — — — — *Recollection of solicitor preparing will.*—*BROWN v. BROWN*, No. 1018, *ante*.

1028. — — — — — *Affidavit of attesting witness & widow.*—*In the Goods of GARDNER*, No. 1010, *ante*.

1029. — — — — — *Application seven years after death.*—*WHARRAM v. WHARRAM*, No. 1013, *ante*.

1030. *For what purposes copy admitted—To complete representative's title—By consent of next-of-kin.*—The copy of a will may be admitted to probate in order to aid the completion of the title of a testator's representative in the Ct. of Ch., but the consent of those persons, if any, who may be interested in the event of an intestacy is required before a grant of probate can be made.—*In the Goods of ENTICHNAP* (1876), 35 L. T. 427; 41 J. P. 57.

B. Where Will Intentionally Destroyed.

1031. *When allowed—Belief that fresh will substituted—Fresh will invalid.*—A will was destroyed by testator, on the supposition that he had substituted another for it, but which was not duly executed. Probate of a copy of the first will granted.—*SCOTT v. SCOTT* (1859), 1 Sw. & Tr. 258; 5 Jur. N. S. 228; 104 E. R. 719.

1032. *Proof of existence of will—Need of stringent proof.*—A testamentary paper was asserted to have existed since the death of the alleged testatrix & to have been subsequently destroyed.—*Held*: these allegations must be proved by the clearest & most stringent evidence.—*HUBLE v. CLARK* (1827), 1 Hag. Ecc. 115; 162 E. R. 520.

Annotation:—Reid. Wharram v. Wharram (1861), 3 Sw. & Tr. 301.

1033. — — — — — *Application by person destroying*

could not be found.—*Held*: the presumption was altogether against revocation; & probate granted of the draft.—*Re SMALLWOOD'S WILL* (1893), 11 N. Z. L. R. 800.—*N.Z.*

s. — — — — — *]*—Some months after making a will, giving all his property to his wife & appointed her sole extrix., testator died & the will could not be found. It was proved that testator appeared to have had no place for safe custody of papers, & that his relations with his wife were affectionate.—*Held*: there were no extraneous circumstances to fortify the *prima facie* presumption that the will had been destroyed by testator *animus revocandi*; that the contents of the will, the relations between testator & his wife, & the circumstances sufficed to rebut it; & the ct. was justified in granting probate.—*Re WELLBROCK*, [1920] N. Z. L. R. 1.—*N.Z.*

PART II. SECT. 6, SUB-SECT. 5.—B.

t. *Evidence of revocation.*—Testator executed two wills, with an interval of nine years between them. The first will still existed at his death; the second had been destroyed. The execution & date of the second will were proved by the evidence of both the attesting witnesses. One of such witnesses proved that during testator's lifetime he found the second will torn to pieces in testator's waste-paper basket; that he put the pieces together & read the will, & afterwards destroyed it; that such will disposed of the whole of testator's property, but contained no clause of revocation of former wills. There was no other evidence of the contents of the second will.—*Held*: the execution & contents of the second will were sufficiently proved for the purpose of showing that

Sect. 6.—How probate is obtained: Sub-sect. 5, B. & C.; sub-sects. 6, 7 & 8, A.]

will.]—Where a person who has himself destroyed a testamentary paper after the death of the alleged testator, asks for probate of the substance thereof, as contained in a copy or otherwise, the ct. will expect the fullest & most satisfactory proof of all the facts necessary to be established—

(1864), 3 Sw. & Tr. 567; 34 L. J. P. M. & A. 31; 11 L. T. 458; 164 E. R. 1395.

1034. — At death of testator—Suspicious conduct of party cited but not appearing.]—It was proved that deceased had executed a will by which he gave all his property to his daughter, pltf., & that he continued to express approval of the contents of this will up to a few weeks before his death. It was further proved that deft. after his father's death, got possession of the key of the drawer in which the will had been kept, & that his conduct generally at that time was of a suspicious character. Although cited, deft. did not appear to contest the suit:—*Held*: as it was not satisfied that the will was not in existence at the time of the death of deceased, & therefore revoked, the ct. ought to grant probate of a copy which had been made by the person who prepared it.—*FINCH v. FINCH* (1807), L. R. 1 P. & D. 371; 36 L. J. P. & M. 78; 16 L. T. 268; 31 J. P. 647; 15 W. R. 797.

*Annotations:—*Consd. *Re Sykes, Drake v. Sykes* (1907), 23 T. L. R. 747. *Reid. Allan v. Morrison*, [1900] A. C. 604.

1035. Proof of contents—Need of stringent proof—Application by person destroying will.]—*MOORE v. WHITEHOUSE*, No. 1033, *ante*.

1036. — Part of will destroyed by disappointed legatee.]—A disappointed legatee got possession of the will after it had been read over to her, & tore it in pieces. One of the pieces was missing, & was supposed to have been carried away by her. The ct. allowed the contents of the missing part to be proved by affidavit, & granted probate of the pieces thus supplemented.—*In the Goods of CLIFT* (1873), 20 L. T. 249; 37 J. P. 761.

1037. — By affidavit—Will supposed to be no longer operative.]—*In the Goods of NEWBY* (1903), 47 Sol. Jo. 337.

1038. — Proof in solemn form by draft—Will destroyed by executrix.]—Where an extrix. destroyed a will in a fit of temper, the ct. refused on motion to admit a draft of the original will

to probate. It must be propounded in an action.—*In the Estate of CARTER* (1908), 52 Sol. Jo. 600.

1039. Statement of claim—What must be included.]—When a will which has been destroyed is propounded it is not necessary to set out the substance of the will, or to allege its destruction in the declaration. The declaration should, however, if possible, assign a particular date to the will, & an averment that deceased in or about a certain month made his last will is *prima facie* insufficient.—*GLEN v. BURGESS & GOVER* (1863), 3 Sw. & Tr. 43; 32 L. J. P. M. & A. 157; 8 L. T. 174; 11 W. R. 463; 164 E. R. 1188.

C. Grant of Administration Pending Production of Will.

See Sect. 12, sub-sect. 12, *post*.

SUB-SECT. 6.—WHERE WILL HAS BEEN ALTERED.

See, generally, WILLS.

SUB-SECT. 7.—WHERE TESTATOR LEAVES DUPLICATE WILLS.

1040. Whether forming one testamentary document.]—*KILLICAN v. PARKER* (LORD), No. 3436, *post*.

1041. —.]—Testator executed a will in Yorkshire, in 1776, he then having four sons. A fifth son being born in 1777, testator, in 1778, executed in London what was apparently intended to be a copy of, & was dated on the same day as, the Yorkshire will, & at the same time made a codicil in duplicate, the ostensible object of the codicil being, to make provision for the newly born son. Testator's third son died in 1795. Testator died in 1808, leaving the other four sons him surviving. After his death, the Yorkshire will, with one copy of the codicil, were found in an open portfolio upon his library table, with erasures in both, the effect of which would be, in a certain event, to give to the eldest son certain estates which otherwise would have gone to the younger sons in succession. The London will, with the other copy of the codicil were found, without alteration, locked up in a drawer in the same table. In the

the first will had been revoked by it.—*MACBOY v. MADDEN* (1868), 5 W. W. & A. B. 38.—AUS.

a. —.]—The ct. refused probate, although deceased had made a will, & a copy was produced. The will not being in the custody of deceased at his death, the presumption, in the absence of evidence to the contrary, was that he had destroyed it.—*Re NAM SING* (1912), 19 W. L. R. 858; 1 W. W. R. 472; 1 D. L. R. 45.—CAN.

b. —.]—A will appearing on its face to be regularly executed & attested, but bearing marks of an attempted revocation, was offered for probate. Testator said that he had made a new will after his attempt at cancelling this will. Before testator's death, the will with the cancelling marks upon it, was handed by him to one of his daughters, for the purpose apparently of enabling her, when the new will, in her favour, should be produced, to exhibit the cancelled will:—*Held*: the execution of this will had been established, & it had not been revoked either by the cancellation attempted or by the subsequent will alleged to have been made, which had

not been found, & its execution had not been proved. What testator did by way of cancellation was done *animo revocandi*, but the will could not be regarded as "otherwise destroyed" by the attempted cancellation, & should be admitted to probate.—*BELL v. MATTHEWMAN* (1920), 48 O. L. R. 364.—CAN.

c. —.]—A will, duly executed by deceased was not found at his death, but had been in his custody. The contents of the will & the circumstances of the case were such that there was a reasonable possibility that the deceased destroyed it *animo revocandi*, & the hypothesis of accidental loss or destruction was unreasonable:—*Held*: the ct. must be morally satisfied that it was not destroyed by the testator *animo revocandi*, & not being so satisfied probate must be refused.—*ALLAN v. MORRISON* (1899), 17 N. Z. L. R. 678; [1900] A. C. 604.—N.Z.

d. —.]—Testator, a member of the New Zealand Expeditionary Force, destroyed, with the intention of revoking it, a will, which he had made, & wrote to his father explaining the reasons for the revocation, & stated

that he had made a new will, & described its contents. Testator died on active service, & as the will could not be found, the letter was propounded as his will:—*Held*: the letter could not be admitted as testator's will since there was no extrinsic evidence to show that it was written *animo testandi*.—*Re MILLING* (No. 1), [1916] N. Z. L. R. 1174.—N.Z.

e. —.]—Where a will is traced to the possession of a deceased person & cannot be found on his death the presumption arises that it has been destroyed by the deceased *animo revocandi*. The mere execution of a subsequent will raises a presumption of intention to revoke an earlier will. Clear proof of an intention to revive an earlier will must be afforded before the destruction of such later testamentary instrument can be held to effect such revival.—*WYNNE v. WYNNE'S ESTATE* (1909), 25 S. C. 931.—S. AF.

PART II. SECT. 6, SUB-SECT. 7.

1. Whether fact must be mentioned in grant.]—A testator having executed duplicate wills, referred to as such in the *testamentum*, the ct. granted probate

portfolio was also found an undated & unfinished sketch of a will. The Yorkshire will, & the codicil found with it, were proved by testator's widow & extrix. After the death of all his brothers, testator's fifth son brought an ejectment against the heir of his eldest brother, claiming under the limitations contained in the unaltered, or London, will & codicil.

At the trial, the judge left it to the jury to say, first, whether the London will was executed by testator as a separate & independent will, or whether the Yorkshire will & the London will, with the duplicate codicil annexed to each, formed one will, the last will of testator; telling them, that, if they were satisfied that all the documents together formed one will in two parts, an alteration or obliteration in one part, was in point of law, an alteration or cancellation of the corresponding portion of the other part, & that the will, so altered, became the last will of testator; secondly, whether the alterations, when they were made by testator, were intended by him to be final, & to stand as his last will, or were merely deliberative, & intended to exist only until he made a future will. The jury found that the two wills & the codicil were intended to form one will, & that the alterations in the Yorkshire will, & in the codicil found with it, were intended to be final:—*Held*: (1) these two questions were properly submitted to the jury, & the direction of the judge was correct in point of law; (2) it was no ground for a new trial, that the judge left to the jury as a question of fact, that which he should himself have decided as a matter of law, unless the objection was presented to the notice of the judge at the trial.—*DOE d. STRICKLAND v. STRICKLAND* (1849), 8 C. B. 724; 19 L. J. C. P. 89; 14 L. T. O. S. 270; 137 E. R. 693.

Annotation:—*Generally*, *Mentd.* Price & Powell (1858), 3 H. & N. 341.

1042. Copy formerly in testator's possession not to be found—Presumption of revocation by destruction—Rebuttal of presumption.—(1) A will being executed in duplicate, one part of which was proved to have been in, & was never traced out of, deceased's possession, & was not found at his death, the *primâ facie* presumptions are: first, that testator destroyed the part in his own possession; & second, if the first be not repelled, that he intended thereby to revoke the duplicate not in his possession. Deceased pronounced dead intestate.

(2) The *primâ facie* presumption, that deceased revoked a will, which was in his own possession, but is either not found at all at his death, or is found cancelled; & the *primâ facie* legal consequence that a duplicate, not in his possession, is revoked thereby, may be rebutted by a strong combination of circumstances leading to a moral conviction, or by direct positive evidence. In order to rebut a presumption of law, e.g. as to the destruction of a will by a testator, declarations unsupported by circumstances strongly marking their sincerity, & confirming their probability, especially where their stringency depends on the exact words of a casual expression, cannot safely

be relied on. Declarations coupled & consistent with conduct & acts are of weight in proof of intention, so are those not depending on the precise words of a particular expression, but on the tenor of an extended conversation, especially if not liable to the suspicion of insincerity; still more if repeatedly made in confidential communications.—*COLVIN v. FRASER* (1829), 2 Hag. Ecc. 266; 162 E. R. 856.

Annotations:—*As to* (1) *Refd.* *James v. Cohen* (1844), 2 L. T. O. S. 518; *Topham & Tombs* (Fenton intervening) v. *Norris* (1857), 29 L. T. O. S. 346. *As to* (2) *Refd.* *Welch v. Phillips* (1836), 1 Moo. P. C. C. 299; *Fenton v. Poulton* (1858), 1 Sw. & Tr. 55. *Generally*, *Refd.* *Hayle v. Hasted & Pierson* (1836), 1 Curt. 236.

SUB-SECT. 8.—PROOF OF AUTHENTICITY AND VALIDITY OF WILL.

A. In General.

1043. Power of court to require.—*FULTON v. ANDREW*, No. 1317, *post*.

1044. Presumption of approval by testator.—The following propositions commend themselves to the ct. as rules which ought to govern its action in respect of a duly executed paper: (1) First, that before a paper so executed is entitled to probate, the ct. must be satisfied that testator knew & approved of the contents at the time he signed it. (2) Secondly, that except in certain cases, where suspicion attaches to the document, the fact of testator's execution is sufficient proof that he knew & approved the contents. (3) Thirdly, that although testator knew & approved the contents, the paper may still be rejected, on proof establishing, beyond all possibility of mistake, that he did not intend the paper to operate as a will. (4) Fourthly, that although testator did know & approve the contents, the paper may be refused probate, if it be proved that any fraud has been purposely practised on testator in obtaining his execution thereof. (5) Fifthly, that subject to this last preceding proposition, the fact that the will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should, when coupled with his execution thereof, be held conclusive evidence that he approved as well as knew the contents thereof. (6) Sixthly, that the above rules apply equally to a portion of the will as to the whole (*SIR J. P. WILDE*).—*GUARDHOUSE v. BLACKBURN* (1866), L. R. 1 P. & D. 109; 35 L. J. P. & M. 116; 14 L. T. 69; 12 Jur. N. S. 278; 14 W. R. 463.

Annotations:—*As to* (5) *Refd.* *In the Goods of Boehm*, [1891] P. 247; *Collins v. Elstone*, [1893] P. 1; *Garnett-Boothfield v. Garnett-Boothfield*, [1901] P. 335; *Gregson v. Taylor*, [1917] P. 256. *Generally*, *Apprvd.* *Harter v. Harter* (1873), L. R. 3 P. & D. 11. *Consd.* *Fulton v. Andrew* (1875), L. R. 7 H. L. 448. *Refd.* *Itteffell v. Itteffell* (1866), L. R. 1 P. & D. 139.

1045. What must be proved.—*GUARDHOUSE v. BLACKBURN*, No. 1044, *ante*.

Proof of due execution.—*See* Sect. 6, sub-sect. 3, *ante*.

of one of them; directing the fact of there being a duplicate to be specially mentioned in the grant.—*Re CURT'S WILL* (1883), 9 V. L. R. 53.—*AUS.*

PART II. SECT. 6, SUB-SECT. 8.—A.

1043 i. Power of court to require.—Where testator had obliterated & altered portions of a codicil, the ct. directed the codicil to be examined by two inspectors, & upon their

report of its entire legibility granted probate of it as set out by them.—*Re RIDGELL'S WILL* (1880), 6 V. L. R. 5.—*AUS.*

8. Presumption in favour of foreign will.—Testator, when domiciled in Scotland, executed a will attested by two witnesses. He afterwards removed to New Zealand, became domiciled, & died there. The exors. resided in Scotland. On appli-

cation by his eldest son in New Zealand for administration:—*Held*: it might be presumed that the attesting witnesses had signed in the presence of testator & of each other, it being the practice, though not necessary, to do so in Scotland; the will must therefore be treated as valid according to English law, & administration granted.—*In the Goods of THOMSON*, 2 J. R. N. S. 154.—*N.Z.*

Sect. 6.—How probate is obtained: Sub-sect. 8, B.; sub-sect. 9, A. & B.]

B. Burden of Proof.

See, generally, EVIDENCE, Vol. XXII., pp. 35 et seq.

1046. Meaning.]—BARRY v. BUTLIN, No. 1294, post.

1047. Circumstances affecting.]—DONNELLY v. BROUGHTON, No. 1322, post.

1048. On party propounding will.]—BAKER v. BATT, No. 1293, post.

1049. —.]—BARRY v. BUTLIN, No. 1294, post.

1050. —.]—PANTON v. WILLIAMS, No. 1297, post.

1051. —.]—BROWNING v. BUDD, No. 1257, post.

1052. —.]—PARKER v. DUNCAN, No. 1302, post.

1053. — Wherever ground for suspicion.]—TYRRELL v. PAINTON, No. 1304, post.

1054. — Testamentary nature of document.]—Where a person claims probate of a paper signed & attested, but not on the face of it clearly testamentary, the burden of proof is on that person to satisfy the ct. that it was executed *animo testandi*. Where a legal question fairly arises on the papers of a deceased person, the ct. will order the costs of the losing party to be paid out of the estate.—**THORNCROFT & CLARKE v. LASHMAR (1862), 2 Sw. & Tr. 479; 31 L. J. P. M. & A. 150; 6 L. T. 476; 26 J. P. 567; 8 Jur. N. S. 595; 10 W. R. 783; 164 E. R. 1083.**

1055. — Will prepared by party propounding—In own favour.]—CROFT v. DAY, No. 1312, post.

1056. —.]—MITCHELL v. THOMAS, No. 1299, post.

1057. — Solicitor.]—Gift by a client to a solr. while that relation subsisted between them declared invalid at the instance of the residuary legatees of the donor; but legacies to the solr., his wife & children, supported.

There are always two points to be considered in these cases. First, whether the donor really made the gift; & secondly, whether the influence of the donee or recipient of the bounty was improperly exercised on the donor to induce the donor to make the gift in question. The burden of proof of the first always lies upon the recipient of the bounty, to show that the gift was intended to be given, & I fully concur in the argument & observation, that a solr. does not stand in any different situation from any other person, & that there is nothing *ipso facto* in the relation of solr. & client which makes it impossible for a solr. to receive a gift from his client. But when the gift has been fully established, the question then arises, whether undue influence has been exercised; &

then the fact of the relation of solr. & client is an ingredient in estimating the extent of the actual or probable influence exercised over the donor (ROMILLY, M.R.).—**WALKER v. SMITH (1861), 29 Beav. 394; 54 E. R. 680.**

1058. —.]—FULTON v. ANDREW, No. 1317, post.

1059. —.]—LAWFORD v. ALLEN, No. 1303, post.

1060. —.]—If a party writes or prepares a will under which he takes a benefit, the burden is on him of proving that the document really expresses the mind & intention of testator.

Pltf., a nephew of testatrix, propounded a will which he had drafted for her & under which he benefited as residuary legatee:—**Held:** he had not discharged the *onus* resting upon him of proving that the document really expressed the mind & intention of testatrix.—**FINNY v. GOVETT (1908), 25 T. L. R. 186, C. A.**

1061. — Will procured by party propounding—In own favour—Prepared by solicitor.]—BROWN v. FISHER, No. 1318, post.

1062. — Will impeached on ground of fraud.]—WYATT v. INGRAM, No. 1310, post.

1063. Discharge of onus.]—PARKER v. DUNCAN, No. 1302, post.

1064. Effect of failure to discharge.]—BARRY v. BUTLIN, No. 1294, post.

1065. When onus shifted.]—TYRRELL v. PAIN-TON, No. 1304, post.

See, generally, EVIDENCE, Vol. XXII., pp. 39 et seq.

SUB-SECT. 9.—PROOF IN SOLEMN FORM.

A. In General.

1066. Duty of executors.]—Next of kin are not barred by mere lapse of time, by acquiescence, or by the receipt of legacies, from requiring exors. to prove a will in solemn form. Where a will had been declared well proved in the Ct. of Ch., after an order for an issue *devisavit vel non* had been discharged on the petition of the heiress-at-law, also sole next of kin, & her husband, & an annuity bequeathed to her regularly received during fourteen years, this ct. refused, at the prayer of the heiress-at-law & her husband to call on the exors. to prove that will in solemn form.

Exors. are bound to prove a will by solemn form of law, where they are called on to do so by those entitled in case of an intestacy; & under common & general circumstances, neither lapse of time, nor the receipt of a legacy, nor acquiescence in the will, will be sufficient to debar them that right; but after so great a lapse of time, fourteen years after the transaction, & ten years after the will

the will, & is in turn satisfied by proof of an insane delusion: the *onus* shifts back to the propounder of the will to satisfy the conscience of the ct. that the dispositions of his property made by testator were not affected by the insane delusion.—**BEAMENT v. FOSTER (1916), 9 O. W. N. 413; 35 O. L. R. 365.—CAN.**

1065 ii. —.]—Wherever circumstances exist which excite the suspicion of the ct., it is for those who propound the will to remove such suspicion, & to prove affirmatively that testator knew & approved of the contents of the document, & it is only where this is done that the *onus* is thrown on those who oppose the will to prove fraud or undue influence.—**SELLERS v. SULLIVAN (1919), 43 O. L. R. 538.—CAN.**

PART II. SECT. 6, SUB-SECT. 8.—B.

1048 i. On party propounding will.]—The *onus* of proving that testator was of testamentary capacity is upon the person propounding his will.—**RE SEVER'S WILL (1887), 13 V. L. R. 572.—AUS.**

h. — After lapse of time.]—Where a trial took place sixteen years after testator's death:—**Held:** the burden of establishing the validity of the will was upon the surviving exors. as if they were for the first time propounding it.—**LAROCQUE v. LANDRY (1921), 50 O. L. R. 614; 64 D. L. R. 618.—CAN.**

1063 i. Discharge of onus.]—Pltf. sought to revoke letters probate, on the grounds that deft. occupied a position of confidence towards testator

& had procured the making of the will by undue influence when testator was dying & was without independent advice:—**Held:** the testamentary capacity of testator, not being disputed, if the *onus* was upon deft. to adduce evidence to remove the suspicion raised by the circumstances in which the will was prepared & executed, deft. had satisfied the *onus*, & established that the will was that of a free & capable testator.—**GALLAGHER v. WOODMAN (1919), 44 O. L. R. 98.—CAN.**

1065 i. When onus shifted.]—The *onus* is, in the first place, upon him who propounds the will & is sufficiently satisfied by proof of the execution of the will in the manner required by law by an apparently competent testator; the *onus* then shifts to him who opposes

has been declared to be well proved in Chancery, may parties not be barred of their remedy if there be no reasonable ground accounting for the delay? (SIR H. JENNER FUST).—*MERRYWEATHER v. TURNER* (1844), 3 Curt. 802; 8 Jur. 295; 163 E. R. 907; *sub nom.* *MERRYWEATHER v. TURNER*, 3 Notes of Cases, 55; 3 L. T. O. S. 6.

1067. Upon whom binding—Heir-at-law joined as defendant as next of kin.—Where the heir-at-law of a testator is made deft., as one of testator's next of kin, in a probate action to establish his will, & appears & contests its validity in the action, he cannot afterwards dispute the validity of the will in respect of real estate affected by it, notwithstanding that he was not cited to appear in the action as heir-at-law.—*BEARDSLEY v. BEARDSLEY*, [1899] 1 Q. B. 740; 68 L. J. Q. B. 270; 80 L. T. 51; 47 W. R. 284; 15 T. L. R. 173; 43 Sol. Jo. 225, D. C.

Annotation:—Reid. Ex p. Twood (1899), 68 L. J. Q. B. 794.

See, generally, ESTOPPEL, Vol. XXI., pp. 159 *et seq.*

B. Grounds for Ordering.

1068. Plight of papers—Torn after testator's death.—Will torn to pieces after the death of testator, directed to be pasted together. Probate decreed in common form.—*KNIGHT v. COOK* (1753), 1 Lee, 413; 161 E. R. 152.

Annotation:—Reid. Wharram v. Wharram (1864), 3 Sw. & Tr. 301.

1069. — Alterations & interlineations—Will opposed.—Unattested alterations in a will dated prior to Wills Act, 1837 (c. 26), without information as to time. The ct. will not decide on motion, if opposed, however strong the presumption.

I must leave the party to propound the will. I cannot dispose of the question in the way of motion, if opposed, on any presumption, however strong (SIR H. JENNER).—*In the Goods of JACKSON* (1841), 1 Notes of Cases, 92.

1070. — Dispositive words continued after formal ending.—A. produced to B. a sheet of paper, having on the first side a formal heading & ending of a codicil, & asked B. to write a codicil for her. B. not having finished the dispositive part when he reached the formal ending, turned over the page & continued the sentence & other dispositive clauses on the second side. The signatures of A. & of the attesting witnesses following the formal ending were on the first page. On motion for probate, counsel suggesting that the writing on the second side might be considered as an interlineation, the ct. refused to decide such a question on motion, but left the parties to propound the paper, if they thought fit.—*In the Goods of PEACH* (1858), 1 Sw. & Tr. 138; 31 L. T. O. S. 283; 6 W. R. 865; 164 E. R. 604.

Annotation:—Reid. In the Goods of Kimpton (1864), 3 Sw. & Tr. 427.

1071. — Words inserted by executor after death—By consent of all parties interested.—On the death of testatrix the exor., in ignorance of the law, & with the consent of all parties interested, inserted the words "everything but money to Rebecca Wilson."

The ct. refused probate of the instrument, without the interlineation, on motion, & required that it should be propounded.—*In the Goods of SPILLER* (1866), 13 L. T. 682; 14 W. R. 349.

1072. — Piece torn from each sheet.—A will dated 1795, testator dying in 1807, now brought

to the ct. for the first time, had a piece torn from the top of each sheet. The clause of attestation mentioned sealing, but no seal appeared. The ct., suspecting the seal to have been torn off, declined granting probate on motion.—*In the Goods of REED* (1854), 2 Ecc. & Ad. 202; 164 E. R. 388.

1073. — Attestation clause & signatures on separate sheet attached to will by wafers.—The ct. refused to grant probate on motion, where the attestation clause & signatures of deceased & the attesting witnesses were written on a separate piece of paper, which had previously been attached by wafers to the bottom of the will.—*In the Goods of LAMBERT* (1862), 31 L. J. P. M. & A. 118; 7 L. T. 219; 26 J. P. 456; 8 Jur. N. S. 158.

1074. — Will destroyed by testator when drunk—Restored when sober—Consent of next of kin though infants—Estate small.—Where a will had been destroyed by testator when drunk & the pieces pasted together by him next day when sober, & it was evident he wished the will to stand, the ct., the estate being worth £1,300, granted probate to the executrix & universal legatee named in the will, on motion, without requiring the will to be propounded, with the consent of the next of kin, although such next of kin were infants & were prejudicially affected by the will.—*In the Goods of BRASSINGTON*, [1902] P. 1; 71 L. J. P. 9; 85 L. T. 644; 18 T. L. R. 15.

1075. Doubtful status of testator—Soldier—Whether on service.—Probate will not be granted, on a mere motion, to the unattested will of a soldier "on service," if there be any doubt whether it is actual service within Wills Act, 1837 (c. 26).—*In the Goods of PERY* (1844), 3 Notes of Cases, 4; 2 L. T. O. S. 335.

See, generally, WILLS.

1076. — Sanity.—Testator left two wills inconsistent with each other. The second was executed at a time when testator was admitted to be of unsound mind; but the ct. declined to admit the first will to probate until the next of kin interested in an intestacy had been cited.—*In the Goods of THOMAS* (1874), 31 L. T. 553; 39 J. P. 25.

1077. Doubts as to due execution—Doubt as to execution before signature by witnesses.—A will, written by deceased, exhibiting on each of the two pages his signature & an imperfect attestation clause, subscribed by three witnesses, as "witnesses to the signature of J. A.," such subscription being made at his request, but the witnesses could not depose that deceased's signature was affixed to the will at the time they subscribed, they being ignorant that the paper was his will, was refused probate on motion.—*In the Goods of ASHTON* (1847), 5 Notes of Cases, 548.

Annotation:—Reid. In the Goods of Huckvale (1867), L. T. 1 P. & D. 375.

1078. — Evidence of attesting witnesses unsatisfactory.—A. produced a paper writing to B. with his signature at the foot of it, said it was his will, & asked B. to attest it. At the request of B. he retraced his signature with a pen & B. attested it. C. the other attesting witness was in the shop where this was done, but did not hear what passed. He saw A. in the act of writing, & then at A.'s request signed his name as a witness. The ct. was not satisfied on the affidavits that C. witnessed the acknowledgment, & refused to grant probate on motion.—*In the Goods of GARNER* (1861), 25 J. P. 183.

PART II. SECT. 6, SUB-SECT. 9.—B.

k. Double as to due execution —
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Seven sheets signed—Six signatures only attested.]—Testator executed an instrument purporting to be a will on seven

sheets of paper, signed each sheet, & subscribed his name at the end thereof. Two witnesses were present, & after

Sect. 6.—How probate is obtained: Sub-sect. 8, D. & C. (a).]

1079. — *Deaf & dumb testator—Inadequate explanation of signs used.*—*In the Goods of OWSTON, No. 1002, ante.*

1080. — *Two sheets both signed—First signature only attested.*—Testator wrote his will on two sheets of paper. He signed both of them, but the signature on the first sheet only was attested. The ct. refused to grant probate on motion, but ordered the will to be propounded.—*In the Goods of MORRIS (1873), 28 L. T. 745; 37 J. P. 488.*

— *Proof of execution.*—*See, generally, Sub-sect. 3, ante.*

1081. *Will possibly revoked—Original will conditional only—Subsequent will not referring to former will—Parties prejudiced minors.*—An unattested letter purporting to dispose of realty & personalty, & conditional on deceased's dying during a visit to Ireland, not admitted to probate in common form, the parties prejudiced being minors, deceased having returned from Ireland & having subsequently executed a will attested by three witnesses, disposing of land, purporting to be bequeathed in the letter, appointing his wife extrix. & guardian of his children, but not referring to the letter, nor to his personalty.—*In the Goods of WARD (1832), 4 Hag. Ecc. 179; 162 E. R. 1412.*

1082. — *Will cancelled—Later will not validly executed.*—Where there were two wills, the one made before, & the other after Jan 1, 1838, the first apparently cancelled, & the latter not executed accordingly to Wills Act, 1837 (c. 20), the ct. refused, on motion, to grant probate of the first will.—*In the Goods of SANDERS (1847), 9 L. T. O. S. 314.*

1083. — *Later will made when incapable—Evidence.*—R. executed a will & codicil in 1845; in 1847 he made another will. The exors. & legatees in the latter refused to propound it on the ground of deceased's want of capacity at the time it was made. The ct. was then moved to grant probate of the former will upon the affidavits of the medical attendants of deceased, confirming the statements of deceased's want of capacity. The ct. granted the motion.—*THORNTON & BAKER v. COSTER (1848), 11 L. T. O. S. 374; 12 Jur. 545.*

1084. — *Parties cited consenting.*—Testator having duly executed a will, subsequently made another betraying on the face of it insanity. The exors. of the former will took out a decree calling on all persons interested in the latter paper to propound it, with an intimation that, on not appearing, the ct. would decree probate of the former will. The persons cited executed proxies declining to propound the latter paper & consenting to probate being granted of the former:—*Held*: the exors. of the former paper were entitled to probate in common form.—*PALMER & BROWN v. DENT (1850), 2 Rob. Eccl. 284; 7 Notes of Cases, 555; 163 E. R. 1319.*

Annotation:—Reid. Morton v. Thorpe (1863), 32 L. J. P. M. & A. 174.

1085. — *Cancelled under misapprehension—As to effect of subsequent settlement.*—Where a testator by misinformation as to the effect of a subsequent deed, settling his property in his lifetime, had been induced to revoke his will by cancellation, the ct. refused to grant probate of a copy on motion, but compelled the parties to propound it in solemn form.—*In the Goods of JAMES (1868), 19 L. T. 610; 33 J. P. 135.*

testator had signed his will, they attested the first six sheets only & not the last:—*Held*: the witnesses signed

the six sheets with the intention of verifying the signature at the end of the will as well as on the other sheets,

1086. — *Former will cancelled—Revoked former will.*—Testator executed two wills, one in 1872 & the other in 1892. By the first he left all his property to his wife, & by the second he made no provision for her. Shortly before his death he asked that the two wills might be brought to him, & directed his wife to burn the later will, which she did, & he then handed to her the earlier will, saying, "Now you will be mistress of all." After his death letters of administration were granted to his widow, upon the assumption that the destruction of the will of 1892 which revoked all previous wills, had caused an intestacy:—*Held*: inasmuch as there were infants interested under the earlier will who could not consent, the ct. would not revoke the letters of administration & grant probate of the later will on motion, but would require such will to be propounded.—*In the Goods of ANDREWS, [1893] P. 14; 62 L. J. P. 25; 68 L. T. 259; 1 R. 474.*

—*See, generally, WILLS.*

1087. *Will possibly contingent.*—M. a mariner, a native of Bremen, but domiciled at Sunderland, died, leaving a will which he executed during illness at Shanghai. After reciting his desire to be removed from the ship on board which he was serving, & that the expenses attending his illness should be defrayed out of his wages, the will proceeded, "& in the event of my death during such time, I do hereby, of my own free will, & at my express desire, will & bequeath," etc., & it concluded, "I also declare this to be my last will & testament, revoking all others previously made." Testator recovered from the illness in question, & lived for a twelvemonth afterwards:—*Held*: the will was not contingent on his death at Shanghai, but before granting probate of it the ct. required that the next of kin, if any, to be cited.—*In the Goods of MARTIN (1867), L. R. 1 P. & D. 380; 36 L. J. P. & M. 116; 17 L. T. 32; 31 J. P. 727.*

Annotations:—Consd. In the Goods of Porter (1869), L. R. 2 P. & D. 22. Reid. In the Goods of Robinson (1870), 19 W. R. 135; In the Goods of Spratt, [1897] P. 28.

1088. *Mistaken reference in codicil—Consents of parties interested obtained by persuasion.*—*QUINCEY v. QUINCEY (1846), 5 Notes of Cases, 154.*

1089. *Original will not before court.*—The ct. is always reluctant to grant probate of a document not before it, & it will not, as a rule, grant probate of such document on motion.—*In the Goods of KELLY (1865), 13 L. T. 303.*

1090. — *Where parties interested consent.*—Will lost, motion to admit a verified copy to probate rejected, the next of kin not having been cited.

The next of kin may give in proxies of consent if they choose (*SIR H. JENNER FUST*).—*In the Goods of DENSTON (1843), 3 Curt. 741; 2 Notes of Cases, 128; 163 E. R. 886.*

1091. — *Necessity for consent of interested parties.*—The contents of a lost will cannot be proved on motion without the consent of the next of kin.—*In the Goods of PEARSON, [1896] P. 289; 66 L. J. P. 8; 45 W. R. 143.*

Annotation:—Consd. In the Goods of Apted, [1899] P. 272. At the present time I am prepared to modify the view I expressed in In the Goods of Pearson. I think, now, that in clear cases, without specifying what those cases may be, these applications may be acceded to (GORELL BARNES, J.).

1092. — *Estate small.*—The ct. will now, in the case of a small estate, entertain an application to prove, upon motion, the contents of a lost will, without requiring, as an absolute condition, the consent of all persons interested in

& probate granted in solemn form.—*WILLIAMS v. PAIN (1889), 3 Q. L. J. 175.—AUS.*

the estate.—*In the Goods of APTED*, [1899] P. 272; 68 L. J. P. 123; 81 L. T. 459.

Annotation.—*Appl. In the Goods of Brassington* (1901), 71 11 L. J. P. 9.

1093. — Disappearance of will after death—Party suspected of destroying will cited but not appearing.—The will of a testator was brought to the house by an extrix. in whose custody it had been, on the morning of the funeral. It was suddenly missed, & there was reason to suspect that it had been abstracted & destroyed by the only party who was interested in an intestacy, & who was cited, but did not appear. The ct., in these circumstances, did not require the will to be propounded in solemn form of law, but granted on motion, probate of the substance as proved by parol evidence.—*COLMAN & BARLOW v. COLMAN*, *In the Goods of COLMAN* (1866), 13 L. T. 682; *sub nom. COLEMAN & BARLOW v. COLEMAN*, 14 W. R. 291.

1094. Probability of testamentary documents being established.—Where a testatrix left three testamentary papers, two of which contained certain informalities & affected the interests of infants, the ct. being of opinion that, if the usual practice were insisted upon & the documents propounded in solemn form, the result would be to establish all three documents, granted probate thereof, on motion, to the exors.—*In the Goods of O'BRIEN*, [1900] P. 208; 69 L. J. P. 55.

1095. Whether necessary in order to prove will invalid.—Where there is a will with the signature of deceased at the foot thereof, with the names of two witnesses subscribed to it, the ct. will not, on motion upon affidavit, *ex p.*, that the will was not duly executed, decree deceased to be dead intestate. The ct. cannot decree administration to pass the effects of deceased as dead intestate, unless the will has been propounded. Although this will is invalid, under Wills Act, 1837 (c. 26), this is only on affidavits *ex p.*, there might, therefore, be collusion. All that the ct. will do in such cases is to reject the prayer for probate, leaving the parties to take out administration if they think proper as, notwithstanding the ct. declines to grant probate, the will might be propounded & established (*SIR H. JENNER*).—*In the Goods of AYLING* (1838), 1 Curt. 913; 163 E. R. 316.

1096. ——*ANON.* (1841), 5 Jur. 1017.

1097. ——Where a paper writing, purporting to be a will, appears clearly from the affidavits of the attesting witnesses to have been not duly executed, & a person appointed by it exor. is desirous of obtaining the decision of the ct. that it is inoperative as a will, he may do so by moving the ct. to decree probate.—*In the Goods of JACKSON* (1858), 28 L. J. P. & M. 32.

1098. Testamentary papers lodged in court—Intestacy presumed & not disputed by next of kin.—The next of kin, the brother, put the asserted widow of deceased upon proof of her marriage, upon the assumption that he had died intestate. There were, however, testamentary papers lodged in the registry of the ct. The ct. declined to entertain the suit until such papers had been propounded.—*WYLLIE v. WYLLIE* (1850), 15 L. T. O. S. 521; 14 Jur. 792.

1099. Codicil only disputed.—B. died on Mar. 27, 1862, leaving a will dated Apr. 17, 1860, whereof he appointed two exors.; there was also a paper purporting to be a codicil dated Mar. 26, 1862. The exors. believing this not to be a true codicil of deceased, asked for a citation on the legatees interested under it, calling on them to propound & prove it if they thought fit. The ct. refused to issue this citation, but suggested that the exors. might proceed to prove the will in solemn form, & cite the next of kin & the legatees under the alleged codicil to see the will proved.—*In the Goods of BENBOW* (1862), 2 Sw. & Tr. 488; 31 L. J. P. M. & A. 171; 6 L. T. 659; 26 J. P. 603; 164 E. R. 1086.

1100. ——Where a testator left a will & two codicils & the exors. sought to propound the will with one codicil in order to raise the question as to whether or not both codicils should be admitted to probate, on a motion for the appointment of an administrator *pendente lite*, the ct. admitted the will to probate in common form & allowed the question as to the codicils to be tried subsequently.—*WAINSWRIGHT v. WAINSWRIGHT* (1894), 71 L. T. 265; 6 R. 562.

C. Parties.

(a) In General.

1101. Who may be parties—Creditor of legatee under will.—A. executed a will & codicil, the latter in favour of B. B. survived A. & died, having made a will, in which he appointed as exors. & residuary legatees, *plfss.*, two of the exors. of A.'s will. B. at the time of his death, was indebted to a certain bank, the affairs of which were being wound up by two official liquidators, appointed by the Ct. of Ch. The ct. ordered a citation to issue to the official liquidators to see proceedings in the suit as to the validity of the codicil to A.'s will.—*DIXON & DICKENSON v. ALLINSON*, *In the Estate of WILSON* (1864), 3 Sw. & Tr. 572; 11 L. T. 427; 10 Jur. N. S. 1242; 164 E. R. 1397.

1102. — Legatee convicted of manslaughter of testator.—The principle according to which a person who is guilty of feloniously killing another cannot take any benefit under that other person's will is based on public policy, & applies equally to a case of manslaughter as to one of murder.

A legatee who had been convicted of the manslaughter of her testator was held to be rightly dismissed from an action for probate of the will. Such an order may properly be made upon an interlocutory proceeding.—*In the Estate of HALL*, *HALL v. KNIGHT & BAXTER*, [1914] P. 1; 83 L. J. P. 1; 109 L. T. 587; 30 T. L. R. 1; 58 Sol. Jo. 30, C. A.

To propound.—See Sect. 6, sub-sect. 9, C. (b), *post*.

To oppose.—See Sect. 6, sub-sect. 9, C. (c), *post*.

1103. Citation to see proceedings.—A next of kin contesting a will propounded by an exor. may take out a decree citing all persons interested under the will "to see proceedings."—*COLVIN v. FRASER* (1827), 1 Hag. Ecc. 107; 162 E. R. 523.

Annotation.—*Follis. Ratcliffe v. Barnes* (1862), 26 J. P. 232.

PART II. SECT. 6, SUB-SECT. 9.—C. (a).

1. General rule.—The rule that all parties interested in the subject matter of a suit must be before the ct. should only be relaxed, under con. order 57, where the interests of justice manifestly require it. A suit was brought to set aside a will, & the persons interested under the will, as well as those interested as next of kin

or heir-at-law in the event of the will being set aside, were made parties. The deft., M. S., one of the heirs-at-law, died subsequently to the institution of the suit.—*Held*: that the suit should be revived against the representatives of M. S.—*QUANTZ v. SMELZER* (1875), 6 P. R. 228.—*CAN.*

m. Who may be parties—Heir-at-law—Not entitled to any of deceased's personality.—The heir-at-law, though

he may not be entitled to any of the personal estate of a deceased person, may file a petition to have an alleged will of deceased proved in solemn form.—*Re Fox* (1880), 20 N. B. R. 391.—*CAN.*

n. ——The devisee of a portion of the property under the will conveyed his title to a third party, & by several intermediate conveyances it came to M., who opposed the decision

Sect. 6.—How probate is obtained: Sub-sect. 9, C.

1104. Ascertainment of necessary parties—Some next of kin uncertain.]—An exor. being desirous to propound in solemn form, the last will of his testator, cited certain next of kin, but was unable to ascertain what other persons were entitled in distribution. The ct. under 20 & 21 Vict. c. 77, s. 24, ordered a subpoena to issue for the attendance of certain persons to be examined as to their knowledge of the members of the family, & the other next of kin of deceased.—*In the Goods of READ, SHEPHEARD v. BEETHAM* (1872), L. R. 2 P. & D. 384; 41 L. J. P. & M. 44; 36 J. P. 503.

1105. Striking out parties—When allowed—One of nine defendants abroad.]—In a probate suit, out of nine defts. on the record eight had been cited & had not appeared. The remaining one, who was resident in New Zealand, had not been served. The ct. at the hearing, allowed him to be struck off the record, & the case to proceed against the other eight defts. The ct. also allowed an affidavit, used on a motion formerly made in the suit, & sworn by a witness who had been subpoenaed but was unable to attend, owing to his being, at the time of the hearing, engaged as a witness elsewhere, to be put in evidence, & treated the application as made before the trial under R. S. C., Ord. 37, r. 1.—*DREWITT v. DREWITT* (1888), 58 L. T. 684; 52 J. P. 232.

1106. Order adding or striking out parties—How made—Whether on interlocutory proceeding.]—*In the Estate of HALL, HALL v. KNIGHT & BAXTER*, No. 1102, *ante*.

(b) *Right to Propound a Will.*

1107. Necessity for interest.]—A person cannot propound a will in which he has no interest either as exor. or legatee.—*GOODMAN v. GOODMAN* (1754), 2 Lec. 2; 161 E. R. 243.

1108. —.]—A party who has no interest under a will cannot propound it.—*PARTON v. JOHNSON* (1808), L. R. 1 P. & D. 549; 37 L. J. P. & M. 67; 18 L. T. 923; 32 J. P. 679; 16 W. R. 1192.

1109. Who are interested—Executor.]—*GOODMAN v. GOODMAN*, No. 1107, *ante*.

1110. — Legatee.]—*GOODMAN v. GOODMAN*, No. 1107, *ante*.

1111. — Legal devisee not charged with any trust.]—A bill to establish a will against an heir-at-law may be maintained at the suit of a mere legal devisee not charged with any trust or duty under the will.—*COLCLOUGH v. BOYSE* (1857), 6 H. L. Cas. 1; 26 L. J. Ch. 256; 3 Jur. N. S. 373; 10 E. R. 1192, H. L.; *affg.* S. C. *sub nom.* *BOYSE v. ROSSBOROUGH* (1854), 3 De G. M. & G. 817, L. C. & L. J.

Annotations:—Fold. *Lovett v. Lovett* (1856), 3 K. & J. 1. *Reid.* *Jonas v. Gregory* (1863), 33 L. J. Ch. 679.

—*See, now, Land Transfer Act, 1897 (c. 65), s. 1 (1) (repealed by Law of Property Act, 1922 (c. 10), s. 156 (11)); Administration of Estates Act, 1925 (c. 23), s. 1 (1).*

1112. — Whether object of unenforceable wish.]—A testator appointed his wife universal legatee. The will continued: "It is my earnest wish & desire that my wife should during her life-

time pay out of my estate to my sister . . . the sum of 30s. each & every week":—*Held*: this expression of a wish did not amount to a precatory trust or direction to pay, & gave to the sister of testator no interest to propound his will.—*DOBIE v. EDWARDS* (1911), 80 L. J. P. 119; 27 T. L. R. 464.

(c) *Right to Oppose Will.*

i. *In General.*

1113. Necessity for interest.]—A next of kin, being assigned to declare whether, or not, she opposed scripts A. B. & C., a will with two codicils, "or any or either, & which, if any," declared she opposed C., the second codicil, on the face of which she had no interest:—*Held*: on a suggestion, contained in her affidavit of scripts, that other intermediate papers had been executed by testator, & were in existence, she had interest sufficient to entitle her to oppose C., but she must declare whether she opposed A. & B.

A next of kin, *qua* next of kin, cannot oppose a paper without some interest, however small or remote.—*BASKCOMB v. HARRISON* (1849), 2 Rob. Eccl. 118; 7 Notes of Cases, 275; 14 L. T. O. S. 295; 13 Jur. 1012; 163 E. R. 1262.

Annotation:—Consd. *Hingston v. Tucker* (1862), 2 Sw. & Tr. 596.

1114. —.]—Before a person is permitted to contest a will he may be called upon by the propounder to show his interest; but when two contest a will, neither can call upon the other first to show his interest.—*HINGSTON v. TUCKER* (1862), 2 Sw. & Tr. 596; 31 L. J. P. M. & A. 91; 7 L. T. 337; 164 E. R. 1129.

1115. — Bare possibility of interest sufficient.]—The bare possibility of an interest is sufficient to entitle a party to oppose a testamentary paper.—*KIPPING & BARLOW v. ASH* (1845), 1 Rob. Eccl. 270; 4 Notes of Cases, 177; 9 Jur. 542; 163 E. R. 1035.

Annotations:—Consd. *Crispin v. Doglioni* (1860), 2 Sw. & Tr. 17. *Reid.* *Dixon & Dickenson v. Allinson, In the Estate of Wilson* (1864), 3 Sw. & Tr. 572.

1116. Who are interested—Creditor.]—It is not competent to a creditor to dispute the articles of a will.—*BURROUGHS v. GRIFFITHS* (1754), 1 Lec. 544; 161 E. R. 201.

Annotation:—Fold. *Menzies v. Pullbrook & Ker* (1841), 2 Curt. 845.

1117. —.]—A creditor, *qua* creditor, not allowed to oppose a grant of probate of a will to the exor. according to the tenour.—*MENZIES v. PULBROOK & KER* (1841), 2 Curt. 845; 1 Notes of Cases, 132; 163 E. R. 605.

Annotation:—Reid. *Hawke v. Wedderburne* (1868), L. R. 1 P. & D. 594.

1118. — Beneficiary under former will.]—A party benefited under a former will, which does not appear, cannot be admitted a contradictor to a subsisting will.—*THOMPSON v. WALDRAM* (1821), 3 Phillim. 584; 161 E. R. 1422.

1119. — Next of kin.]—*BASKCOMB v. HARRISON*, No. 1113, *ante*.

1120. — Party entitled to personalty under law of testator's domicile.]—The law of the domicile of a deceased person governs the succession to his personal property. Where, therefore, in a foreign ct. upon the death of a person domiciled in the country where that ct. had jurisdiction, C.

of the judge of probate setting the will aside:—*Held*: M., as "parties interested," were competent parties, & clearly entitled to be heard, even though "parties interested" were not specifically mentioned among those to be cited.—*Re HILL'S ESTATE* (1901), 34 N. S. R. 494.—*CAN.*

PART II. SECT. 6, SUB-SECT. 9.—C. (a) i.

1119 i. Who are interested—Next of kin.]—*Pitts*, propounded a will under which they took the whole estate, & were named as executors. Deft., one of several next of kin, contested its validity. The other next of kin also

disputed the will, but were not acting in concert with deft.:—*Held*: the other next of kin should be made parties.—*CORNELL v. SMITH* (1890), 14 P. R. 375.—*CAN.*

e. — *Person disputing testator's right to deal with property—Without claiming any part of it.]*—A person not

claimed to be the natural son of H. C. deceased, & as such natural son to be entitled by the law of that country to inherit his father's property, & alleged that his father was of a particular station in society, which circumstance allowed of such a claim by a natural son, & that the father had died domiciled in the country, & had died intestate, & the foreign ct. found all these allegations in his favour:—*Held*: the Probate Ct. in this country was bound by the judgment of the foreign ct. & had, therefore, rightly admitted C. to be heard as contradictor to a will set up in this country as having been made by H. C. disposing of his personal property here.—*DOGLIONI v. CRISPIN* (1866), L. R. 1 H. L. 301; 35 L. J. P. & M. 129; 15 L. T. 44, H. L.; *affg.* S. C. *sub nom.* *CRISPIN v. DOGLIONI* (1863), 3 Sw. & Tr. 96.

Annotations:—*Apld.* *Re* Trufort, *Trafford v. Blanc* (1887), 36 Ch. D. 600. *Reid.* *Pemberton v. Hughes* (1899), 1 Ch. 781; *Re* Martin, *Loustalan v. Loustalan*, [1900] P. 211.

Conflict of Law in relation to succession to movables generally, *see* CONFLICT OF LAWS, Vol. XI., pp. 365 *et seq.*

Compare Nos. 3031, 3032, *post*.

1121. Proof of interest—Who may call for—Propounder.—*HINGESTON v. TUCKER*, No. 1114, *ante*.

1122. ——— Other opposer.—*HINGESTON v. TUCKER*, No. 1114, *ante*.

1123. ——— Time for.—A caveat was warned by the widow of a deceased, & debts. appeared thereto as universal devisees & legatees of the estate of A. B., the universal devisee & legatee of the whole estate of deceased. Pltf. thereupon declared, alleging an intestacy. Defts. pleaded propounding a will, whereof A. B. was sole extrix. & universal legatee. On motion for an order to amend the pleas by setting forth how they derived their interest:—*Held*: it was too late for pltf. to call upon defts. to set forth their interest after the declaration had been delivered.—*INKSON v. JEEVES* (1863), 3 Sw. & Tr. 39; 32 L. J. P. M. & A. 69; 8 L. T. 173; 27 J. P. 264; 11 W. R. 350; 164 E. R. 1180.

ii. On Conditions.

1124. Leave to oppose on conditions—Legacy already received to be brought in.—*PYEFINCH v. PALMORE* (1767), cited in 1 Add. at p. 374; 162 E. R. 132.

Annotation:—*Reid.* *Bell v. Armstrong* (1822), 1 Add. 365.

1125. ————*ASHBY v. HAY & THRALE* (1768), cited in 1 Add. at p. 374; 162 E. R. 132. *Annotation*:—*Reid.* *Bell v. Armstrong* (1822), 1 Add. 365.

1126. ————*LEGGE v. BROOKMAN* (1777), cited in 1 Add. at p. 374; 162 E. R. 132.

Annotation:—*Reid.* *Bell v. Armstrong* (1822), 1 Add. 365.

1127. ————A next of kin who has acquiesced in probate taken in common form has even received a legacy due to him under the will may still be at liberty to call in such probate & put the exor. on proof of that identical will *per testes*, first bringing in the legacy so received.—

claiming any of the property of testator, but disputing the right of testator to deal with certain property as his own, has not such an interest in the estate of testator as entitles him to come in & oppose the grant of probate.—*ABHIRAM DASS v. GOPAL DASS* (1889), 1 L. R. 17 Cal. 48.—*IND.*

p. — *Judgment creditor alleging fraud.*—A judgment-creditor who, but

for the will, would in execution of his decree have a right to seize the property or that share of it which should descend to his debtor, & who alleges that the will has been set up for the purpose of defrauding the creditors, is a person claiming an interest in the estate of the deceased, & has a *locus standi* in opposing the grant of probate.—*KISHEN DAI v. SATYENDRA NATH DUTT* (1901), 1 L. R. 28 Cal. 441.—*IND.*

BELL v. ARMSTRONG (1822), 1 Add. 365; 162 E. R. 129.

Annotations:—*Consd.* *Morryweather v. Turner* (1844), 3 Curt. 802. *Reid.* *Ratcliffe & Duckworth v. Barnes* (1862), 8 Jur. N. S. 313. *Mentd.* *Beale v. Beale* (1874), 43 L. J. P. & M. 70.

1128. ————A legatee who had received a legacy under a will not allowed to call in the probate, not having brought in his legacy.

It is the practice of the ct., founded upon obvious reasons of justice, that a legatee cannot put an exor. upon proof of a will unless he brings in the legacy he may have received under the will; if for no other object, it would serve to test his sincerity in opposing the will whether his opposition proceeded from a real doubt as to its validity, or was merely vexatious (SIR H. JENNER PUST).—*HOUSE v. NORTON* (1852), 18 L. T. O. S. 280.

1129. Power of court to compel legacy to be brought in—Legacy paid to infant legatee.—An exor. after taking probate of the will, paid to a minor the amount of her legacy under it, & received her discharge; such legatee subsequently citing him to bring in the probate & prove the will, the exor. prayed the ct. to order the money so paid to be brought into the Registry:—*Held*: the acknowledgment of a minor not being a valid discharge, the ct. could not consider the payment as that of a legacy, & consequently could not compel the party to bring the money so paid into ct.—*GODDARD v. NORTON* (1846), 5 Notes of Cases, 76; 8 L. T. O. S. 216; 10 Jur. 1064.

(d) Loss of Right to Oppose Will.

i. By Admission.

1130. By predecessor in title.—An heir-at-law in his answer to a bill to establish a will, admitted that the will was well executed, & the sanity of testator. The heir died, & the bill was revived against his brother, who disputed the execution of the will, & the sanity of testator:—*Held*: the ct. would not allow him to do so.—*LIVESSEY v. HARDING* (1830), as reported in Tam. 400; 48 E. R. 183.

1131. ————If, in a suit to establish a will, the heir admits the will, & dies before the hearing, the derivative heir is bound, & the will need not be proved.—*ROBINSON v. COOPER* (1831), 4 Sim. 131; 58 E. R. 50.

1132. S. P. LOCK v. FOOTE (1833), 4 Sim. 132; 58 E. R. 51.

1133. ——— Whether infant successor bound.—*SLEEMAN v. SLEEMAN* (1772), 2 Dick. 787; 21 E. R. 477; *sub nom.* *SLEEMAN v. ANGOVE*, 4 Sim. 133, n., L. C.

Annotation:—*Expld.* *Lock v. Foote* (1833), 4 Sim. 132.

—A ———. —A heir-at-law admits the will of his ancestor in a bill filed by him for carrying into execution the trusts of such will, & afterwards dies before the hearing. The ct. will not establish the will on such admission, against the heir of such heir, who is an infant. It must be regularly proved against him.—*THORNS v. BOWYER* (1835), 4 L. J. Ch. 68.

See, generally, *ESTOPPEL*, Vol. XXI., pp. 306 *et seq.*

PART II. SECT. 6, SUB-SECT. 9.—C. (c) ii.

1124 i. Leave to oppose on conditions—Legacy already received to be brought in.—A legatee to whose wife a portion of the legacy has, at his request, been paid must bring into ct. the amount so paid before he can contest the validity of the will.—*In the Goods of RUSSELL*, *RUSSELL v. KEENAN* (1870), 18 W. R. 472.—*IR.*

Sect. 6.—How probate is obtained: Sub-sect. 9, C. (d) ii., iii. & iv., & (e) i.]

ii. By Acquiescence.

1185. What operates as a bar—Acquiescence—Renunciation of administration with will annexed by legatee.]—A legatee, having renounced administration *cum testamento annexo*, is not barred thereby from contesting the validity of a will.—*GASCOYNE v. CHANDLER* (1755), 2 Lee, 241; 161 E. R. 327.

1186. — Declaration by next of kin of intention not to oppose—Declaration not acted on.]—A next of kin who has declared that she will not oppose a will, may retract that declaration if she has not acted upon it.—*WRIGHT v. RUTHERFORD* (1758), 2 Lee, 292; 161 E. R. 345.

Annotation:—Refd. Hingston v. Tucker (1862), 2 Sw. & Tr. 596.

1187. — Receipt of annuity.]—*CORE v. SPENCER* (1790), cited in 1 Add. at p. 374; 162 E. R. 132.

Annotation:—Consd. Bell v. Armstrong (1822), 1 Add. 365.

1188. — By agent—Attorneys of executor withdrawing from suit.]—The attorneys of an extrix, having withdrawn from the suit after propounding an alleged will & suffered a next of kin to take administration:—*Held*: in the circumstances not to bar that extrix, from calling upon the next of kin to bring in the administration & repounding the alleged will.—*TROWER & SMEDLEY v. COX* (1822), 1 Add. 219; 162 E. R. 76.

1189. — Wilful negligence.]—This is an application on behalf of R. against B. the residuary legatee for life, & administratrix with the will annexed, of E. whilst living the universal legatee & administratrix of T., to show cause why such administration with the will annexed of T. should not be revoked, & the administration granted to him; in other words, the object is to put her on proof of the will. This application is founded on an affidavit of R., that he was in New South Wales when the administration was granted; that he did not hear of these proceedings until 1819; that he arrived in England in Dec. of that year; was soon afterwards taken ill & unable to make inquiries; but that he has since made them, & finds sufficient ground for contesting the validity of the will in question; that E. is since dead; that her will has been proved, & he prays that Mrs. B. may be called upon again to prove the will of T. What are the grounds which would warrant me in opening the case? If there had been any fraud or contrivance, or collusion, in taking out the process, of course that would be sufficient, for no person should be allowed to take advantage of his own fraud. I think complainant is barred by his own wilful negligence; & the ct. would run the risk of committing injustice if it allowed him to

proceed (SIR JOHN NICHOLL).—*In the Goods of ROBINSON* (1821), 3 Phillim. 511; 161 E. R. 1400.

1140. — Whether delay necessarily negligence.]—*In the Estate of WILLIAMS, WILLIAMS v. EVANS*, No. 3032, *post*.

Knowledge of former proceedings relating to will.]—*See Sub-sect. 9, C. (d) iv., post*.

1141. — Receipt of legacy—Whether an absolute bar.]—*BELL v. ARMSTRONG*, No. 1127, *ante*.

1142. — Whether next of kin barred.]—*MERRYWEATHER v. TURNER*, No. 1066, *ante*.

1143. — By minor.]—*GODDARD v. NORTON*, No. 1129, *ante*.

1144. — Delay—Seven years.]—A. as exor. of B., cited to bring in the probate, taken in common form, of her will, seven years before, by A., & to prove the will *per testes*, at the instance of C., as the representative of D., mother & sole next of kin of B. A., who appeared under protest, dismissed with costs:—*Held*: it was only competent to C. [residuary legatee named in the will & administrator with will annexed of D.] to do, in the premises, what D., if living, could have done. D. if living could not have cited A., in effect, as cited by C.—*BRAHAM v. BURCHELL* (1826), 3 Add. 243; 162 E. R. 468.

1145. — Whether next of kin barred.]—*MERRYWEATHER v. TURNER*, No. 1066, *ante*.

1146. Who bound by acquiescence—Whether next of kin.]—*RICHARDSON v. CLANEY* (1802), 2 Phillim. 228, n.; 161 E. R. 1128, n.

Annotations:—Refd. Newell v. Weeks (1814), 2 Phillim. 224; *Ratcliffe & Duckworth v. Barnes* (1862), 8 Jur. N. S. 313.

1147. —]—*MERRYWEATHER v. TURNER*, No. 1066, *ante*.

1148. — Party claiming under party acquiescing—Residuary legatee & administrator with will annexed of next of kin.]—*BRAHAM v. BURCHELL*, No. 1144, *ante*.

iii. By Lapse of Time.

1149. Time no bar.]—Probate granted in 1808, of an imperfect codicil, revoked.—*SATTERTHWAITE v. SATTERTHWAITE* (1818), 3 Phillim. 1; 161 E. R. 1240.

Annotation:—Refd. Merryweather v. Turner (1844), 8 Jur. 295.

1150. —]—Probate of an imperfect codicil which had been granted in 1807, revoked [in 1820].—*FINUCANE v. GAYFERE* (1820), 3 Phillim. 405; 161 E. R. 1366.

1151. —]—*BELL v. RAISBECK* (1844), cited 3 Notes of Cases, at p. 64, P. C.

Annotation:—Consd. Merryweather v. Turner (1844), 3 Curt. 802.

1152. — Security for costs ordered.]—On motion made for a decree calling upon the exor.

PART II. SECT. 6, SUB-SECT. 9.—C. (d) ii.

1141 i. What operates as a bar—Receipt of legacy.]—An heir at law taking a legacy under a testament, cannot challenge the bequest of an heritable bond made in such testament to his prejudice.—*LOUDEN v. LOUDEN* (1811), Huime, 23.—*SCOT*.

q. Whether delay necessarily acquiescence—By minors.]—The ct. will exercise great caution in declaring null & void, by reason of undue execution, a will which has been duly registered & acted upon, but will not refuse relief to the heirs *ab intestato* of the deceased if there has been no acquiescence on their part. The fact

that they have not instituted their action till ten years after the registration of the will, is not sufficient proof of such acquiescence if they were minors at the time of such registration, & instituted proceedings within a reasonable time after they became of age.—*VAN DER BYL & HAUPT v. SCHOLTZ* (1897), 14 S. C. 483.—*S. AF*.

PART II. SECT. 6, SUB-SECT. 9.—C. (d) iii.

1149 i. Time no bar.]—Lapse of time, short of 30 years, is not *per se* a bar to the right of the next of kin to demand proof of a will in solemn form, but may be a bar taken in conjunction with other circumstances, & the onus of showing that there are such circum-

stances lies upon the exors.—*Re GOODRE* (1890), 11 N. S. W. Eq. 281; 6 N. S. W. W. N. 121.—*AUS*.

1149 ii. —]—The last will of H. was proved before the registrar of probate. The will was acted upon, & remained unquestioned for a period of twenty-four years, when, after the death of the witnesses on whose oath it was proved, it was set aside on the testimony of the remaining witness, M. H., & his brother:—*Held*: after the long lapse of time, it was impossible to accept the evidence of M. H. & his brother—both being interested parties—to establish the invalidity of the will.—*Re HILL'S ESTATE* (1901), 34 N. S. R. 494.—*CAN*.

of a will, of which probate had been granted in 1835, to prove the same *per testes*, otherwise to show cause why the probate should not be revoked, etc., the ct. granted the motion on security being given for costs in £100 & observed, there was no limitation, as to time, in requiring a will to be proved in solemn form.—*In the Goods of TOPPING* (1853), 2 Rob. Eccl. 620; 163 E. R. 1434.

iv. Effect of Former Proceedings.

1153. Opposer with knowledge of former proceedings.]—Held: next of kin to be barred from calling in a probate from the circumstances of their having been consulant of a prior suit, in which the validity of the same will had been contested by other parties.—*NEWELL v. WEEKS* (1814), 2 Phillim. 224; 161 E. R. 1126.

Annotations:—Consd. Merryweather v. Turner (1844), 3 Curt. 802. *Apld.* Ratcliffe v. Barnes (1862), 2 Sw. & Tr. 486. *Distd.* Wytcherley v. Andrews (1871), L. R. 2 P. & D. 327; Young v. Holloway, [1895] P. 87. *Reid.* Bell v. Armstrong (1822), 1 Add. 365; Hayle v. Hasted & Pierson (1836), 1 Curt. 236.

1154. — Though not cited—& not intervening.]—A next of kin, though not cited to see proceedings, & not having intervened, if in fact cognisant of a suit between the exor. of a will & other next of kin, ending in the establishment of the will, is not at liberty in any way to oppose probate of such will being taken; & where, on a verdict, the ct. had pronounced for a will, & a next of kin so situated had entered a caveat, the ct. directed probate to issue in spite of the caveat, & condemned the next of kin in costs.—*RATCLIFFE v. BARNES*, [1862] 2 Sw. & Tr. 486; 31 L. J. P. M. & A. 61; 6 L. T. 658; 26 J. P. 232; 8 Jur. N. S. 313; 164 E. R. 1085.

Annotations:—Distd. Wytcherley v. Andrews (1871), L. R. 2 P. & D. 327. *Reid.* Young v. Holloway, [1895] P. 87.

1155. — — — — —.]—A next of kin, although not cited to see proceedings, & not having intervened, is bound by a decree in a suit in which a will is contested by other next of kin, if he was cognisant of the suit & had an opportunity of intervening. But this rule does not apply to a case where the parties to the suit compromise, & the decree is founded on the compromise. The ct. having pronounced for a will in consequence of a compromise between the parties contesting it:—*Held:* a next of kin who was no party to the suit, although cognisant of it, not to be barred by the decree from instituting a fresh suit for the revocation of probate.—*WYTCHERLEY v. ANDREWS* (1871), L. R. 2 P. & D. 327; 40 L. J. P. & M. 57; 25 L. T. 134; 35 J. P. 552; 19 W. R. 1015.

Annotations:—Consd. Young v. Holloway, [1895] P. 87; *Re* Lart, Wilkinson v. Blades, [1896] 2 Ch. 788; *Birch* v. Birch, [1902] P. 62. *Expld.* *Re* King, Jackson v. A.-G., [1917] 2 Ch. 420.

1156. — Fresh facts appearing after termination of proceedings.]—An exor. having propounded papers in an allegation which was rejected, & administration being thereupon decreed to the

next of kin; a legatee cannot be allowed to call in such administration, in order to repropound the same papers, unless he can bring in an admissible allegation, & show by affidavit that the facts have come to his knowledge since the rejection of the former allegation: in which case *semble* even the exor. might repropound them.

An allegation repropounding two unfinished papers rejected, the facts not being sufficient to rebut the adverse presumption of law: & the administrator who appeared under protest dismissed with costs.—*WOOD v. MEDLEY* (1828), 1 Hag. Ecc. 645; 162 E. R. 705.

Annotation:—Reid. Hayle v. Hasted & Pierson (1836), 1 Curt. 236.

1157. — Suit compromised.]—WYTCHERLEY v. ANDREWS, No. 1155, *ante*.

1158. — Where no right to intervene in former proceedings.]—A person who is not a party to proceedings in the Probate Div. in which the validity of a will is questioned is bound by the result only if he was cognisant of the proceedings & had a right to intervene.

An action was brought for revocation of probate of a will which the ct. in a previous action had held to be valid. Pltf. was cognisant of, & had assisted pltf. in the previous action; but, according to his affidavit, he had not then, so far as he knew, any interest in the suit & could not, therefore, have intervened. His case was that the will which had been declared void was a forgery, & that he was a legatee under an earlier will which there had been a conspiracy to suppress, but that these facts had only come to his knowledge since the previous action. It appeared that the earlier will was not likely to be produced at the trial:—*Held:* pltf. was not bound by the result of the previous action, & the action brought by him ought not to be dismissed as frivolous.—*YOUNG v. HOLLOWAY*, [1895] P. 87; 64 L. J. P. 55; 72 L. T. 118; 43 W. R. 429; 11 T. L. R. 128; 11 R. 596.

Annotation:—Consd. *Re* Lart, Wilkinson v. Blades, [1896] 2 Ch. 788.

Opposer party to former proceedings—In different capacity—Heir-at-law joined as next of kin.]—See No. 1067, *ante*.

(e) Parties Interested in Real Estate.

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), Sched. V., Part II.

i. Where Testator died before 1898.

1159. Citation—Whether necessary.]—FRENCH v. BARON (1740), 2 Atk. 120; *EMBERLEY v. TREVANION* (1860), 4 Sw. & Tr. 197; *COMER v. PARNELL* (1807), 36 L. J. P. & M. 81.

1160. — When allowed.]—NICHOLS v. BINNH (1858), 1 Sw. & Tr. 19; *TALBOT v. TRAHERNE* (1861), 25 J. P. 104; *LISTER v. SMITH* (1862), 3 Sw. & Tr. 53; *DOMVILLE v. DOMVILLE* (1865), 4 Sw. & Tr. 17; *MOORE v. HOIGATE* (1866), L. R. 1 P. & D. 101; *CAMPBELL v. LUCY*

PART II. SECT. 6, SUB-SECT. 9.— C. (d) iv.

**r. Whether opposer estopped—Op-
poser cited in former proceedings.]—A** person, although cited to see proceedings, is not estopped by judgment therein as the result of a compromise, to which he was not a party, & of which he knew nothing; & he is not estopped from questioning the validity of a will proved in solemn form as the result of such verdict & compromise.—*RITCHIE v. MALCOLM*, [1902] 2 I. R. 403.—*IR.*

s. — — — — —.]—An action was brought by the exors. of testator to establish a will against four of his next

of kin. Two others, next of kin & legatees, one of whom was a minor, aged sixteen years, entered caveats, & were cited to see proceedings. They entered appearances, but the solr., who entered the caveat & an appearance for the minor did not state in either that she was a minor. The remaining next of kin entered an appearance as intervenient. At the trial a compromise was entered into with three of defts., who withdrew their pleas in opposition to the will on terms, & the trial proceeded against the fourth deft., who had served notice to cross-examine only, & resulted in a verdict & judgment for pltf., establishing the will. The cited parties

were represented at the trial by counsel & solr., the minor did not apply for leave to intervene, & the action was allowed to proceed without objection. They made no application for a new trial, but brought an action against the exors. to establish an earlier will, under which they would take somewhat larger legacies than under the will which had been established. On a motion by the exors. to stay the second action:—*Held:* pltf. were bound by the result of the first action, & the second action must be stayed, & the minority of one of pltf. made no difference.—*MACARDY v. BROWN*, [1906] 2 I. R. 437.—*IR.*

Sect. 6.—How probate is obtained: Sub-sect. 9, C. (e) i. & ii., (f), & D. (a), (b), (c), (d), (e) & (f).]

(1871), L. R. 2 P. & D. 209; KENNAWAY v. KENNAWAY (1876), 1 P. D. 148.

1161. — Heir-at-law out of jurisdiction.]

—MARTIN v. HARDING (1864), 11 Jur. N. S. 118.

1162. — Who may be cited.]—WYMAN v. ASHWELL (1860), 4 Sw. & Tr. 196; JONES v. JONES (1882), 7 P. D. 66; WARD v. HUCKLE (1887), 12 P. D. 110.

1163. — Practice.]—PEACOCK v. LOWE (1867), L. R. 1 P. & D. 311; CAMPBELL v. LUCY (1871), L. R. 2 P. & D. 209; KENNAWAY v. KENNAWAY (1876), 1 P. D. 148.

ii. *Where Testator died after 1897.*

1164. Compared to next of kin.]—Exors., who are also residuary legatees, are in the same position, as to costs, as any other party who unsuccessfully propounds a will. Where exors., who were also named as residuary legatees, had ample opportunities of forming an opinion as to the testamentary capacity of deceased, & acting upon their opinion, propounded a will or wills, which, in the result, were pronounced against, after verdict of a jury, on the ground of testamentary incapacity & want of knowledge & approval of the contents:—*Held*: not only was this a case in which their costs should not be allowed out of the estate, but, following the general rule that costs follow the event, they should pay the costs of deft.; but not of any of the parties cited, whose interests were practically identical with those of deft.

A considerable change was effected in the position of the heir-at-law by Land Transfer Act, 1897 (c. 65). His position is practically that of the next of kin; & practically the heir-at-law & all the other persons who benefit by an intestacy were fighting in the same interest, as, & so far as they took any steps at all, in support of deft. I see no reason why they should not have joined in supporting deft., & so fought the case as a whole. It would be unreasonable to saddle plffs. with any but deft.'s costs (GORELL BARNES, J.).—TWIST v. TYE, [1902] P. 92; 71 L. J. P. 47; 80 L. T. 259; 18 T. L. R. 211; 46 Sol. Jo. 177. *Annotation*:—*Apld.* Page v. Williamson (1902), 87 L. T. 146.

(f) *Effect of Non-Appearance.*

1165. No party having interest before court.]—When there is no party before the ct. who has an interest in supporting a testamentary paper propounded, the ct. will require the appearance of such a party.—REDMILL v. REDMILL (1820), 3 Phillim. 410; 161 E. R. 1368.

1166. Defendants—Executor of will already proved—Probate revoked.]—A citation was personally served upon the exor. & universal legatee, named in a will of deceased, calling upon him to bring into the registry the probate of it which had been granted to him, & to show cause why the probate should not be revoked & declared null & void, & the will itself declared null & invalid. The probate was brought into the registry, but no appearance entered to the citation. The ct., although there was no evidence before it as to the invalidity of the will, revoked the probate granted, & ordered probate of an earlier will to issue in common form to the exor. named therein.—CROSBY v. NOTON (1867), 30 L. J. P. & M. 55; 16 L. T. 153; 31 J. P. 407; 15 W. R. 775. *Annotation*:—*Apld.* In the Goods of Dennis, [1899] P. 191.

1167. — Whether court will allow proof of execution of will by affidavit—R. S. C., Ord. 37, r. 1.]—COOK v. TOMLINSON, No. 958, *ante*.

1168. Plaintiff—Restoration of cause on terms.]

—Where, for a reason explained to the ct., plff. was not represented at the hearing of a probate suit, & applied within six days from the date of judgment for leave to restore the cause, the ct., in granting the application, made it a condition that plff. should, before a certain day, pay the costs of deft. as between solr. & client, & directed that, if he failed to do so, the judgment against him should stand.—CUDWORTH v. HAYWARD (1896), 75 L. T. 456.

D. Practice.

(a) *Place of Trial.*

1169. General rule.]—Application on behalf of plffs. to direct a cause to be tried at the coming assizes at D. refused. There is no similarity between the position of a plff. here & his common law right to lay the venue where he pleases. A testamentary suit is at large, & ought to be tried before the judge in the Ct. of Probate, though he has a discretionary power to send an issue to be tried before a judge of assize.—COOPER & SPARKS v. MOSS & MOSS (1858), 1 Sw. & Tr. 143; 31 L. T. O. S. 284; 6 W. R. 866; 164 E. R. 667.

1170. Change of venue—Power of registrar to order.]—The registrar, in a suit for revocation of probate, has no power to order the venue to be changed, & to direct that the suit be removed from this ct. to be tried at the assizes.—LANCASTER v. BROOK (1889), 14 P. D. 80; 58 L. J. P. 67; 60 L. T. 680; 53 J. P. 343; 37 W. R. 768.

1171. — At instance of party on whom onus of proof.]—In a probate suit, where the nominal plff., who was claiming an intestacy, had inserted the place of trial in his statement of claim, defts., who were propounding a will of deceased & upon whom the onus of proof at the trial would lie to establish that will, applied upon summons to change the venue from the assizes to Middlesex, & BUTT, J., made the order. Upon plffs. appealing, upon motion, to set aside the order:—*Held*: the order was right; the venue should stand changed, & the case should come on for trial in this ct., the more especially as there appeared to BUTT, J., a doubt as to whether the case could be conveniently disposed of at the approaching assizes.

From this order plffs., upon special leave given, appealed to the Ct. of Appeal; whereupon the Lord Justices, after consulting the learned judge appointed to preside at the assizes in question, & having ascertained from him that the cause list was a light one, & that the case could, without difficulty, be disposed of at the approaching assizes, & that BUTT, J., was under a misapprehension in supposing that it could not, directed the case to be so tried; & ordered accordingly.—JACKSON v. BRAITHWAITE (1890), 63 L. T. 231, C. A.

1172. Discretion to send case to assizes.]—COOPER & SPARKS v. MOSS & MOSS, No. 1169, *ante*.

1173. — When exercised—In special circumstances only.]—(1) In a suit for revocation of probate deft. is the party who should deliver the issue & move for directions as to the mode of trial.

(2) The ct. will not direct an issue to be tried at the assizes unless reasons for so doing appear on affidavit.—BRANDRETH v. BRANDRETH (1862), 2 Sw. & Tr. 446; 31 L. J. P. M. & A. 153; 6 L. T. 335; 26 J. P. 567; 10 W. R. 672; 164 E. R. 1069.

Annotation:—*As to* (1) *Apld.* Jackson v. Braithwaite (1890), 63 L. T. 231.

1174. — **Grounds for exercise**—To save expense or delay.]—In order to save expense & delay, the ct. will generally allow issues in a testamentary suit to be tried at the assizes. When, however, the suit was for revocation of probate, & there had been great delay in calling in the probate, & the property of deceased was large, the ct. considered those circumstances sufficient ground for refusing an application by pltf. opposed by deft., that the issues should be tried at the assizes, but ordered that deft. if successful should not be allowed more costs than he would have been entitled to if the issues had been tried at the assizes.—*RIDGWAY v. ABINGTON* (1863), 32 L. J. P. M. & A. 107; 11 W. R. 500.

1175. — **Who may exercise.**]—*LANCASTER v. BROOK*, No. 1170, *ante*.

1176. — **—**]—*KING v. BRONTOFT* (1899), cited in *Tristram & Coote's Probate Practice*, 15th ed., p. 475, n.

(b) Mode of Trial.

1177. **Jurisdiction to order trial without jury.**]—In an action by an exor. to establish a will, the heir-at-law was cited. Pltf. gave notice of trial by jury. The action was twice tried by a special jury, & in each case the jury disagreed & were discharged. Pltf. having set the action down for trial again before a special jury, defts. applied for special directions as to the further trial. The heir-at-law appearing & not opposing, order was made that the action should be tried by a judge without a jury. Pltf. appealed:—*Held*: the case was one where, under Ct. of Probate Act, 1857 (c. 77), s. 35, as the heir-at-law did not ask for a jury, the judge could, before Jud. Act, 1873 (c. 66), without any consent, have ordered the action to be tried without a jury; a choice of the mode of trial under R. S. C., Ord. 36, r. 3, did not exclude the application of rule 26, & the judge therefore had jurisdiction to make the order appealed from—further, though the order was subject to appeal, the Ct. of Appeal would not interfere with the discretion of the judge except in a strong case, & there was no ground for holding that his discretion had been wrongly exercised.—*Re MOORDAFF, BURGOINE v. MOORDAFF* (1883), 8 P. D. 205; 52 L. J. P. 77; 48 L. T. 504; 31 W. R. 735, C. A.

1178. — **Whether order subject to appeal.**]—*Re MOORDAFF, BURGOINE v. MOORDAFF*, No. 1177, *ante*.

1179. **When trial with jury ordered.**]—Where the main question to be decided was presumptive revocation of a will, the ct., defts. who were not heirs-at-law opposing, directed the cause to be tried by the ct. without a jury.—*SMITH v. HOAD* (1864), 3 Sw. & Tr. 462; 164 E. R. 1354.

1180. — **Separation of issues.**]—Where the contents of a will were propounded, & one of the pleas was that it was not in the words or to the effect alleged in the declaration, the ct., refusing the application of the parties opposing probate, ordered that particular issue to be tried before itself, & the other issues of undue execution & revocation by a jury.—*JAMES v. FOSTER* (1867), 36 L. J. P. & M. 46; 15 L. T. 544.

1181. **Whether before common or special jury**—Order for special jury obtained—But no further steps taken.]—If a party to a testamentary cause who has obtained an order for the trial of the cause by a special jury does not take the requisite steps for striking a special jury, it is competent to the other party to have it tried in its turn by a common jury.—*MORRIS v. OWEN* (1861), 30 L. J. P. M. & A. 213; 25 J. P. 535.

(c) Proceedings in County Court.

1182. **Issues sent to county court for trial—Subsequent proceedings in High Court.**]—(1) Where the issues raised in a suit for proving a will in solemn form have been directed to be tried by the judge of a county court, & are found by him against the will, upon a certified copy of his decree being filed in the principal registry, the judge of the Ct. of Probate will pronounce against the will, & decide any questions as to costs.

(2) Where an order has been made for payment of costs, the ct. will not grant an attachment for non-payment of them without an affidavit of personal service of the original order on the party to be attached.—*THOMAS v. CROWTHER* (1861), 2 Sw. & Tr. 501; 10 W. R. 801; 164 E. R. 1091. *Annotations*:—As to (1) *Reid. Morris v. Freeman* (1878), 3 P. D. 65. As to (2) *Reid. Williams v. Davies* (1864), 33 L. J. P. M. & A. 127.

1183. **Cause remitted to county court—Mode of trial.**]—(1) When the judge of the Ct. of Probate is satisfied that the county ct. has jurisdiction, he will direct a cause to be tried before the judge of a county ct. having jurisdiction, & will also direct the papers in the cause to be transmitted to the county ct. for the purposes of the suit; but he will give no directions as to the mode in which the cause shall be tried.

(2) It will be for the judge of the county ct. to decide whether the cause shall be tried before him with or without a jury.—*NORRIS v. ALLEN* (1862), 2 Sw. & Tr. 601; 1 New Rep. 34; 32 L. J. P. M. & A. 3; 7 L. T. 338; 27 J. P. 9; 11 W. R. 32; 164 E. R. 1131.

Jurisdiction of county court.]—See Sect. 1, subsect. 1, C., *ante*.

(d) Conduct of Action.

1184. **Different wills propounded by different executors—Parties proceed *pari passu*.**]—Parties propounding different interests to proceed *pari passu*.

If there are two wills, the exor. of the first cannot call upon the exor. of the other to prove the latter without propounding his own interest (*per Cur.*).—*WALLER & SMYTH v. HESELTINE v. BURGH* (1789), 1 Phillim. 170; 161 E. R. 951.

Annotations:—*Distd. Dabbs v. Chisman, Jennens v. Beauchamp* (1810), 1 Phillim. 155. *Reid. Panchard v. Weger* (1811), 1 Phillim. 212; *Ex p. Exeter* (Bp.) (1850), 10 C. B. 102. *Mentd. R. v. Fust* (1850), 14 J. P. 258.

1185. **In party propounding—Though defendant—Delivery of issue.**]—*BRANDRETH v. BRANDRETH*, No. 1173, *ante*.

1186. — **—** Motion for directions.]—*BRANDRETH v. BRANDRETH*, No. 1173, *ante*.
Sec. now, R. S. C., Ord. 30, r. 1.

(e) Security for Costs.

1187. **Whether ordered—Action brought by married woman—Since Married Women's Property Act, 1882 (c. 75).**]—In a probate action brought by married women subsequently to the passing of above Act the ct. will not order them either to find security for costs or join their husbands as co-pltfs.—*In the Goods of WILSON, THRELFALL v. WILSON* (1883), 8 P. D. 18; 48 L. T. 238; 47 J. P. 279; 31 W. R. 508.

(f) Proceeding in *forma pauperis*.

1188. **Whether allowed.**]—A sole exor. & legatee in a pretended will, having been cited to propound the same, admitted to sue *in forma pauperis*, though the paper was not produced till after a long lapse of time, & other circumstances of suspicion & vexation had appeared. On the merits, the ct. pronounced against the will, &

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condemned the pauper in costs; but intimated that it should not proceed to enforce a monition for payment thereof unless he ceased to be a pauper.

If D. were not a pauper, I should have no hesitation in pronouncing against this paper with costs; but though a pauper, the ct., in order to mark its view of the case, condemns him in the costs; it being a matter of discretion whether the ct., unless he should cease to be a pauper, would proceed to enforce a monition against him for their payment (SIR JOHN NICHOLL).—RIND v. DAVIES (1833), 4 Hag. Ecc. 394; 162 E. R. 1490.

See, now, R. S. C., Ord. 16, rr. 22 et seq., & generally, PRACTICE.

(g) *The Hearing.*

1189. Who may be heard—Where executor propounds—Person benefited.]—A next of kin, contesting a will propounded by an exor. may take out a decree citing all persons interested under the will to see proceedings.—COLVIN v. FRASER (1827), 1 Hag. Ecc. 107; 162 E. R. 523. *Annotation:—*Reid. Itatello v. Barnes (1862), 26 J. P. 232.

1190. — Several defendants pleading same case.]—(1) Where an exor. propounds a will in solemn form, & there are several defts. whose case on the pleadings is substantially the same, the ct. will hear counsel only for one deft.

(2) The opposite counsel cannot inspect letters which a witness has with him during examination, though they relate to the cause, without putting them, if required by the other side, in evidence.—PALMER v. MACLEAR & M'GRATH (1858), 1 Sw. & Tr. 149; 164 E. R. 670.

Annotation:—As to (1) Fold. Bagshaw v. Plimm (1899), 80 L. T. 360.

Parties generally.]—*See* Sub-sect. 9, C., *ante*.

1191. Right to begin—Party propounding will—In suit for revocation.]—(1) In a suit for revocation of probate, the party propounding the will must begin, though pltf. has declared, alleging an intestacy.

(2) Verdict of a jury establishing a will, although the surviving attesting witness swore that when she subscribed her name testatrix was dead, upheld on evidence.

(3) It being doubtful whether the unsuccessful pltf. in a suit for revocation of probate would be able to pay the costs of an intervenor, who had propounded the will, the ct. ordered that the intervenor's costs should be paid out of the estate.

(4) A next of kin, who unsuccessfully opposed a will, was condemned in the costs of another next of kin, whom he had cited to see proceedings, & who had appeared & pleaded, but had taken no other part.

Pltf. has not only failed in his suit, but has so acted in the matter as not to entitle himself to any relief (SIR J. P. WILDE).—CROSS v. CROSS (1864), 3 Sw. & Tr. 292; 33 L. J. P. M. & A. 49; 10 L. T. 70; 28 J. P. 183; 10 Jur. N. S. 183; 12 W. R. 694; 164 E. R. 1287.

Annotation:—Generally, Reid. Lindsey v. Lindsey (1872), 31 W. R. 272.

1192. — Party propounding last will.]—In a testamentary suit the party propounding the last will is entitled to begin. So also is a party who alleges only undue influence, in opposition to the validity of a will.—HUTLEY v. GRIMSTONE (1879), 5 P. D. 24; 48 L. J. P. 68; 41 L. T. 531.

1193. — Party alleging undue influence.]—KEAYS v. ADAMS (1879), 5 P. D. 25, n.; 48 L. J. P. 68, n.; 41 L. T. 531, n.

Annotation:—Reid. Hutley v. Grimstone (1879), 5 P. D. 24.

1194. — —.]—HUTLEY v. GRIMSTONE, No. 1192, *ante*.

1195. — Party alleging revocation—Making of will admitted.]—Where ptfs. claimed a decree of intestacy, & the due execution of a will propounded by deft. was admitted by ptfs. in their reply, the only plea against the will being that it was duly revoked by testatrix:—*Held*: the onus of proof lay on ptfs. & they must begin by opening their case.—SAQUI v. LAZARUS (1895), 73 L. T. 194.

See, generally, EVIDENCE, Vol. XXII., pp. 43 et seq.

1196. Evidence—Witness not available—Attesting witness to will—Affidavit made on proof in common form read.]—GORNALL v. MASON, No. 986, *ante*.

— — —.]—*See, generally, Sub-sect. 3, D., ante.*

1197. — — Affidavit used on former motion in suit read.]—DREWITT v. DREWITT, No. 1105, *ante*.

1198. — Cross-examination of witnesses—Application of R. S. C., Ord. 21, r. 18.]—Pltf. brought an action for revocation of probate which had been granted in common form, & deft., by way of counter-claim, propounded the will. In his reply & defence to the counter-claim pltf. gave notice, under R. S. C., Ord. 21, r. 18, that he merely insisted on the will being proved in solemn form, & that it was simply his intention to cross-examine the witnesses:—*Held*: in the construction of this rule the principle which guided the Ecclesiastical Cts. & the Probate Cts. ought to be considered; there was a distinction between a party who sought a revocation of probate & one who entered a caveat & took the ordinary steps to oppose a will being admitted to proof; & the present pltf. could not secure the benefit of the rule as to costs, since the notice given by him was bad.—TOMALIN v. SMART, [1904] P. 141; 73 L. J. P. 37; 90 L. T. 171; 20 T. L. R. 197. *Annotation:—Reid. Patrick v. Hevercroft (1920), 123 L. T. 201.*

(h) *The Order.*

i. *In General.*

1199. No order against propounding other papers.]—In a suit touching the validity of a will, the ct. refused to make an order on the party propounding the instrument, to oblige him to declare that he never would hereafter propound any other of the testamentary papers then before the ct.—WINFORD v. HELLIER & BARRINGTON (1752), 1 Lee, 137; 161 E. R. 51.

1200. Probate of earlier will not propounded granted.]—Deceased left a will dated in 1841. After his death a paper, purporting to be a will of subsequent date, but proved by various circumstances to be a forgery, was clandestinely sent to the exor. The circumstances having been stated & the ct. asked to grant probate of the false document, not only rejected the motion, but in the circumstances decreed probate of the genuine will of 1841.—*In the Goods of Goss* (1854), 1 Ecc. & Ad. 413; 164 E. R. 237.

1201. Whether execution of trusts ordered.]—Decree may be made establishing a will without proceeding to direct the trusts to be carried into execution.—BELL v. BELL (1837), 1 Jur. 51.

ii. *Where Action Compromised.*

1202. Whether terms of compromise made rule of court—Jurisdiction of court.]—In a cause of proving a will & codicil in solemn form, promoted by exor. against the legal personal representative of the sole next of kin of deceased, a compromise having been agreed to, by which a verdict establishing the will & codicil was to be taken by consent for pltf., & deft. was to receive £2,000 out of the estate:—*Held*: the judge of the Ct. of Probate had jurisdiction to make the terms of the compromise a rule of ct., & to enforce it as such. Probate of the will & codicil was decreed to pltf. as exor., the terms of the compromise being embodied in the decree.—*HARVEY v. ALLEN* (1858), 1 Sw. & Tr. 151; 164 E. R. 670.

1203. — Agreement to renounce probate not enforced.]—Where on a trial before a judge of assize & a jury of issues relating to the validity of a will, certain exors. of which were pltf.s. & certain other exors. of which were defts. in the suit, a verdict was taken by consent for pltf.s. on an agreement made an order of *nisi prius*, one of the terms of which was that exors., defts., should renounce probate, the judge of the Ct. of Probate refused to make the order of *nisi prius* a rule of ct. on the ground that the Ct. of Probate could not properly enforce an agreement that any exors. of a will should renounce probate thereof, but granted probate to the exors. pltf.s.—*HARGREAVES v. WOOD* (1862), 2 Sw. & Tr. 602; 1 New Rep. 34; 32 L. J. P. M. & A. 8; 7 L. T. 338; 27 J. P. 57; 11 W. R. 31; 164 E. R. 1131.

1204. — Probate of two documents granted—Unless entirely inconsistent.]—In a testamentary suit, where the parties have come to an arrangement under the terms of which the ct. is applied to to grant probate of two testamentary instruments, it will do so provided such documents are not entirely inconsistent with one another.—*ROBINSON v. CLARKE* (1877), 2 P. D. 269; 47 L. J. P. 17; 39 L. T. 43; 42 J. P. 217.

1205. — Where married women or infants parties—Compromise agreed by all parties sui juris.]—*Semble*: in an action as to the validity of a will when terms of compromise are agreed to by the parties who are *sui juris*, the Ct. of Probate will not make an order binding married women or infants to the terms of a compromise.—*NORMAN v. STRAINS* (1880), 6 P. D. 219; 50 L. J. P. 30; 45 L. T. 191; 29 W. R. 744.

1206. Residuary charitable devise—Sanction of Attorney-General.]—Testator by his will bequeathed the residue of his real & personal estate for the establishment of an agricultural college. The will was disputed by one of his next of kin who was also heiress-at-law; but a compromise was agreed to by which the will was to be proved in solemn form without opposition. The A.-G. as interested in the disposal of the residue was cited & appeared at the hearing to give his sanction to the compromise.—*BOUGHEY v. MINOR*, [1893] P. 181; 62 L. J. P. 104.

E. Pleading.

See, now, R. S. C., Ord. 3, r. 5, Ord. 19, r. 25A, & generally, PLEADING.

1207. What particulars must be given—Where will contains unintelligible erasures.]—Where

erasures are unintelligible in a will, the ct. is not to be prayed to grant probate "as to it may seem meet," although an alternative may be prayed.—*In the Goods of SCOTT* (1841), 6 Jur. 40.

1208. — Allegation that former probate obtained surreptitiously.]—Where exors. of a later will having called in the probate of a will of prior date, propound in a declaration the later will, it is not competent to them to allege in their declaration that the probate of the earlier will was surreptitiously obtained, or that the earlier will ought to be pronounced null & invalid.—*ROSBOTHAM v. ROSBOTHAM* (1860), 2 Sw. & Tr. 121; 30 L. J. P. M. & A. 38; 3 L. T. 557; 9 W. R. 148; 164 E. R. 939.

1209. — Papers intended to be set up—Papers existing not referred to in declaration.]—Where a will or codicil is propounded in a declaration in the usual form, & there is ground for suggesting that other testamentary papers, besides those specifically referred to in the declaration, may be included in the probate, the ct. will order the party propounding the will or codicil to furnish the other party with particulars of the testamentary papers he intends to set up.—*MARSH v. CORRY* (1864), 3 Sw. & Tr. 458; 33 L. J. P. M. & A. 112; 10 Jur. N. S. 159; 164 E. R. 1353.

1210. — Where incapacity alleged.]—In an action for probate the ct. will not order particulars to be given of incapacity.—*HANKINSON v. BARNINGHAM* (1883), 9 P. D. 62; 53 L. J. P. 16; 48 J. P. 24; 32 W. R. 321.

Annotations:—Consd. Cave v. Torre (1886), 54 L. T. 515; *In the Estate of Shrewsbury*, [1922] P. 112.

See, generally, WILLS.

— Details of alleged undue influence.]—See Nos. 1276-1278, post.

1211. Effect of pleading—Plea of undue execution—Whether evidence of forgery admissible.]—(1) At the trial a legatee in an earlier will who resisted probate of a later will, which was propounded by the exors. impeached the genuineness of testator's signature to the instrument, though no allegation of fraud had been pleaded:—*Held*: evidence in support of the allegation of forgery was admissible under the plea of undue execution.

(2) Where the litigation arose out of testator's act, & the subsequent conduct of the parties was calculated to excite suspicion the ct. allowed a legatee who resisted probate costs out of the estate, although the opposition was unsuccessful & fraud was charged.—*HUTTON v. DENNET* (1868), 17 L. T. 670; 16 W. R. 488.

1212. — Allegation of non-approval & incapacity—How far defendants' proof restricted.]—*FULTON v. ANDREW*, No. 1317, post.

1213. Substance of the case—Sufficiency.]—Pltf. who, by the "substance of the case," as stated in the statement of claim, has merely put defts. to proof that the requirements of Wills Act, 1837 (c. 26), were duly complied with, is entitled not merely to cross-examine defts.' witnesses, but also to bring testimony to negative due execution.—*PATRICK v. HEVERCROFT* (1920), 123 L. T. 201; 36 T. L. R. 290.

F. Costs.

See Sect. 19, sub-sect. 4, B., post.

PART II. SECT. 6, SUB-SECT. 9.—E. t. What particulars must be given—When will lost & no copy available.]—In a suit to establish a lost will of which there is no copy, it is necessary that the substance of the lost will, as

sought to be proved, should be set out in the declaration.—*EGINGTON v. EGINGTON* (1870), 19 W. R. 136; 18 IR.

a. —.]—A petition to prove a will in solemn form must state the

names, ages, occupations, & places of residence of the heirs, etc., whether such petition is by a person interested in supporting the will, or in defeating it.—*Re McMULLIN* (1883), 23 N. B. R. 302.—*CAN.*

SECT. 7.—LIMITED PROBATES.

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 155; Non-Contentious Probate Rules, 1925, r. 119.

SUB-SECT. 1.—IN GENERAL.

1214. Whether necessary—Will clearly limited to certain property.—A widow left a testamentary paper strictly confined to particular property therein described, & appointed an exor. in reference solely to such property. On question whether the probate was to be general or limited, the ct. was of opinion it should be general; but ultimately a limited probate was issued.

The paper is strictly confined to property under the will of D. When property is so strictly described, & limited, . . . I do not see the necessity for a limited probate (SIR H. JENNER FUST).—DAVIES v. QUEEN'S PROCTOR (1851), 2 Rob. Eccl 413; 163 E. R. 1363.

See, generally, Part I., Sect. 4, *ante*.

1215. Grant limited until production of original will.—In the Goods of VON LINDEN, No. 890, *ante*. Administration pending production of will, see Sect. 12, sub-sect. 12, *post*.

1216. Termination of liability—Executorship durante minore ætate—Assets transferred to executor at full age.—CHANDLER v. THOMPSON (1619), Hob. 205; 80 E. R. 411.

*Annotations:—*Reid. Lawson v. Crofts (1661), 1 Keb. 157; Elstob v. Thorowgood (1696), 1 Ld. Raym. 283. *Mentd.* R. v. Middlesex, Late Sheriff (1804), 4 East, 604.

1217. —————(1) If an exor. *durante minoritate* has duly administered the assets, & paid over the surplus to the exor. of full age, he is not chargeable to creditors: & he may show this matter under a general plea of *plene administravit*. (2) If an exor. *durante minoritate* commits a *devastavit*, & obtains a release from the exor., when of full age, yet he remains liable to creditors. It is no waste to pay legacies before debts, where the estate is sufficient to pay all.

(3) Whenever an exor. or administrator has done what he ought to do, & has no goods in his hands to be administered, he may plead *plene administravit*.

(4) An executorship *durante minore ætate* ceases on the infant's coming to the age of seventeen years.—BROOKING v. JENNINGS (1674), Freem. K. B. 150; 1 Mod. Rep. 174; 89 E. R. 109.

*Annotation:—*As to (3) *Consd.* Davis v. Blackwell (1832), 9 Bing. 5.

1218. Cæterorum grant—After limited administration on allegation of intestacy—Whether granted.—Where testator died in 1823, & no step was taken to prove his will till 1846, & in the meantime an administration had been obtained limited to his interest in the remainders of two terms, on an allegation that he was dead intestate, without citation of or renunciation by the parties entitled to the general grant; the court refused a *cæterorum* probate to the sole extrix., & stopped the practice of making such grants without citation.

I feel great difficulty in acceding to the motion, & I think that the ct. should stop such an irregular practice as that of granting administration for the assignment of terms without citing the next of kin under a mere allegation of the party deceased being dead intestate (SIR H. JENNER FUST).—In

the Goods of CURREY (1846), 5 Notes of Cases, 54; 9 L. T. O. S. 39.

1219. ———— Will of bastard—Property only partly disposed of.—Where a bastard having no relations makes a will disposing of a part only of his or her property, the Crown has a right to a grant save & except, or to a *cæterorum* grant, but not to a general grant of administration, & the legatees have a right to a grant of administration with the will annexed, limited to the property disposed of by the will.—In the Goods of RHOADES (1866), L. R. 1 P. & D. 119; 35 L. J. P. & M. 125.

1220. Will partially revoked by marriage—Grant limited to fund appointed under power.—In the Estate of POOLE, POOLE v. POOLE, No. 904, *ante*.

SUB-SECT. 2.—WILLS OF MARRIED WOMEN.

See, now, Probate Rules (Non-contentious), Rule 15 taking effect from Apr. 19, 1887.

1221. Former practice—Grant limited to property of which deceased could dispose.—Probate of the will of a married woman under a power limited in such manner as would leave questions of construction for the decision of cts. of equity.

The ct. will grant probate to the exors. limited to the settled property, & all accumulations over which deceased had a disposing power, & which she has disposed of: that is the usual & most convenient mode, in order to give parties an opportunity of making their claims elsewhere (SIR H. JENNER).—LEDGARD & PARR v. GARLAND (1836), 1 Curt. 286; 163 E. R. 97.

*Annotations:—*Fold. In the Goods of De Pradel (1867), L. R. 1 P. & D. 454. *Consd.* Re Lambert's Estate, Stanton v. Lambert (1888), 39 Ch. D. 626. *Reid.* Tugman v. Hopkins (1842), 11 L. J. C. P. 309.

1222. —————There was very strong evidence to show, that, in the case of a will made by a married woman, either with the assent of her husband or under a power, an administration limited to the subject-matter of the bequest contained in such will is the usual & proper form of administration, & that such administration is required by the practice of the Ct. of Chancery before they will allow any party to claim any interest under such will (TINDAL, C.J.).—TUCKER v. TUCKER (1842), 5 Scott, N. R. 843.

1223. ———— Property acquired since protection order.—B., a married woman, obtained a protection order for her property on Apr. 12, 1861, she made a will on Apr. 19 & died on Apr. 24. The order was not entered with the registrar of the county ct. till Apr. 24, being more than ten days after it was obtained:—*Held*: the requirement of the statute as to the entry of the order with the registrar is directory & not imperative, & on affidavits from the exors. that they were ignorant of the husband's place of abode, probate granted limited to the property acquired since the date of desertion.—In the Goods of FARRADAY (1861), 31 L. J. P. M. & A. 7; 6 L. T. 57; 25 J. P. 808; 7 Jur. N. S. 1252.

*Annotation:—*Consd. In the Goods of Brighton (1865), 34 L. J. P. M. & A. 55.

1224. ———— Property acquired since separation.—Testatrix separated from her husband & lived apart from him for thirty-nine years before

PART II. SECT. 7, SUB-SECT. 1.
b. Administration limited to extent of interests of beneficiaries.—D., a Parsi, died intestate in 1877, leaving him surviving a widow, three daughters, & two sons, A. & F. On D.'s death, his sons, without taking out administration, assumed the management of the estate, & each received sums of money

on account of it. The widow & daughters of deceased obtained letters of administration, but limited to the extent of their interests in the estate. In 1888 A. brought a suit against his brother F. & other members of the family to recover out of the estate a certain sum of money advanced by him to D.:—*Held*: the letters of

administration issued to the widow & daughters of deceased, being limited only to the extent of their shares in the estate, were not letters of administration such as are meant by Indian Succession Act.—FRAMJI DORABJI GHASWALA v. ADARJI DORABJI GHASWALA (1893), 1 L. R. 18 Bom. 337.—IND.

her death. During the separation she had acquired property, which she disposed of by will. The ct. made a grant limited to the property over which she had disposing power, & which she had disposed of.—*In the Goods of ANDREWS* (1873), 28 L. T. 479; 37 J. P. 425; 21 W. R. 576.

1225. — **Property acquired since Married Women's Property Act, 1870 (c. 93)—Wife deserted by husband.**—Testatrix was a married woman who had been deserted by her husband in 1866. The property which she disposed of by her will consisted of her earnings since 1866, which had all been invested since 1870. The ct. limited the probate to property acquired since 1870, the date of the above Act.—*In the Goods of PEPPER* (1874), 31 L. T. 274; 38 J. P. 712; 22 W. R. 832.

1226. — **—**—(1) Husband of testatrix, having assented to the making of her will, of which he was one of the exors., & there being property upon which the will could operate:—*Held*: he could not withdraw his consent after steps had been taken to obtain probate.

(2) Plffs., co-exors., having asked for a general grant of administration with the will annexed & that the husband should be ordered to file the written assent required in the registry:—*Held*: they were only entitled to the usual grant but the husband's assent might, under the circumstances, be dispensed with.—*CHAPPELL v. CHARLTON* (1887), 56 L. J. P. 73; 57 L. T. 496; 51 J. P. 215.

1227. Present practice—Grant in general form.—The limitation inserted before Married Women's Property Act, 1882 (c. 75), in the probate of the will of a married woman ought no longer to be required, & the ct. will henceforth make a general grant.—*In the Goods of PRICE* (1887), 12 P. D. 137; 56 L. J. P. 72; 57 L. T. 497; 51 J. P. 615; 35 W. R. 596.

Annotations:—*Consd.* *Re Lambert's Estate, Stanton v. Lambert* (1889), 39 Ch. D. 626. *Follid.* *In the Goods of Williams* (1892), 67 L. T. 502. *Refd.* *Re Atkinson, Waller v. Atkinson*, [1898] 1 Ch. 637.

1228. — **—**—The ct. henceforth refused to limit the grant of probate of a married woman's will, even where such will was made, & the person who made it has died, before Married Women's Property Act, 1882 (c. 75), & where the will & codicils are executed by virtue of a power of appointment.—*In the Goods of HOMFRAY* (1887), 12 P. D. 138, n.; 57 L. T. 479, n.; 51 J. P. 615. *Annotation*:—*Consd.* *Re Atkinson, Waller v. Atkinson*, [1898] 1 Ch. 637.

1229. — **Wife married before Married Women's Property Act, 1882 (c. 75)—Property accruing in possession after.**—Testatrix was married in 1872, & died in 1874. She made a will in 1873, to which her husband's consent was not obtained. Under a settlement of 1846, made upon the marriage of her parents, she was entitled to a share of certain property in reversion. Part of this interest became an interest in possession some months after her death in 1874, & the remainder in 1890. The ct. declined to grant administration to the husband, as upon intestacy, but made the ordinary grant of probate to him.—*In the Goods of WILLIAMS* (1892), 67 L. T. 502.

1230. — **—** **Property of which wife could**

not dispose excepted.—Where, upon the death of a woman who had married before the commencement of the above Act, it appeared that, before her marriage, she had acquired a mtge. debt, which her husband had not reduced into possession, & had since her marriage made a will purporting to dispose of all her real & personal property, the ct. made a grant to her husband of administration to such of her property as she had no power to dispose of by will.—*In the Goods of LEMAN*, [1898] P. 215; 67 L. J. P. 100.

1231. — **Law of domicile same as former English law—New Zealand.**—Under certain circumstances a grant of letters of administration limited to such property as the wife could not dispose of by will may still be made to a husband though the wife has made a will.

In 1875 deceased, a married woman domiciled in New Zealand, the law of which colony in respect of married women's property was at that time identical with English law before the passing of the Married Women's Property Acts, made a will purporting to dispose of all her property, & after her death in 1875 the will was proved in New Zealand. She had been at the time of her marriage entitled to certain sums under English settlements. These were not limited to her separate use & had never been reduced into possession during her lifetime:—*Held*: letters of administration to these sums might be granted to the husband.—*In the Goods of DONOVAN* (1898), 78 L. T. 567.

1232. — **Testatrix with foreign domicile—Will invalid by law of domicile.**—Upon an application for administration with the will annexed it appeared that deceased was domiciled in France, her husband, who survived her, being a domiciled Frenchman. Appt. was the appointee in trust under the marriage settlement of deceased, which, on the face of it, appeared to include all her property. The will had not been executed in accordance with the law of the domicile of deceased:—*Held*: unless the husband of deceased were to consent, a full grant ought not to be made; & in accordance with the practice, failing the husband's consent, the grant to appt., as appointee, should be limited to such property as the deceased had power to dispose of, & did dispose of, by the instrument executing the appointment.—*In the Goods of TREFOND*, [1899] P. 247; 68 L. J. P. 82; 81 L. T. 56.

Annotation:—*Consd.* *In the Goods of Vannini*, [1901] P. 330.

SECT. 8.—CESSATE AND DOUBLE GRANTS.

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 153, Sched. V., Part I., 1 (iii).

1233. Cessate grant—What is—Whether administration with will granted to widow—Effect of remarriage.—*In the Goods of TEED*, No. 1552, *post*.

1234. — **Distinguished from administration de bonis non.**—*In the Goods of FOZARD*, No. 1237, *post*.

1235. — **Fresh probate unnecessary.**—B. was made exor. for ten years, & afterwards C. was to be exor.; B. proved the will & then the two

PART II. SECT. 7, SUB-SECT. 2.

1227. 1. Present practice—Grant in general form.—By a deed of partition executed in 1863 by the various beneficiaries under, & the trustees of, a will, the fee simple of certain property was vested in a married woman subject to a joint power of appointment by her & her husband. On Dec. 17, 1881, she made a will, appointing her husband exor. On Dec. 13, 1884, Married

Women's Property Act, 1884 (No. 828), came into operation. On Dec. 18, 1885, the wife died, the joint power of appointment by husband & wife never having been exercised, & the husband applied for probate of her will, which was refused:—*Held*: the effect of the Act was to make all that her separate property which deceased acquired as real estate before the passing of the Act; & her will spoke

& took effect as if executed immediately before her death; & probate of her will granted accordingly.—*Re Hopkins' Will* (1886), 12 V. L. R. 285.—*AUS.*

s. Will made during lifetime of husband—Admission to probate—Whether acts of republication necessary.—*Re DOYLE'S Will* (1859), 4 Nfld. L. R. 403.—*NFLD.*

Sect. 8.—Cessate and double grants. Sect. 9: Sub-sects. 1, 2, 3, 4 & 5, A. & B.]

years expired. The question was whether C. ought to prove the will again, or whether he might administer without any probate:—*Held*: probate of the will by B. did not determine the election of C., but he was at liberty to take the executorship upon him, or refuse it; but if he pleased he might administer without any further probate.—ANON. (1875), *Freem. Ch.* 313.

1236. — Executors nominated "in default of" executor—Treated as appointment for life.]—Deceased appointed his wife sole extri. of his will & in default of her, two other exors. The wife took probate, & afterwards died, leaving a will in which she had appointed exors. On motion for probate of the will of deceased to the two substituted exors., the ct. treated the wife's executorship as one for life only, & made the grant.—*In the Goods of FOSTER* (1871), *L. R. 2 P. & D.* 304; 41 *L. J. P. & M.* 18; 25 *L. T.* 763; 36 *J. P.* 24; 20 *W. R.* 302.

1237. — Executors nominated in case first executor leaves will unperformed—Grant of administration with will annexed—Amount of bond.]—A grant of administration with the will annexed to a legatee upon the death of the original exor., & the renunciation of an exor. substituted in the event of his death, is a cessate grant & not a grant *de bonis non*, & the administrator is therefore bound to give security to the amount of double the value of the estate at testator's death according to the ordinary practice.

F. appointed S. residuary legatee & exor., & in case of his decease leaving the directions of the will unperformed, substituted P. as exor. In Aug. 1850, probate was granted to S., who died in Dec. 1862, leaving certain legatees of income for their lives under the will surviving. P. renounced probate, & the widow of S. renounced administration with the will annexed. One of the legatees for life was entitled to administration with the will annexed, technically a cessate grant, on which bond is usually required in double the amount of deceased's property at time of death.

The ct., under Probate Act, 1857 (c. 77), s. 52, directed a bond to be taken in the same amount as would have been required if the grant had been one *de bonis non*.—*In the Goods of FOZARD* (1863), 3 *Sw. & Tr.* 173; 32 *L. J. P. M. & A.* 160; 8 *L. T.* 702; 27 *J. P.* 649; 9 *Jur. N. S.* 756; 12 *W. R.* 19; 164 *E. R.* 1240.

Annotation.—*Apld. In the Goods of Halliwell* (1885), 54 *L. J. P.* 32.

Grant of administration durante minore etate.]—*See Nos.* 1216, 1217, *ante*.

1238. Double probate—Application for—How necessary evidence obtained.]—An application for an order on exors. to supply information necessary for obtaining double probate should be made by means of summons.—*Re GRIFFIN* (1910), 54 *Sol. Jo.* 378.

Probate issued in duplicate—Testator leaving separate will of trust property.]—*See No.* 1378, *post*.

SECT. 9.—GROUNDS FOR REFUSING PROBATE.

SUB-SECT. 1.—WANT OF TESTAMENTARY CAPACITY.

See, generally, WILLS.

PART II. SECT. 9, SUB-SECT. 5.—A. d. Whether presumed from particular relationship.]—Undue influence cannot be presumed from the relation-

ship of parties to each other.—*NYE v. SEWELL* (1894), 15 *N. S. W. L. R.* (B.) 18.—*AUS.*

s. Party instrumental in pre-

SUB-SECT. 2.—WANT OF COMPETENT UNDERSTANDING.

Necessity for competent understanding.]—*See, generally, WILLS.*

Evidence of competent testamentary understanding.]—*See, generally, WILLS.*

Presumption of sanity generally.]—*See LUNATICS.*

SUB-SECT. 3.—WANT OF DUE EXECUTION. Statutory requirements as to execution.]—*See WILLS.*

SUB-SECT. 4.—WANT OF KNOWLEDGE OR APPROVAL.

1239. General rule.]—To entitle a testamentary paper to probate, there must be proof of testator's knowledge of the contents of the paper. Such proof may be given in any mode; the degree necessarily depends upon the circumstances of each case. Where the capacity is undoubted, knowledge of the contents may be presumed, from execution of the paper. Where the capacity is impaired, or the drawer of the paper largely benefited by it, the proof must be adequately stringent, & the ct. must be satisfied of knowledge of the contents, by proof beyond the bare fact of execution.—*DURNELL v. CORFIELD* (1844), 1 *Rob. Eccl.* 51; 3 *Notes of Cases*, 225; 3 *L. T. O. S.* 323; 8 *Jur.* 915; 163 *E. R.* 961.

Annotation.—*Refd. Reece v. Pressey* (1856), 2 *Jur. N. S.* 380.

1240. —.]—*GUARDHOUSE v. BLACKBURN*, No. 1044, *ante*.

See, generally, WILLS.

1241. When knowledge & approval presumed.]—*DURNELL v. CORFIELD*, No. 1239, *ante*.

1242. — Will duly executed.]—*GUARDHOUSE v. BLACKBURN*, No. 1044, *ante*.

1243. — Will read once to testator.]—*GUARDHOUSE v. BLACKBURN*, No. 1044, *ante*.

See, generally, WILLS.

Circumstances giving rise to suspicion.]—*See Sub-sect. 7, post*.

SUB-SECT. 5.—UNDUE INFLUENCE.

A. In General.

1244. Exercise of influence must be proved.]—A will was written on three sides of a sheet of paper; on the fourth side was written a codicil. Both instruments were signed in the presence of, & attested by the same two witnesses, & at the same time; the witnesses were not informed of the fact that they were attesting two separate instruments. The codicil to a great extent annulled the will:—*Held*: this circumstance was not sufficient to discredit the will, it being proved to have been the voluntary act of a capable testatrix.

Where coercion in procuring the execution of a paper is charged, it is necessary for the party alleging it, to make his charge good by proof; the ct. cannot assume, that because a party is a legatee to a large amount under a will, therefore that party has exercised coercion, to obtain the will from a testatrix: a person otherwise admitted to have

participation of will—Receiving benefit thereunder.]—A party instrumental in the preparation & execution of a will under which he receives benefits is

been of sufficient capacity to make a will (SIR H. JENNER FUST).—BIDDLES v. BIDDLES (1843), 3 Curt. 458; 7 Jur. 777; 163 E. R. 790.

1245. — Presumption insufficient.]—Undue influence may exist in the form of bad companionship & bad example, & yet not be sufficient to invalidate a will made under its operation. To be within the meaning of the rule of law, so as to produce that effect, it must be an influence exercised by coercion or by fraud. But actual violence is not necessary to constitute coercion. Imaginary terrors may be sufficient for that purpose. In order to set aside the will of a person of sound mind, it must be shown that the circumstances under which it was executed are inconsistent with any hypothesis but that of undue influence, which cannot be presumed, but must be shown to have been exercised, & exercised in relation to the will itself, & not merely to other transactions.—BOYSE v. ROSSBOROUGH, BOYSE v. COLCLOUGH (1857), 6 H. L. Cas. 2; 29 L. T. O. S. 27; 3 Jur. N. S. 373; 5 W. R. 414; 10 E. R. 1192, H. L.

*Annotations:—*Consd. Parfitt v. Lawless (1872), L. R. 2 P. & D. 462; Boughton v. Knight (1873), L. R. 3 P. & D. 64; Hampson v. Guy (1891), 64 L. T. 778; Roe v. Nix, (1892), 9 T. L. R. 128; Craig v. Lamoureux, [1920] A. C. 349. *Reid.* Wright v. Wilkin (1859), 4 De G. & J. 141; Baudains v. Richardson, [1906] A. C. 169. *Mentd.* Jones v. Gregory (1863), 33 L. J. Ch. 679; Tredegar v. Windus (1875), L. R. 19 Eq. 607; The Liverpool, [1893] P. 154; Bank of Montreal v. Stuart, [1911] A. C. 120.

1246. —]—Low v. GUTHRIE, No. 1306, *post*.
Whether presumed from particular relationship.]
—See Nos. 1057, 1244, *ante*, Nos. 1250, 1265, 1266, *post*.

B. Evidence of.

Undue influence in transactions inter vivos.]—See CONTRACT, Vol. XII., pp. 98 *et seq.*, FRAUDULENT & VOIDABLE CONVEYANCES; GIFTS; SETTLEMENTS.

1247. What constitutes—Destruction of testator's free agency.]—The influence to vitiate a testamentary act must amount to force & coercion destroying free agency; it must not be the influence of affection & attachment; it must not be the mere desire of gratifying the wishes of another; for that would be a very strong ground in support of a testamentary act; further, there must be proof that the act was obtained by this coercion, by importunity which could not be resisted, that it was done merely for the sake of peace, so that the motive was tantamount to force & fear (SIR JOHN NICHOLL).—WILLIAMS v. GOUDE (1828), 1 Hag. Ecc. 577; 162 E. R. 682.

*Annotations:—*Consd. Stultz v. Schoeffle (1852), 20 L. T. O. S. 183. *Reid.* Browning v. Budd (1848), 6 Moo. P. C. C. 430. *Mentd.* Harrison v. Harrison (1846), 1 Rob. Eccl. 406.

1248. —]—In order to invalidate a will on the score of influence . . . it must be an influence depriving the party of the exercise of his judgment & his free action; it must be such an influence as induces you to think that the will, when executed, is not the will he desired to execute, that he does not benefit the parties whom he would wish to benefit, but that he is doing that which is not his desire, & therefore not his will (CRESSWELL, J.).—SEFTON (EARL) v. HOPWOOD (1855), 1 F. & F. 578, N. P.

1249. —]—Undue influence, to defeat a will, made by a person otherwise of testamentary capacity, must not be such as arises from the

influence of gratitude, affection or esteem, but it must be the control of another will over that of testator, whose faculties have been so impaired as to submit to that control, so that he has ceased to be a free agent, & has quite succumbed to the power of that controlling will.—LOVETT v. LOVETT (1857), 1 F. & F. 581, N. P.; *previous proceedings* (1856), 3 K. & J. 1.

1250. —]—(1) On an issue *devisavit vel non*, the will being impeached on the ground that testator's mind was impaired by drinking, & was under undue influence on the part of the devisee or his family:—*Held*: although it was drawn by a son of the devisee, an old friend, & at his house, if testator had really requested him to do it, & it was his voluntary & spontaneous act, not under constraint, free from force or fraud, from imposition or importunity, there was no undue influence, & the will was valid.

(2) On such issue the devisee begins, as he affirms the validity of the will.—HANDLEY v. STACEY (1858), 1 F. & F. 253, 574, N. P.

1251. —]—A will cannot be set aside on the ground that it was obtained by undue influence, unless testator at the time of the execution was under so much control that he was not a free agent in executing it.—LEACH v. SMITH (1859), 23 J. P. 168.

1252. —]—Persuasion is not unlawful, but pressure of whatever character if so exerted as to overpower the volition without convincing the judgment of testator, will constitute undue influence, though no force is either used or threatened.—HALL v. HALL (1868), L. R. 1 P. & D. 481; 37 L. J. P. & M. 40; 18 L. T. 152; 32 J. P. 503; 16 W. R. 544.

*Annotations:—*Consd. Hampson v. Guy (1891), 64 L. T. 778. *Reid.* Shortman v. Shortman (1892), 67 L. T. 717.

1253. —]—To establish undue influence sufficient to invalidate a will, it must be shown that the will of testator was coerced into doing that which he did not desire to do, & the mere fact that in making his will he was influenced by immoral considerations does not amount to such undue influence so long as the dispositions of the will express the wishes of testator.—WINGROVE v. WINGROVE (1885), 11 P. D. 81; 55 L. J. P. 7; 50 J. P. 56; 34 W. R. 260.

*Annotations:—*Consd. Cousins v. Tubb (1891), 65 L. T. 716; Baudains v. Richardson, [1906] A. C. 169. *Reid.* Black v. Cleland (1895), 12 T. L. R. 63; Craig v. Lamoureux, [1920] A. C. 349.

1254. — Distinguished from affection & attachment.]—WILLIAMS v. GOUDE, No. 1247, *ante*.

1255. — & gratitude.]—LOVETT v. LOVETT, No. 1249, *ante*.

1256. — Distinguished from bad example.]—BOYSE v. ROSSBOROUGH, BOYSE v. COLCLOUGH, No. 1245, *ante*.

1257. — Exaggerated report of conduct of beneficiary.]—(1) The principles expounded in the cases of *Paske v. Ollatt*, No. 1291, *post*, & *Barry v. Bullin*, No. 1294, *post*, that the burden of proof lies upon the party propounding a will, & that the ct. is not bound to pronounce in favour of a will, unless it is judicially satisfied that it is the last will of a free & capable testator, considered & affirmed.

(2) Exaggeration of the conduct of a party benefited by a will, towards testatrix, though it

at the most liable to suspicion, & it is the duty of the ct. to investigate carefully the circumstances of the case before granting probate.—GREEN v. DUMSDAY (1916), 18 W. A. L. R. 73.—AUS.

PART II. SECT. 9, SUB-SECT. 5.—B. 1. General rule.]—Where the will of a person of unsound mind has been duly executed, the ct. will not refuse probate of it on any suspicious circumstances which are consistent with any

other hypothesis than that of undue influence.—*Re* BOYD'S WILL, MILLER v. FARR (1872), 3 V. R. 46.—AUS.

*g. Procurement of execution of will by importunity.]—*Testator had made a will on Aug. 6, when he was

Sect. 9.—Grounds for refusing probate: Sub-sect. 5, B. & C.]

induce her to revoke the will, & the bequest made in his favour, & to execute another will, to his exclusion, is not such a fraud as to destroy free agency, & render the will invalid; neither does such conduct amount to undue influence or importunity.—*BROWNING v. BUDD* (1849), 6 Moo. P. C. 430; 13 L. T. O. S. 1; 13 E. R. 749, P. C.

1258. — Effect of immoral considerations.]—WINGROVE *v.* WINGROVE, No. 1253, *ante*.

1259. — Influence exercised by coercion or fraud.]—BOYSE *v.* ROSSBOROUGH, BOYSE *v.* COLCLOUGH, No. 1245, *ante*.

1260. — Whether use of or threat of force necessary.]—HALL *v.* HALL, No. 1252, *ante*.

1261. — —.]—BOYSE *v.* ROSSBOROUGH, BOYSE *v.* COLCLOUGH, No. 1245, *ante*.

1262. Degree of influence—Whether standard for transactions inter vivos applies.]—Pltf., a Roman Catholic priest, had resided with testatrix & her husband many years as chaplain, & for a part of the time as confessor. He was confessor at the time the will in dispute was made. There was no evidence that pltf. had interfered in the making of such will, or that he had procured the gift of the residue to himself, or that he brought such gift about by coercion or dominion exercised over testatrix against her will, or by importunity not to be resisted. Moreover, it was not shown that even in the common affairs of life, in business or in anything else, testatrix was under pltf.'s control or dominion:—*Held*: there was no evidence to go to a jury on an issue of undue influence. Natural influence exerted by one who possesses it to obtain a benefit for himself is undue *inter vivos*, so that gifts & contracts *inter vivos* between certain parties will be set aside, unless the party benefited can show affirmatively that the other party could have formed a free & unfettered judgment in the matter; but such natural influence may be lawfully exercised to obtain a will or legacy. The rules, therefore, of cts. of equity in to gifts *inter vivos* are not applicable to the making of wills.—*PARFITT v. LAWLESS* (1872), 1. R. 2 P. & D. 402; 41 L. J. P. & M. 68; 27 L. T. 215; 30 J. P. 822; 21 W. R. 200.

Annotations:—*Consd.* *Hovew v. Bishop*, [1909] 2 K. B. 380; *Craig v. Lamoureux*, [1920] A. C. 349. *Reid*. *Hampson v. Guy* (1891), 64 L. T. 778; *Chaplin v. Brammall* (1907), 97 L. T. 860.

1263. — Testator of feeble intellect.]—Where there is evidence tending to show some mental incapacity, & also evidence tending to show some

very weak & ill. On Aug. 9, when he was in the same condition, according to the medical evidence, a condition in which he would do anything & give in in anything for the sake of peace & quiet, he executed another will, upon the loud importunity of his sister, who was strong in body & will. He died on Aug. 13:—*Held*: the will so procured could not stand.—*ROMAN CATHOLIC EPISCOPAL CORPN., TORONTO DIOCESE v. O'CONNOR* (1907), 10 O. W. R. 76; 14 O. L. R. 666.—*CAN.*

PART II. SECT. 9, SUB-SECT. 5.—C.

1269 i. Onus of proof—Where undue influence presumed.]—*W.*, a married man separated from his wife & family, executed about a month before his death, document purporting to be last will whereby he devised & bequeathed all his property to S., his housekeeper, a married woman living apart from her husband, & appointed her sole extric. On evidence as to relation between S. & W. & habits of latter probate was

refused on ground of undue influence exercised by the housekeeper over W. who was of intemperate habits for some years before death.—*BUCKLEY v. MILLAR* (1869), 8 N. S. W. S. C. R. (Eq.) 474.—*AUS.*

1269 ii. — —.]—A mother, who by a previous will had left certain property to her son H., during her last illness, in confidential intercourse with another son, G. alone, according to G.'s evidence, arranged with him to leave the property absolutely to him, he promising to apply it for the benefit of H. who was of intemperate habits. G. then instructed a solr., D., to prepare a new will, who did so, leaving the property absolutely to G. without disclosing any trust. This will, G. stated in evidence was read over by him to his mother, they being alone, & she in bed. It was then executed by her & attested by D. & the nurse, D. first asking her if it had been read to her & if she was aware of the contents; & she replying "Yes." It appeared by independent evidence that

undue influence, it is easier to satisfy the ct. that undue influence has been exercised, inasmuch as the degree of influence required to induce a person of strong mind & in good health to do any act is much greater than that which would induce a person of feeble mental capacity & in a weak state of health.—*HAMPSON v. GUY* (1891), 64 L. T. 778, C. A.

1264. Whether presumed—Legatee propounding will.]—BIDDLES *v.* BIDDLES, No. 1244, *ante*.

1265. — Codicil in favour of mistress.]—A codicil, materially lessening the benefit given by testator's will to his sister, in favour of a person with whom he cohabited, made at a time when he was suffering under attacks of apoplexy, epilepsy, & paralysis, of which he died, pronounced for, on the testimony principally of medical witnesses.

I am of opinion that the ct. is bound to pronounce for the validity of this codicil, & to assign the exor. to take probate of it as part of the testamentary disposition of the deceased; & as the party was bound to propound the codicil, according to the general rule, she is entitled to the costs of doing what the exor. ought to have done (SIR H. JENNER FUST).—*CUMBERLEGE v. MENCE* (1845), 3 Notes of Cases, 606.

1266. — Will in favour of medical attendant.]—Although there is no rule of law which forbids a man to bequeath his property to his medical attendant, yet it is not a favourable circumstance for one in such a confidential position, with respect to a patient labouring under severe disease, to take a large benefit under such patient's will, more particularly if it be executed in secrecy, & the whole transaction assumes the character of a clandestine proceeding. In such a case the *onus* will lie very heavily upon the party benefited to maintain the validity of the will.—*ASHWELL v. LOMI* (1850), L. R. 2 P. & D. 477.

1267. — Will drawn by son of devisee—Testator addicted to drink.]—HANDLEY *v.* STACEY, No. 1250, *ante*.

1268. — Will in favour of solicitor.]—WALKER *v.* SMITH, No. 1057, *ante*.

Relationships giving rise to presumption—In transactions inter vivos.]—See CONTRACT, Vol. XII., pp. 101 *et seq.*; FRAUDULENT & VOIDABLE CONVEYANCES; GIFTS; SETTLEMENTS.

Circumstances giving rise to suspicion.]—See Sub-sect. 7, *post*.

C. Practice.

1269. Onus of proof—Where undue influence presumed.]—ASHWELL *v.* LOMI, No. 1266, *ante*.

testatrix at the time of executing the will was very infirm & weak, but of sound mind:—*Held*: the above facts did not afford evidence of undue influence by G.—*Re WAUGH'S WILL, WAUGH v. WAUGH* (1872), 3 V. R. 39.—*AUS.*

1269 iii. — —.]—The fact that a person, who prepared a will, under which he takes a benefit, was not seeking to benefit himself personally, so much as his church, does not relieve him from the obligation cast upon him in propounding the will of satisfying the ct. that no undue influence was used to procure the will.—*Re WALSH* (1892), 18 V. L. R. 739.—*AUS.*

1269 iv. — —.]—Testator was a man of miserly habits who had for many years lived alone, & had accumulated considerable property. Two years before his death he was visited by a niece, his next of kin, who was informed by him that, on his death, all his property would go to her & her mother. Before returning home the niece obtained a promise from the

1270. ——— **Will prepared by beneficiary.]—**FINNY v. GOVETT, No. 1060, *ante*.

1271. ——— **On party alleging undue influence.]—**When once it is proved that a will has been executed with due solemnities by a person of competent understanding, & apparently a free agent, the burden of proving that it was executed under undue influence rests on the person who so alleges. That burden is not discharged by showing merely that the beneficiary had the power unduly to overbear the will of testator; it must be shown that in the particular case the power has been exercised, & that execution of the will was obtained thereby.—CRAIG v. LAMOUREUX, [1920] A. C. 349; 89 L. J. P. C. 22; 122 L. T. 208; 30 T. L. R. 26, P. C.

1272. ——— **Discharge of onus.]—**FINNY v. GOVETT, No. 1060, *ante*.

1273. ——— **]**—CRAIG v. LAMOUREUX, No. 1271, *ante*.

—**]**—*See, generally*, EVIDENCE, Vol. XXII., pp. 35 *et seq.*

1274. **Right to begin—In party alleging validity of will.]—**HANDLEY v. STACEY, No. 1250, *ante*.

1275. ——— **In party alleging undue influence.]—**HUTLEY v. GRIMSTONE, No. 1192, *ante*.

—**]**—*See, generally*, Sect. 6, sub-sect. 9, D. (g), *ante*; & *generally*, EVIDENCE, Vol. XXII., pp. 43 *et seq.*

1276. **What particulars must be given—Whether names of persons exercising undue influence.]—**Plea that a will had been procured by undue influence:—*Held*: bad for not specifying the person or persons by whom the undue influence was alleged to have been exercised.—HARRIS v. BRADBURY (1861), 30 L. J. P. M. & A. 168; 25 J. P. 472.

1277. ——— **]**—*Deft.* in a probate action alleged that the will had been procured by the undue influence of *pltf.* & others. *Pltf.* applied

for particulars of the names of the persons charged with undue influence & particulars of the acts of undue influence alleged, & the times when & places where each of the acts was alleged to have taken place. The *ct.* ordered *deft.* to give the names of the persons charged with undue influence, but refused to order him to give particulars of the acts:—*Held*: as it was admitted to have been the long settled practice of the Probate Ct., & subsequently of the Probate Div., not to require a party alleging undue influence to give particulars of the acts of undue influence, such practice ought not now to be disturbed.—SALISBURY (LORD) v. NUGENT (1883), 9 P. D. 23; 53 L. J. P. 23; 50 L. T. 160; 32 W. R. 221, C. A.
Annotations:—Expld. & Apld. Cayo v. Torre (1886), 51 L. T. 515. *Consd.* In the Estate of Shrewsbury, [1922] P. 112.
See, now, R. S. C., Ord. 19, r. 25A.

1278. ——— **Whether names of persons present at alleged acts.]—**Where in an action to establish a will *deft.* pleads that testator is of unsound mind, or that the will was obtained by undue influence, *pltf.* is entitled to have stated in the substance of the case particulars of the nature of the unsoundness, & of the character of the undue influence & the acts alleged in the exercise of it, with necessary dates, but not of the names of the persons present.—*In the Estate of SHREWSBURY (EARL)*, McLEOD v. SHREWSBURY (EARL), [1922] P. 112; 91 L. J. P. 46; 126 L. T. 415; 38 T. L. R. 203.

1279. ——— **Acts of undue influence—When ordered.]—**SALISBURY (LORD) v. NUGENT, No. 1277, *ante*.

1280. ——— **]**—*In the Estate of SHREWSBURY (EARL)*, McLEOD v. SHREWSBURY (EARL), No. 1278, *ante*.

1281. **Admissibility of evidence Hearsay evidence—Statements not in presence of testator—By**

prepared without the intervention of any faithworthy witness, or any one capable of giving independent evidence as to testator's intention & instructions, it will be regarded with suspicion, & its invalidity presumed, & the onus is on the party propounding it to clearly establish it.—MCHUGH v. DOOLEY (1903), 10 B. C. R. 537.—CAN.

1289 vii. ——— **]**—*Observations as to the onus falling on a law-agent, or other person in a fiduciary relationship, who has assisted in the preparation of a will under which he benefits, of establishing that no undue influence had been employed.*—LOW & LOW (OR FORREST) v. GUTHRIE, ETC. (LOW'S TRUSTEES), [1907] S. C. 1240.—SCOT.

1270 i. ——— **Will prepared by beneficiary.]—**If the person who obtains a benefit under a will takes part in the actual drawing of the will, the onus is cast upon him of showing the righteousness of the transaction.—COLLINS v. KILROY (1901), 1 O. L. R. 503; 21 C. L. T. 230.—CAN.

h. Sufficiency.]—Testator during his last illness made his will, leaving all his property to *deft.*, who was not his wife, but had lived with him as such for many years, thus cutting off his only child, *pltf.*, with whom he was on friendly terms. It sufficiently appeared that he was of sound mind at the time, & evidence showed the probability of his having been influenced to make the will in the way he did, by the action recently brought by his wife for alimony against him, & by a notion that *pltf.* had been assisting her mother in such action. *Deft.* was present in the room when the instructions for the

will were taken by the solr.; but, beyond the fact that she had untruly stated to deceased during his last illness that *pltf.* did not want to visit him, there was no direct evidence of any improper influence brought to bear upon him by *deft.*, & *pltf.* was compelled to rely on the general suspicion to be drawn from the surrounding circumstances:—*Held*: the evidence was insufficient to warrant a finding that the will had been obtained by the exercise of undue influence.—TELLER v. SCHULMANS (1907), 7 W. L. R. 229; 17 Man. L. R. 262.—CAN.

k. Whether corroboration necessary.]—In an action to impeach a will on the ground of undue influence it should not be upheld on the evidence of one witness, whose credibility is attacked, when the attesting witnesses may also be examined.—MADILL v. MCCONNELL (1908), 12 O. W. R. 124; 17 O. L. R. 209.—CAN.

l. Whether undue influence presumed.]—In the case of a will undue influence is never presumed; it must be proved by those who allege it.—AIMEA v. TAYLOR (1897), 15 N. Z. L. R. 530.—N.Z.

1276 i. What particulars must be given—Whether names of persons practicing undue influence.]—A plea alleging undue influence practised by *pltf.* & others in his interest will not be ordered to be amended, but the *ct.* will grant particulars of the persons by whom the undue influence is alleged to be practised.—JACKSON v. HILLAS (1869), 18 W. L. R. 216.—IR.

m. Plea of undue influence withdrawn at hearing—Whether party withdrawing plea pays costs.]—*Deft.*, who

Secl. 9.—Grounds for refusing probate: Sub-sect. 5, C.; sub-sects. 6 & 7.]

person alleged to exercise influence.]—In a probate suit deft. alleged that the will propounded by the exors. had been obtained by the undue influence of C., who died a few days before the execution of the will. C.'s estate was not represented in the suit:—*Held*: evidence of a statement by C., not in the presence of testator, was admissible so far as it went to the plea of undue influence. — **RADFORD v. RISDON** (1912), 28 T. L. R. 342; 56 Sol. Jo. 416.

generally, EVIDENCE, Vol. XXII., pp. 76 et seq.

SUB-SECT. 6.—FRAUD.

1282. General rule.]—Will set aside on the ground of fraud & for failure of proof with respect to handwriting.—**GRACE v. CALEMBERG** (1752), 1 Lee, 76; 161 E. R. 29.

1283. —.]—**BUTTERFIELD v. SCAWEN** (1775), cited 1 H. L. Cas. 191; 9 E. R. 727, H. L. *Annotation*:—*Reid*. **Allen v. M'Pherson** (1847), 1 H. L. Cas. 191.

1284. —.]—**GUARDHOUSE v. BLACKBURN**, No. 1044, *ante*.

1285. —.]—**Part of will—If severable.]**—**RHODES v. RHODES**, No. 1346, *post*.

1286. —.]—**Rejection of part affecting sense of whole.]**—**RHODES v. RHODES**, No. 1346, *post*.

1287. Necessity for proof.]—**MITCHELL v. THOMAS**, No. 1299, *post*.

1288. —.]—**Low v. GUTHRIE**, No. 1306, *post*. **Circumstances raising presumption.]**—*See* Sub-sect. 7, *post*.

1289. Conduct amounting to—Exaggeration of conduct of beneficiary.]—**BROWNING v. BUDD**, No. 1257, *ante*.

1290. Right to begin—Fraud the only issue—In party alleging fraud.]—**TATE v. TATE**, No. 3202, *post*.

Fraud in transactions inter vivos.]—*See* **FRAUDULENT & VOIDABLE CONVEYANCES; GIFTS; MISREPRESENTATION & FRAUD; SETTLEMENTS.**

SUB-SECT. 7.—CIRCUMSTANCES GIVING RISE TO SUSPICION OF UNDUE INFLUENCE OR FRAUD OR ABSENCE OF KNOWLEDGE OR APPROVAL.

1291. Will or codicil prepared by propounder—In own favour.]—Where a legatee is the writer of his own legacy, more than ordinary proof of the authenticity of the will is called for.—**PASKE v. OLLAT** (1815), 2 Phillim. 323; 161 E. R. 1158.

Annotation:—*Reid*. **Barry v. Butlin** (1838), 1 Curt. 637; *Chambers* 384. *Expld.* **Raworth v. Marriott** (1833), 1 My. & K. 643. *Consd.* **Barry v. Butlin** (1838), 1 Curt. 637; *Chambers*

to an action for proof of will in solemn form pleads undue influence & fraud & at the hearing withdraws such pleas, must pay the costs of such issues.—**MULLOWNEY v. KING** (1906), 9 Nfld. L. R. 182.—**NFLD.**

PART II. SECT. 9, SUB-SECT. 6.

1287 i. Necessity for proof.]—Deft. contested the validity of a will propounded by plffs., & also propounded two earlier wills, under which, in the event of the last in date being invalidated, he claimed.—*Held*: a general defence of fraud was admissible in such case; but under that defence deft. was required to give particulars immediately after the examination of plff.—**APPLEMAN v.**

APPLEMAN (1887), 12 P. R. 138.—**CAN.**

PART II. SECT. 9, SUB-SECT. 7.

n. General rule.]—The existence of circumstances which might raise suspicion that the execution of a will was procured by captation, improper suggestions, or undue influence on the part of those promoting it, is not a sufficient ground to justify an appellate ct. in interfering with the concurrent findings of the cts. below as to the validity of the will.—**LARAMÉE v. FERRON** (1909), 41 S. C. R. 391.—**CAN.**

1291 i. Will or codicil prepared by propounder—In own favour.]—Where a will was prepared by a solr. & his

Wood (1843), 2 Notes of Cases, 481. *Apprvd.* **Browning v. Budd** (1848), 6 Moo. P. C. C. 430; *Michell v. Thomas* (1848), 12 Jur. 967. *Reid.* **Durling & Parker v. Loveland** (1839), 2 Curt. 225; *Scouler v. Plowright* (1852), 28 L. T. O. S. 193; *Fulton v. Andrew* (1875), L. R. 7 H. L. 448; *Donnelly v. Broughton*, [1891] A. C. 435.

1292. —.]—**HENSHAW v. ATKINSON** (1815), cited 10 Moo. P. C. C., p. 445; 14 E. R. 444.

Annotation:—*Reid.* **Scouler v. Plowright** (1856), 10 Moo. P. C. C. 441.

1293. —.]—The burden of proof of the genuineness & authenticity of a will lies on the party propounding it; & if the conscience of the judge is not judicially satisfied that the paper in question does contain the last will & testament of the deceased, he is bound to refuse its admission to probate. A will written or procured to be written by a party who is benefited by it is not void; but the circumstance forms a just ground of suspicion against the instrument, & calls upon the ct. to be vigilant & jealous; & unless clear & satisfactory proof be given that it contains the real intentions of the deceased, will be pronounced against.

A will of a married woman, possessed of a separate estate with a power of appointment, having been prepared by her husband's solr., unknown to testatrix, from instructions given by the husband, by which he was appointed sole exor. & residuary legatee, & executed by testatrix under the influence & control of her husband on her death-bed, declared void, & probate refused; it being, according to the evidence in the cause, contrary to the intentions previously expressed by the testatrix.—**BAKER v. BATT** (1838), 2 Moo. P. C. C. 317; 12 E. R. 1026, P. C.

Annotations:—*Reid.* **Barry v. Butlin** (1838), 2 Moo. P. C. C. 480; *Fulton v. Andrew* (1875), L. R. 7 H. L. 448; *Farrelly v. Corrigan*, [1899] A. C. 563.

1294. —.]—The *onus* of proving a will being on the party propounding it is in general discharged by proof of capacity & the fact of execution; from which the knowledge of & assent to its contents by the testator will be assumed.

The fact of a party, preparing a will with a legacy to himself, is at most only one of suspicion, of more or less weight according to the circumstances, demanding however the vigilant care of the ct. in investigating the case before granting probate: & though evidence of the instructions given by the deceased & the reading over of the instrument are the most satisfactory proofs of the testator's knowledge of the contents, they are not the only description of proof by which the cognisance of the contents of the will may be brought home to the deceased even in a case of doubtful capacity.

A will prepared by the deceased's solicitor under which he took a considerable benefit, the only son of deceased being excluded, the deceased being of weak though of testable capacity under the

clerk for a man, who at the time of giving instructions & at the time of executing it appeared to them perfectly competent to make a will, & on whose evidence in support of the will it standing alone the ct. would undoubtedly have acted, but, who, other evidence showed, had from long drinking, become partly imbecile & who had been influenced in the making of the will by the exor. & sole beneficiary & his wife, the judge refused to admit the document to probate on the ground that the exor. had failed to satisfy the *onus* cast upon him of removing from the judge's mind the impression of unfair dealing to be gathered from the whole of the evidence.—**RE WHITE** (1892), 18 V. L. R. 715.—**AUS.**

circumstances pronounced for affirming the sentence of the Prerogative Ct. with costs.

The strict meaning of the term *onus probandi* is this, that if no evidence is given by the party on whom the burden is cast, the issue must be found against him (PARKE, B.).—BARRY v. BUTLIN (1838), 2 Moo. P. C. C. 480; 1 Curt. 637; 12 E. R. 1089, P. C.

Annotations.—*Consd.* Durling v. Loveland (1839), 2 Curt. 225; Durnell v. Corfield (1844), 1 Rob. Ecl. 51. *Apld.* Mitchell v. Thomas (1847), 6 Moo. P. C. C. 137; Browning v. Budd (1848), 6 Moo. P. C. C. 430; Greville v. Tyles (1851), 7 Moo. P. C. C. 320; Scouler v. Plowright (1856), 10 Moo. P. C. C. 441; Goodacre v. Smith (1867), L. R. 1 P. & D. 359; Fulton v. Andrew (1875), L. R. 7 H. L. 448. *Expld.* Tyrell v. Painton, [1894] P. 151. *Consd.* Finny v. Govett (1908), 25 T. L. R. 156. *Expld.* Low v. Guthrie, [1909] A. C. 278. *Refd.* Sutton v. Sadler (1857), 3 C. B. N. S. 87; Mitchell v. Gard (1862), 3 Sw. & Tr. 75; Hastilow v. Stobie (1865), L. R. 1 P. & D. 64; Guardhouse v. Blackburn (1866), L. R. 1 P. & D. 109; Brown v. Fisher (1890), 63 L. T. 465; Farrelly v. Corrigan, [1899] A. C. 563. *Mentd.* Broadbent v. Hughes (1860), 29 L. J. P. M. & A. 134; Baudains v. Richardson, [1906] A. C. 169.

1295. ———.]—The will of an aged person of doubtful capacity prepared by a solr., who was appointed exor. & one of the residuary legatees, pronounced against, & the parties propounding it condemned in costs. Bare execution in such a case is not sufficient.—DURLING & PARKER v. LOVELAND (1839), 2 Curt. 225; 163 E. R. 393.

Annotation.—*Refd.* Scouler v. Plowright (1856), 10 Moo. P. C. C. 440.

1296. ———.]—A will of an aged testator, drawn by the party principally benefited, from instructions given by deceased to a third party, under circumstances of suspicion, the disposition being at variance with that contained in prior wills, & exhibiting omissions unexplained, pronounced for.

The mere act of executing a new testamentary paper proves that some alteration of intention had taken place, & in the absence of other proof, the extent of such alteration cannot safely be considered as raising any presumption against the authenticity of the document, if there be nothing unreasonable in the disposition itself (LORD COTTENHAM, C.).

It is no part of the law of this country, that a will prepared by, & executed under the sole direction of, the party taking beneficially under it, is not to take effect; although that circumstance exposes the transaction to deserved suspicion, & justifies the ct. in requiring proof that the act was really the mind & act of deceased (LORD COTTENHAM, C.).—CHAMBERS v. WOOD (1843), 2 Notes of 480, P. C.

1297. ———.]—A will & two codicils, bearing the genuine signature of testator, but accompanied by very suspicious circumstances upon the face of, as well as *dehors*, the papers, pronounced for in the ct. below on the strength of the testimony of the attesting witnesses; testator's capacity being unimpeached; the sentence reversed on appeal on the facts & the superior ct. admitting further evidence not admissible in the ct. below.

Whether the question arises between a will & an alleged intestacy, or, as in the present case, between one will & another of prior date, the proof being upon the party propounding any testamentary writing, the course of administration directed by the law is to prevail against him who cannot satisfy the Ct. of Probate that he has established a will; or the prior instrument, which is liable to no doubt, is to be established in preference to the posterior one, which cannot be so proved to speak the testator's intentions as to leave the ct. in no doubt that it declares those intentions. There is no duty cast upon the ct.

to strain after probate, & to grant it where grave doubts remain wholly unremoved, & great difficulties oppose themselves to our progress, which we are quite unable to surmount (LORD BROUGHAM).

The will mainly relied on is in the handwriting of the legatee, the party propounding it, & in whose favour it is made. Nothing can tend more to excite the jealousy of a Ct. of Probate than this (LORD BROUGHAM).—PANTON v. WILLIAMS (1843), 2 Notes of Cases, Supp., p. xxi; 1 L. T. O. S. 406; 7 Jur. 865, P. C.

1298. ———.]—DURNELL v. CORFIELD, No. 1239, ante.

1299. ———.]—A second codicil to a will was prepared by the person in whose favour it was made & executed by deceased when in a state of great infirmity & exhaustion. There not being sufficient proof from the evidence of the attesting witnesses, that deceased was aware of its contents, the paper not having been read over to him before he signed it, & physical infirmity rendering him unable to do so himself, such codicil was pronounced against.

The ct. is not to presume fraud where there is no proof of it; but the court has a right to ask for adequate proof of a paper which is prepared by a party for his own benefit (SIR H. JENNER FUST).

A party who propounds an instrument containing a disposition in his own favour, is bound to furnish the ct. with proof of knowledge of the contents by deceased, which knowledge may be proved in a variety of ways; by showing an intention to do the act, & that the act is in accordance with the previous declarations; or by proof of reading over at the time of execution, or of some reference in the contents by deceased, showing a knowledge of them, or by proof of subsequent recognition. It is not for the ct. to presume fraud, but some proof of knowledge of the contents must be given in all such cases (SIR H. JENNER FUST). MITCHELL v. THOMAS (1847), 6 Moo. P. C. C. 137; 13 E. R. 636; *sub nom.* MITCHELL v. THOMAS, 5 Notes of Cases, 600; 11 L. T. O. S. 90; 12 Jur. 967, P. C.

Annotation.—*Refd.* Mitchell & Mitchell v. Gard & Kingwell (1862), 3 Sw. & Tr. 75.

1300. ———.]—A paper of a testamentary nature, written by the person solely benefited thereby at the dictation of deceased, & signed by him, but couched in language improbable from the position of deceased:—*Held*: nevertheless, under the circumstances, entitled to probate.—BARLEY v. PORTARLINGTON (EARL) (1848), 12 L. T. O. S. 456; 13 Jur. 18.

1301. ———.]—Where the will is prepared by a party principally benefited, & the circumstances are suspicious, it is necessary to prove to the satisfaction of the ct. that testator had full knowledge of the instrument & its contents, & executed the same freely, without any undue control.—SCOUER v. PLOWRIGHT (1856), 10 Moo. P. C. C. 440; 28 L. T. O. S. 193; 5 W. R. 99; 14 E. R. 557, P. C.

1302. ———.]—The fact that a person propounding a will under which he benefits largely is the person who alone took the instructions for it & either prepared or procured its preparation, is a circumstance of grave suspicion & calls for special care & vigilance on the part of the ct. & jury in examining the evidence adduced in support of it; & unless that suspicion is removed & the ct. & jury are judicially satisfied that the terms of the document actually express the true wishes of the testator, the plea of undue influence is established, & the will ought to be pronounced against.

The *onus probandi* being in every case upon the

Sect. 9.—Grounds for refusing probate: Sub-sect. 7.]

person propounding a will, he must satisfy the ct. & jury that the instrument he is setting up is the true last will of a free & capable testator.—*PARKER v. DUNCAN* (1890), 62 L. T. 642; 54 J. P. 920.

1303. ———.—[A person making a will & taking a substantial benefit thereunder must give reasonable & sufficient proof to show that the testatrix did, in fact, know & approve its contents, & that it was duly executed. The attesting witnesses had proved that the testatrix was of sound mind, & that she duly executed the will which they then attested (*JEUNE, P.*).—*LAWFORD v. ALLEN* (1892), 9 T. L. R. 145.

1304. ———.—[The rule throwing upon the party propounding a will prepared by a person who takes a benefit under it the burden of showing that the paper propounded expresses the true will of the deceased, is not confined to cases where the will is prepared by a person taking a benefit under it, the true rule being, that wherever a will is prepared & executed in circumstances which raise the suspicion of the ct., it ought not to be pronounced for unless the party propounding it adduces evidence which removes such suspicion & satisfies the ct. that the testator knew & approved of the contents of the instrument.

At the trial of an issue as to the validity of a will, it appeared that the testatrix in 1880, & again in 1884 made a will in favour of deft. Afterwards she became dissatisfied with him, & from 1888 to 1892 wrote repeatedly to her solr. making serious complaints against him. On Nov. 7, 1892, she made a will leaving her property to pltf. On Nov. 9, T. P. a son of deft., brought to her a will prepared by himself, leaving her property to deft. This will was executed by her in the presence of & attested by T. P. & a young friend of his, no one else being present, & the existence of this will was not known to any one else till after the death of the testatrix on the 23rd. The only evidence adduced by deft., the party setting up the later will, was that of the attesting witnesses to such will who were orally examined, & deposed clearly that the will was read over to testatrix & that she appeared to understand it & approved of it. The President pronounced in favour of the later will:—*Held*: on appeal, the evidence of the attesting witnesses was not sufficient to remove the suspicion arising from the circumstances under which the will was prepared & executed, & the former will must be established.—*TYRRELL v. PAINTON*, [1894] P. 151; 70 L. T. 453; 42 W. R. 343; 0 R. 540, C. A.

Annotations:—*Apld.* *Finny v. Govett* (1908), 25 T. L. R. 186. *Refd.* *Atkinson v. Morris* (1896), 75 L. T. 440; *Wilson v. Basil* (1903), 72 L. J. P. 89.

1305. ———.—[On a motion for a new trial made by the exors. after the ct. had excluded from probate a pecuniary legacy exhausting nearly the whole of testator's estate to his confidential agent who had drawn the will, it appeared that the jury had properly found that testator knew & approved its contents except as regards the above bequest, which he did not know & approve of, but had in a rider expressed his belief that testator intended to give to said legatee half his property:—*Held*: the motion was properly refused. The rider did not neutralise but rather supported the verdict, for, if correct it showed that the will did not truly express testator's intention.—*FARRELLY v. CORRIGAN*, [1899] A. C. 563; 68 L. J. P. C. 133, P. C.

1306. ———.—[The rule that where a will

is prepared by a party who takes a benefit under it, that is a circumstance which forms a just ground of suspicion & requires clear & satisfactory proof that the instrument contains the real intention of testator, does not authorise the ct. to consider suggestions of fraud or undue influence of which no foundation is laid in evidence.—*LOW v. GUTHRIE*, [1909] A. C. 278; 78 L. J. P. C. 126, H. L.

1307. ———.—*Solicitor.*—*BARTON v. ROBINS* (1769), 3 Phillim. 455, n.; 161 E. R. 1382.

Annotations:—*Consd.* *Fincham v. Edwards* (1842), 3 Curt. 63. *Refd.* *Fawcett v. Jones*, *Codrington & Pulteney* (1810), 3 Phillim. 434; *Thorne v. Rooke* (1842), 2 Curt. 799; *Allen v. M'Pherson* (1847), 1 H. L. Cas. 191.

1308. ———.—[The circumstance, that one residuary devisee was the attorney, who drew the will, not decisive evidence of fraud.—*PAINE v. HALL* (1812), 18 Ves. 475; 34 E. R. 397, L. C.

Annotations:—*Consd.* *Balch v. Symes* (1823), *Turn. & R.* 87. *Refd.* *Hindson v. Weatherill* (1854), 2 Eq. Rep. 733. *Mentd.* *Lomax v. Ripley* (1855), 3 Sm. & G. 48; *Sweeting v. Sweeting* (1863), 3 New Rep. 240.

1309. ———.—[In a case of perfectly sound mind, & free from any suspicion of imposition, evidence of bare execution is sufficient; but where deceased's attorney is the drawer of the will, & the person principally benefited, the jealousy of the ct. is excited, & demands more than proof of bare execution.

The will, executed eight years before death, of a woman, who, though guilty of excessive drinking & great extravagances, managed her own property, received her dividends, did various acts of business, corresponded rationally with her friends, & was not shown to be under any delusion, cannot be set aside on the ground of insanity; & though such will—in total exclusion of distant next of kin, with whom she had quarrelled, be in the handwriting of, & executed at the office of, her attorney, one of the exors. & residuary legatees to a great amount, he & his family having also very large legacies, & the attesting witnesses speak to a bare execution; documents in her own handwriting, showing both capacity & knowledge of contents, though not mentioning the residue, will supply the additional proof required by such circumstance.—*WHEELER & BATSFORD v. ALDERSON* (1831), 3 Hag. Ecc. 574; 162 E. R. 1268. *Annotation*:—*Mentd.* *Wright v. Tatham* (1838), 5 Cl. & Fin. 670.

1310. ———.—[Where a will is impeached on the ground of fraud, the parties who seek to establish the will must remove or explain & so neutralise the facts out of which suspicion arose. The relation of client & solr. between testator & beneficiary excites suspicion.—*WYATT v. INGRAM* (1832), 3 Hag. Ecc. 466; 162 E. R. 1228; *sub nom.* *INGRAM v. WYATT*, 1 L. J. Ch. 135, L. C.

1311. ———.—[*BARRY v. BUTLIN*, No. 1294, *ante*.

1312. ———.—[*(1)* A will & five codicils being propounded; the will & four codicils established. The fifth being prepared by a solr. in his own favour, the deceased being at the time of fluctuating capacity, was pronounced against, the ct. not being satisfied that the deceased understood the contents of the instrument & intended it to operate, although no fraud was imputed to the solr.

(2) The party propounding a codicil compelled to produce an attesting witness thereto, for the purpose of his being cross-examined, although such witness was interested against the codicil.—*CROFT v. DAY* (1838), 1 Curt. 782; 163 E. R. 271.

1313. ———.—[Where a will is ob-

1321. Language unlike that of deceased.]--
BARLEY v. PORTARLINGTON (EARL), No. 1300, *ante*.

Sect. 9.—Grounds for refusing probate: Sub-sects. 7, 8, 9, 10 & 11. Sect. 10: Sub-sects. 1, 2 & 3.

1322. Will not signed with usual signature—Signature by mark.]—Strict proof must be given of a will which is informal, signed by mark instead of the usual subscription in full of the testator, & has been obtained from him by one of the propounders having a substantial interest in its provisions & witnessed by two of her relations. Such a will is not invalid; but the *onus probandi* may be increased by circumstances, & the presumption may even be conclusive against the validity of the instrument.—*DONNELLY v. BROUGHTON*, [1891] A. C. 435; 60 L. J. P. C. 48; 65 L. T. 558; 40 W. R. 209, P. C.

SUB-SECT. 8.—INSTRUMENT NOT INTENDED TO OPERATE AS A WILL.

1323. General rule.]—*GUARDHOUSE v. BLACKBURN*, No. 1044, *ante*.

See, generally, WILLS.

SUB-SECT. 9.—REVOCATION.

See, generally, WILLS.

SUB-SECT. 10.—WILL PREPARED OR PROCURED BY PROPOUNDER.

1324. Will not void—Grounds for suspicion.]—*BARRY v. BUTLIN*, No. 1291, *ante*.

1325. ———.]—*CHAMBERS v. WOOD*, No. 1296, *ante*.

1326. ———.]—*HANDLEY v. STACEY*, No. 1250, *ante*.

1327. ———.]—*DONNELLY v. BROUGHTON*, No. 1322, *ante*.

See, further, Sub-sect. 7, ante.

SUB-SECT. 11.—OTHER GROUNDS.

1328. Character of attorney preparing will.]—When the drawer & attesting witnesses of a will executed ten days before death by a person of eighty-five, in weak health, are confirmed as to

capacity volition & free agency by adverse witnesses & by deceased's affections, declarations, & recognitions; the general character of the drawer, an attorney employed by deceased for many years, & slight discrepancies in the evidence of the *factum* are not material. A will in such a case pronounced for.—*BIRD v. BIRD* (1828), 2 Hag. Ecc. 142; 162 E. R. 813.

1329. Will inofficious.]—An inofficious will, prepared from instructions given to the drawer by the party almost solely benefited, & who was in nowise related to testator, pronounced valid, on proof of capacity of testator, & of the will having been read over to him.—*WRENCH v. MURRAY* (1843), 3 Curt. 623; 1 L. T. O. S. 412; 7 Jur. 705; 163 E. R. 846.

1330. Existing grant—Refusal by existing representative to bring in grant—Probate.]—Probate had been taken in a will; another will of a later date was produced. The extrix. of the former will refused to bring it in to have the probate revoked. Probate of the latter will decreed notwithstanding.—*WILKINSON & WEBSTER v. ROBINSON* (1849), 14 L. T. O. S. 381; 14 Jur. 72.

1331. ——— Administration.]—Deceased died as was supposed intestate, & letters of administration were granted to his wife. She realised as much as she could of the estate, & left the country. A will was subsequently discovered, & a citation was issued, calling on her to bring in the letters of administration, which she did not obey. The ct. admitted the will to probate, notwithstanding that the letters of administration had not been brought in, but directed the fact that the administration was outstanding to be recited on the probate.—*In the Goods of INGALL*, *INGALL v. DRAYTON* (1869), 21 L. T. 367; 33 J. P. 792.

1332. ———.]—*In the Goods of HORNBUCKLE*, No. 877, *ante*.

Double probates generally, *see Sect. 8, ante*.

Revocation of grants, *see Sect. 16, post*.

SECT. 10.—FORM OF GRANT OF PROBATE.

SUB-SECT. 1.—DESCRIPTION OF TESTATOR.

1333. Part of estate invested in wrong name—Spinster described as widow.]—N., a spinster, having invested money in the funds, & described herself as R., widow, & afterwards invested other money in her right name, the ct. refused to decide the

PART II. SECT. 9, SUB-SECT. 10.

1324 i. Will not void—Ground for suspicion.]—In a suit to obtain probate of a will which was prepared by an estate agent & a solr., who are resps. & under which both received large benefits:—*Held*: (1) the trial judge having directed his mind to the question whether in view of the suspicious circumstances resps. had established that testator knew & approved of the contents of the will & having found that they had established that fact & there being evidence to support that finding his decision in favour of resps. should not be disturbed.—*NOCK v. AUSTIN* (1918), 25 C. L. R. 519.—**AUS.**

PART II. SECT. 9, SUB-SECT. 11.

o. Will not read over to testator—Testator's instructions not followed.]—Where a solr. received instructions from testator to leave his property to his wife & daughter, & drew up a will leaving the property to the wife & daughter for their joint lives, with

remainder to the daughter, & the will was not read over to testator, owing to the danger of his becoming unconscious, the ct. refused to grant probate, as the will did not follow the instructions.—*Re KING'S WILL* (1884), 10 V. L. R. 34.—**AUS.**

p. Will written on three pages—Only signed at foot of first page.]—Where a person intending to execute his will writes a portion upon the first page, but states the substance of his will upon the second & third pages, & places his signature at the foot of the first page, the document will not be admitted to probate.—*Re WOOD'S WILL* (1897), 23 V. L. R. 362.—**AUS.**

q. Defects on face of will—Agreement by counsel to dispense with practice of court—Investigation to test will in solemn form.]—A will having been produced for probate in common form, probate was refused on account of defects on the face of it, & thereupon counsel present consented to proceed with an investigation to test the will

in solemn form without the usual citations & other preliminaries according to the practice of the ct. The judge of probate decreed the will to be invalid. A pecuniary legatee under the will, who had not been a party to the consent, was one of applts. from this decree:—*Held*: the appeal must be allowed but without costs, as there had been a consent to the proceeding below by all counsel who had appeared at the bar in this ct., who were the same proctors & advocates who had appeared below.—*Re CONOLLY'S ESTATTE* (1881), 14 N. S. R. (2 R. & G.) 73; 1 C. L. T. 555.—**CAN.**

r. No administrative duties to perform.]—The mother of testatrix applied for probate of the following will: "I am leaving bank-book with my mother. If anything should happen to me I am leaving money to her & effects to share with rest of the family":—*Held*: as no administrative duties were cast on applt., probate should be refused.—*Re CURTIS*, [1919] N. Z. L. R. 739.—**N.Z.**

question of identity by granting a special probate of her will, which was in her right name, & showed no ambiguity.—*In the Goods of NEALE* (1853), 1 Ecc. & Ad. 112; 164 E. R. 65.

SUB-SECT. 2.—DESCRIPTION OF EXECUTOR.

1334. Executrix living with testator as wife—After going through form of marriage—Both parties already married at date of marriage—Described in will by former name.]—H. appointed as sole executrix, of, & universal legatee in, his will, a woman to whom he had been *de facto* married, but describing her not as his wife, but as his housekeeper, & calling her by the name she bore before her marriage with him. [At the time of the marriage, she was a married woman & it was uncertain whether testator's first wife was dead.] On a motion to grant probate to her by the name of E. H., widow & relict of deceased, formerly E. B., probate was granted to her as sole executrix, named in the will, on the consent of her husband, as E. B., wife of B.—*In the Goods of HALE* (1847), 5 Notes of Cases, 258, 513; 11 Jur. 758; *sub nom.* ANON., 9 L. T. O. S. 490.

1335. Surname of executor omitted—Extrinsic evidence of identity—Grant to executor in full name.]—Testator by his will appointed several exors., one of whom was described as "Perceval . . . of Brighton, Esq., the father." Testator was intimately acquainted with William Perceval Boxall, of Brighton, who was commonly known as Mr. Perceval Boxall, & had a son named Perceval Gretwick Boxall. It did not appear that any person bearing the surname of Perceval was known to testator:—*Held*: extrinsic evidence was admissible to assist the ct. in ascertaining the person designated, & the name of William Perceval Boxall was ordered to be included in the probate as one of the exors.—*In the Goods of DE ROSAZ* (1877), 2 P. D. 66; 46 L. J. P. 6; 36 L. T. 263; 41 J. P. 247; 25 W. R. 352.

Annotations:—Foll. *In the Goods of Cooper*, [1899] P. 193. *Refd.* *In the Estate of Hubback*, [1905] P. 129.

1336. One Christian name of executor omitted—Grant in full name—With alias as in will.]—The Christian names of an exor. called in a will & grant of probate "Frederick" were "Frederick John." The ct., on proof that the Bank of England had objected to transferring stock into the names of the exors., in consequence of this exor. having signed the memorandum for the transfer with the initials F. J., allowed the description in the grant to be altered into "Frederick John M., called in the will Frederick M."—*In the Goods of HONYWOOD*, [1895] P. 341; 65 L. J. P. 9; 44 W. R. 256.

1337. Misdescription of executor—Both as to name & residence—Grant in correct name & description—With alias as in will.]—Where it is shown that testator has misdescribed the name & residence of an exor., probate may be granted to the exor. in his real name & as of his real residence, described in the will as of another name & another residence.—*In the Goods of BASKETT* (1898), 78 L. T. 843.

PART II. SECT. 10, SUB-SECT. 2.

a. Trustees "for the time being" of settlement, appointed—Probate granted to present trustees.]—Where testator appointed the trustees for the time being of a settlement exors. of his will, & devised & bequeathed his property to them upon the same trusts as the settlement, the ct. granted probate to the present trustees of the

settlement absolutely.—*Re ANKETELL* (1888), 14 V. L. R. 111.—*AUS.*

PART II. SECT. 10, SUB-SECT. 3.

t. Correction of clerical mistake in engrossment—To agree with draft—Word struck out.]—Where it was clear that words which appeared in a draft of a will which had been approved by testatrix were omitted in the subse-

1338. Incorrect surname of executor—Extrinsic evidence of identity—Surname omitted from probate copy.]—Deceased, by his will, appointed certain exors., of whom one was described as "the said T. O." Deceased had no friend, child, or relative named T. O., but he had a friend named T. S., who was named in the will as a trustee along with the other two persons properly named as exors. The ct. ordered the surname O. to be struck out of the engrossment of the will to be made for the purposes of probate, & granted probate to T. S. & the other two exors.—*In the Goods of COOPER*, [1899] P. 193; 68 L. J. P. 65; 80 L. T. 632.

SUB-SECT. 3.—CORRECTION OF WILL BY COURT.

1339. Will altered after death of testator—Insertion.]—PLUME v. BEALE, No. 1300, *post*.

1340. — Erasure.]—*In the Goods of NORTH* (1842), 6 Jur. 564.

— Whether probate granted in common form.]—See No. 1071, *ante*.

1341. Words inserted or left in contrary to testator's intention—Jurisdiction of court.]—Testator gave oral instructions for a will to his attorney, who made a memorandum of them in his presence. The residuary clause was as follows: "And the residue equally amongst all the sons, including the eldest son for the time being, on attaining twenty-one." From the memorandum a draft will was drawn, which disposed of the residue in the following terms, "the trustees to stand possessed of all the residue & remainder of my real estate in trust to divide the same, etc." The draft will was left with testator, & on his suggestion certain alterations were made in it, but not in reference to the words of the residuary clause above given. The will with such words was executed by testator:—*Held*: however clearly an error can be established in a will unless words have been inserted by fraud or by mistake without the knowledge of testator, the Ct. of Probate cannot correct it either by the omission of words or by the insertion of other words.—*HARTER v. HARTER* (1873), L. R. 3 P. & D. 11; 42 L. J. P. & M. 1; 27 L. T. 858; 37 J. P. 583; 21 W. R. 341.

Annotations:—Refd. *Morrell v. Morrell* (1882), 7 P. D. 68; *Rhodes v. Rhodes* (1882), 7 App. Cas. 192; *In the Goods of Boehm*, [1891] P. 247; *Grogson v. Taylor*, [1917] P. 256; *In the Estate of Philpot*, *Grogson v. Taylor* (1917), 117 L. T. 318.

1342. — Revocation clause—Will on printed form.]—*In the Goods of MOORE*, No. 902, *ante*.

1343. — — — — —.]—MARKLEW v. TURNER, No. 903, *ante*.

1344. — — — — —.]—Deceased by her will left a portion of her furniture & household effects to her daughter, & disposed of the residue of her property, appointing trustees & exors. Subsequently she was advised that the bequest to her daughter should be secured to her separate use, & she gave directions that a testamentary paper should be prepared to that effect. The paper thus prepared purported to be her last will & testament, & in addition to a clause to the effect above

engrossment, which in consequence of such omission did not give effect to the real & obvious intention of testatrix, the ct. granted probate of the will & struck out an inconsistent word.—*Re COGAN* (1912), 31 N. Z. L. R. 1204.—*N.Z.*

a. To carry out testator's intention.]—The ct. will, if necessary, transpose or supply words in a will in order

Sect. 10.—Form of grant of probate: Sub-sects. 3 & 4, A. & B.]

mentioned, contained one revocatory of all former wills. This paper was executed by deceased, but was not read over to or by her, & she was not aware that it contained such words of revocation:—*Held*: as the words of revocation had been introduced *per incuriam* & without the instructions of deceased, & their presence there was unknown to deceased when she executed the will, they ought to be omitted from the probate.—*In the Goods of OSWALD* (1874), 1 L. R. 3 P. & D. 162; 43 L. J. P. & M. 24; 30 L. T. 344; 38 J. P. 425.

Annotations:—*Fidd.* *In the Goods of Moore*, [1892] P. 378; *Marklew v. Turner* (1900), 17 T. L. R. 10.

1345. — Draft approved.]—Where the solr. who drew the will of testatrix mistook the extent of her interest in certain landed estates, & the will was accordingly executed devising only her "undivided moiety of & in" the estates, the ct., notwithstanding the fact that a draft of the will had been sent for her approval, & she had returned the draft with certain alterations in other parts, found as a fact that she did not know & approve of the clause as drawn, & directed that the restrictive words should be eliminated from the probate.—*BRISCO v. BAILLIE & HAMILTON*, [1902] P. 234; 71 L. J. P. 121; 87 L. T. 746.

Annotations:—*Reid.* *Grogson v. Taylor*, [1917] P. 256.

1346. — By fraud or inadvertence—Part severable.]—There is no difference between the words which testator himself uses in drawing up his will & the words which are *bona fide* used by one whom he trusts to draw it up for him. The ct. in either case must take the words as it finds them, & therefore:—*Held*: *pltf.*, the natural daughter, was not entitled to have probate amended by omitting the words "from & after the decease of my said wife without leaving issue of our said marriage" on the ground that the draughtsman introduced them without reason or special directions & that the effect of the same had not been intelligently appreciated by testator. Where a portion of a will has been introduced through fraud or perhaps inadvertence it may be rejected and probate granted of the remainder if the two are severable. *Qu.*: where the rejection of part alters the sense of the remainder, whether there is a valid will within Wills Act, 1837 (c. 26), s. 9.—*RHODES v. RHODES* (1882), 7 App. Cas. 192; 51 L. J. P. C. 53; 40 L. T. 403; 30 W. R. 709, P. C.

Annotations:—*Reid.* *Evans v. Ball* (1882), 47 L. T. 160; *In the Goods of Boehm*, [1891] P. 247; *Karunaratne v. Ferdinandus*, [1902] A. C. 405.

1347. — Omission of part affecting sense of whole.]—*RHODES v. RHODES*, No. 1346, *ante*.

1348. — —.]—Testator, in the instructions for his will, directed that all his B. shares should be given to his nephews, but the word "forty" was inserted several times in the will before the word "shares" & the will was executed with that word repeated several times before the word "shares." The jury found that the word "forty" was introduced by mistake, that the clauses including the word were never read over to testator, & that he only approved of the will upon the supposition that all his B. shares were given to his nephews, & thereupon the ct. ordered the word "forty" wherever it occurred in the will, to be struck out.—*MORRELL v. MORRELL* (1882), 7 P. D. 68; 51 L. J. P. 49; 40 L. T. 485; 40 J. P. 328; 30 W. R. 491.

Annotations:—*Apld.* *Collins v. Elstone*, [1893] P. 1. *Reid.*

to carry out the apparent intention of testator.—*Ex p. POLLARD* (1877), *Knox*, 501.—*AUS.*

b. —.]—Where a clause in a will drafted by testator's solr., had a

legal effect contrary to testator's instructions & contrary to the explanation given by the solr. when he read the will to testator:—*Held*: in the absence of fraud, the testator, by his

In the Goods of Boehm, [1891] P. 247; *Garnett-Botfield v. Garnett-Botfield*, [1901] P. 335; *Karunaratne v. Ferdinandus*, [1902] A. C. 405; *Grogson v. Taylor*, [1917] P. 256; *In the Goods of Beech*, *Beech v. Public Trustee* (1922), 127 L. T. 787; *In the Estate of Beech*, *Beech v. Public Trustee*, [1923] P. 46.

1349. Omission of signatures—Executors.]—*In the Goods of EDWARDS* (1858), 1 Sw. & Tr. 10; 30 L. T. O. S. 295; 6 W. R. 275; 164 E. R. 605.

1350. — Apparently of attesting witnesses.]—Three persons were present & saw deceased sign a will & codicil, & two of them signed as attesting witnesses. Immediately after they had signed, the signature of one of them was struck through, & deceased acknowledged his previous signature, & the third person signed as an attesting witness:—*Held*: the name which had been struck through could not be omitted from the probate, & probate was ordered to issue in facsimile.—*In the Goods of RAINE* (1865), 34 L. J. P. M. & A. 125; 11 Jur. N. S. 587.

1351. — —.]—After a will had been executed, & duly attested by two attesting witnesses, the wife of testator, who was also an exor. & took a life interest in the whole estate, signed her name to the will by testator's request, not with the object of attesting it, but in order to verify its contents. The ct. granted an application for probate of the will, omitting the signature of the wife, upon proof that notice of the application had been served upon a guardian appointed by the ct. to represent children who had a reversionary interest in the will & were minors & that no appearance had been entered.—*In the Goods of SMITH* (1889), 15 P. D. 2; 59 L. J. P. 5; 62 L. T. 183; 54 J. P. 199; 38 W. R. 384.

1352. Correction of clerical mistake in engrossment—To agree with draft—"Bristol" substituted for "British."]—Testator in the draft of his will which was duly executed & read over to him before execution, bequeathed a legacy to the Bristol Royal Infirmary. In the will, which was not read over to him, the bequest by a mistake in the engrossment was to the British Royal Infirmary. The ct., subject to an affidavit that there was no such institution as the British Royal Infirmary, granted probate of the will with the word "Bristol" substituted for "British."—*In the Goods of BUSHELL* (1887), 13 P. D. 7; 57 L. J. P. 16; 58 L. T. 58; 41 J. P. 806; 36 W. R. 528.

Annotations:—*Consd.* *In the Goods of Huddleston* (1890), 63 L. T. 255. *N.F.* *In the Goods of Schott*, [1901] P. 190. *Reid.* *In the Goods of Boehm*, [1891] P. 247; *In the Goods of Walkeley* (1893), 69 L. T. 419.

1353. — — Miscorrection in engrossment rectified.]—The draft of a will for which testator had given instructions was read over & explained to him by his solr. By testator's request the word "including" was altered to "excluding" in a clause relating to the name & arms of testator, & it was believed, at that time, that the alteration so made in the draft was correctly copied in the engrossment of the will. The latter was duly executed by testator under that belief. Although he subsequently executed two codicils, he never again saw the will, which remained in the custody of the solr. It was found, after testator's death, that the word had been altered in the engrossment in a different part of the will, through a clerical error. Upon motion by the exors. to substitute the word "excluding" for "including," where altered by the said clerical error, & also to make

assent, adopted the clause as written, although he had been misled as to its effect, & the will, including this clause, was admitted to probate.—*Re DAVIS* (1910), 40 N. B. R. 23.—*CAN.*

the alteration from "including" to "excluding" where the same had been made in the draft will:—*Held*: that the clerical error should be rectified, but that the ct. could not take upon itself to make the other alteration in the will.—*In the Goods of HUDDLESTON* (1890), 63 L. T. 255.

Annotations:—*W.F.* *In the Goods of Schott* (1901), 84 L. T. 571. *Reid.* *In the Goods of Boehm*, [1891] P. 247.

1354. ——— **Correction in draft omitted from engrossment not rectified.**—*In the Goods of HUDDLESTON*, No. 1353, *ante*.

1355. ——— **Name of legatee repeated—Second name left blank.**—Testator in giving instructions for the preparation of his will directed that a bequest of £10,000, should be given to each of his unmarried daughters "Georgiana" & "Florence." The conveyancer who prepared the will, by inadvertence inserted the name of "Georgiana" in both the clauses of the will relating to the gifts to the unmarried daughters & omitted the name of "Florence" altogether. The draft was not read over to testator at any time & the error was not brought to his notice:—*Held*: probate of the will, omitting the name of "Georgiana" in the second clause of gift, might be granted to the exors.—*In the Goods of BOEIM*, [1891] P. 247; 60 L. J. P. 80; 64 L. T. 806; 39 W. R. 576; 7 T. L. R. 368.

Annotations:—*Reid.* *Re Baynham, Hart v. Mackenzie* (1891), 7 T. L. R. 587; *Collins v. Elstone* (1892), 67 L. T. 624; *Gregson v. Taylor*, [1917] P. 256.

1356. ——— **Number of house repeated—Second number left blank.**—A will was engrossed from a draft approved by testatrix. The engrossment clerk copied the number of one house twice over, & omitted the number of another house. The will was read over to testatrix, but the clerical error was not discovered till after the death of testatrix. Upon motion by the exors. for rectification of the mistake.

The ct. struck out the duplicate number, & granted probate of the will with a blank in place of the number struck out, but declined to insert the correct number.—*In the Goods of WALKLEY* (1893), 69 L. T. 419; 1 R. 480.

Annotation:—*Reid.* *Gregson v. Taylor*, [1917] P. 256.

1357. ——— **Words struck out—No fresh words inserted.**—Upon an application to rectify a clerical error in the residuary clause of a will:—*Held*: words might be struck out, but that no fresh word could be inserted.—*In the Goods of SCHOTT*, [1901] P. 190; 70 L. J. P. 46; 84 L. T. 571; 17 T. L. R. 476.

1358. ————*When it is clear that a word has been inserted into a will by mistake in the process of copying, the ct. will cause such word to be struck out.*—*VAUGHAN v. CLERK* (1902), 87 L. T. 144; 18 T. L. R. 704.

Erroneous reference to will in codicil.—*See* Nos. 870, 871, *ante*.

1359. **Admissibility of extrinsic evidence.**—The Ct. of Probate does not admit parol evidence to show an error in a testamentary paper, unless there be (1) some ambiguity on the face of the instrument; (2) the means of obtaining clear & indisputable proof of deceased's intention.—

HARRISON v. STONE (1820), 2 Hag. Ecc. 537; 162 E. R. 949.

Annotations:—*Reid.* *Castell v. Tagg* (1836), 1 Curt. 298; *Thorne v. Rooke* (1841), 2 Curt. 799.

Erroneous description of executor.—*See* Sub-sect. 2, *ante*.

Evidence of testator's intention.—*See, generally*, *WILLS*.

SUB-SECT. 4.—OMISSION OF PART OF WILL FROM PROBATE.

A. In General.

1360. **Whether allowed.**—*BARTON v. ROBINS* (1769), 3 Phillim. 455, n.; 161 E. R. 1382.

Annotations:—*Reid.* *Fawcett v. Jones, Codrington & Pulteney* (1810), 3 Phillim. 434; *Allen v. M'Pherson* (1847), 1 H. L. Cas. 191. *Mentd.* *Thorne v. Rooke* (1841), 2 Curt. 799; *Fincham v. Edwards* (1842), 3 Curt. 63.

1361. ————*Part of a will established, & part held not entitled to probate.*—*BILLINGHURST v. VICKERS* (FORMERLY *LEONARD*) (1810), 1 Phillim. 187, 199; 161 E. R. 956.

Annotations:—*Reid.* *Allen v. M'Pherson* (1847), 1 H. L. Cas. 191. *Mentd.* *Ingram v. Wyatt* (1828), 1 Hag. Ecc. 381; *Barry v. Butlin* (1838), 1 Curt. 637; *Chambers v. Wood* (1843), 2 Notes of Cases, 181; *Fulton v. Andrew* (1875), L. R. 7 H. L. 448.

1362. ————*ALLEN v. M'PHERSON*, No. 717, *ante*.

1363. ——— **By consent On verbal application.**—It is incompetent to the ct. to strike out or expunge any part of a will, however immaterial, on mere verbal statements to the fitness of this, i.e. statements unsupported by any evidence, etc., even though with the consent of all parties whose interest it can, by possibility, affect.—*CURTIS v. CURTIS* (1825), 3 Add. 33; 162 E. R. 393.

Annotations:—*Reid.* *In the Goods of Honeywood* (1871), L. R. 2 P. & D. 251; *In the Estate of White*, [1914] P. 153.

1364. ———— **Libellous matter.**—*MARSH v. MARSH*, No. 1370, *post*.

1365. **Grounds for omission—Grounds justifying refusal of probate.**—*GUARDHOUSE v. BLACKBURN*, No. 1014, *ante*.

1366. **Omission of alterations Presumed to be made after death.**—Exor. proves a will of a personal estate, wherein one of the legacies is forged; the exor. has no remedy in equity, but ought to have proved the will with a special reservation as to that legacy.

This £100 legacy was interlined in the will by a different hand, & supposed to have been done by deft. herself when she was left in the room alone with the corpse, in which room the will was left (*LORD COWPER, C.*)—*PLUME v. BEALE* (1717), 1 P. Wms. 388; 24 E. R. 438.

Annotations:—*Consd.* *Allen v. M'Pherson* (1847), 1 H. L. Cas. 191. *Mentd.* *Sheldon v. Sheldon* (1841), 1 Rob. Eccl. 81.

— **After execution.**—*See* *WILLS*.

Evidence of testator's intention.—*See* *WILLS*.

B. Libellous or Undesirable Matter.

1367. **Objectionable matter—General rule.**—Although it is not competent to the ct. to strike out or expunge any part of a will merely because

PART II. SECT. 10, SUB SECT. 4.—A.

a. **Clause written below signatures of testator & witnesses.**—In a testamentary writing a clause directing certain dispositions of property was written below the signatures of testator & attesting witnesses:—*Held*: it could not be admitted to probate as part of testator's will.—*Re STAWELL* (1904), S. R. Q. 4.—*AUS*.

d. **Will modified by letter.**—Testator by his will gave all his property, real & personal, to trustees, with directions as to its disposal. A letter was found among his papers, addressed to his wife, by which he modified his will:—*Held*: the will & letter must be read together, & that the will must stand except so far as "modified."—*DUMBLE v. DUMBLE* (1882), 8 A. R. 476.—*CAN*.

e. **Will in two parts—Signatures of witnesses in one part.**—Where a will was in two parts & the signatures of the attesting witnesses were in the first part:—*Held*: probate should be granted, but in setting out the will in the probate no part of the first part of the document should be set out save the signatures.—*Re DAVIDSON* (1912), 31 N. Z. L. R. 593.—*N.Z.*

Sect. 10.—Form of grant of probate: Sub-sect. 4, B. & C.; sub-sects. 5, 6, 7 & 8, A. & B. (a).]

it contains objectionable matter, the ct. may, nevertheless, order the omission from the probate of words in the will which are scandalous & defamatory & which do not affect any testamentary disposition or appointment contained in the will.—*In the Estate of WHITE*, [1914] P. 153; 111 L. T. 413; 30 T. L. R. 536; 58 Sol. Jo. 534; *sub nom. In the Goods of A. B.*, 83 L. J. P. 67.

1368. — Unconnected with testamentary dispositions — Libel.]—Libellous passages, unconnected with the testamentary dispositions in a will, on a stranger allowed to be omitted in the probate copy.—*In the Goods of WARTNABY* (1846), 1 Rob. Eccl. 423; 4 Notes of Cases, 476; 163 E. R. 1088.

Annotations:—*Refd. In the Goods of Honeywood* (1871), L. R. 2 P. & D. 251; *In the Goods of White* (1914), 111 L. T. 413.

1369. — Scandalous or defamatory matter.]—*In the Estate of WHITE*, No. 1367, *ante*.

1370. — Omission by consent.]—Upon an application to the ct. to except from probate certain expressions derogatory to persons named therein, the ct., upon consent of counsel for the plffs., made the order as prayed.—*MARSH v. MARSH* (1860), 1 Sw. & Tr. 528; 30 L. J. P. M. & A. 77; 1 L. T. 523; 24 J. P. 311; 6 Jur. N. S. 380; 104 E. R. 845.

Annotations:—*Refd. In the Goods of Honeywood* (1871), L. R. 2 P. & D. 251; *In the Goods of White* (1914), 111 L. T. 413. **Mentd. In the Goods of Steele (1868), L. R. 1 P. & D. 575; *Rees v. Rees* (1873), L. R. 3 P. & D. 84.**

1371. — Matter not calculated to injure.]—The ct. will not exercise its power of omitting from the probate offensive or libellous passages in a will, except in cases of a very special & definite character. It therefore refused to omit from the probate a paragraph in a will which, though offensive, was not calculated to injure those at whom it was levelled.—*In the Goods of HONEYWOOD* (1871), L. R. 2 P. & D. 251; 40 L. J. P. & M. 35; 25 L. T. 164; 35 J. P. 600; *sub nom. In the Goods of R—H—*, 19 W. R. 760.

Annotation:—*Refd. In the Goods of White* (1914), 111 L. T. 413.

1372. Publication contrary to public policy—Military information.]—Where it appeared that the military authorities thought it undesirable that portions of a letter which included a military will should be published, the ct. directed that the person applying for the grant should be at liberty to offer for probate so much only of the letter as was testamentary or necessary for the understanding of the testamentary part.—*In the Estate of HAYWOOD*, [1916] 1 P. 47; 85 L. J. P. 24; 114 L. T. 375; 60 Sol. Jo. 239.

C. Matter inserted by Fraud or Mistake.
See Sub-sect. 3, ante.

SUB-SECT. 5.—INCORPORATION OF DOCUMENTS REFERRED TO BY TESTATOR.

1373. Will of former testator.]—Where testatrix bequeathed by her will, in a certain event, a part of her estate to "the residuary legatees named in her father's will," the ct. directed that an office copy of that will should form part of the probate.—*In the Goods of DARBY* (1846), 4 Notes of Cases, 427; 10 Jur. 164.

1374. Trust deed—To which testator not party.]

—Testator disposed of his residue according to the trusts contained in a certain deed to which he was not a party, & in which he had no interest. The persons interested under those trusts, & who had the custody of the deed, refused to produce it or to allow a copy to be made of any part of it for the purpose of being incorporated in the probate. The ct. directed probate of the will to issue without the incorporation of the deed, or of any part thereof.—*In the Goods of SIBTHORP* (1866), L. R. 1 P. & D. 106; 35 L. J. P. & M. 73; 13 L. T. 803; 14 W. R. 543.

Annotation:—*Refd. In the Goods of Leigh* (1873), 28 L. T. 914.

1375. — Executed by testator—Trusts not effecting devolution of English property—Affidavit identifying deed to be filed.]—A domiciled American subject made a will in the United States, by which he directed his property in this country to be paid over, after the discharge of certain specified legacies, to his exors. in America, & to be by them distributed according to the provisions of a trust deed also executed in the United States. The deed did not affect the devolution of property in this country, & the ct. therefore allowed probate to go without incorporating an affidavit being filed in the registry identifying it by date & name of trustees.—*In the Goods of PEABODY* (1870), 21 L. T. 730; 34 J. P. 120.

1376. Settlement having testamentary effect—Settlement dealing with Scottish estate.]—Testator, who was a Scotsman domiciled in England, died possessed of property in both countries. Some time before his death he executed a settlement of his Scottish estate, which had a testamentary effect. He subsequently executed a will which disposed of his English property, but which the Scottish ct. held had no effect on his Scottish estate. The ct. granted probate of the English will, & the Scottish settlement as together constituting the will of deceased.—*In the Goods of DONALDSON* (1873), L. R. 3 P. & D. 45; 42 L. J. P. & M. 19; 28 L. T. 477; 37 J. P. 393; 21 W. R. 549.

1377. —]—Testator left the following testamentary papers: (1) Will, dated June 3, 1875, relating to property in Argentina, & made in the form there prevailing; (2) A settlement or testamentary disposition bearing date June 28, 1875, & comprising property in Scotland; (3) Will dated Mar. 30, 1882, with two codicils dated respectively Apr. 16, 1884, & July 7, 1888, relating to property in England. Testator left an only child, B., whom he appointed sole exor. of the Argentine & Scottish documents; but H. & F. were, together with B., appointed exors. of the English documents. The Argentine will was executed in the way usual in that country, i.e. before a notary public. The original was not forthcoming, but an authenticated copy was produced, & probate was sought of the copy, together with the other testamentary papers.

The ct. accordingly made a general grant to the son B. of all the documents, & a grant to his co-exors. limited to the three English documents.—*In the Goods of BRIDGES* (1891), 65 L. T. 764.

Separate will of foreign property.]—*See Sub-sect. 7, B., post.*

Incorporation of unattested documents in wills.]—*See, generally, WILLS.*

Whether document testamentary.]—*See, generally, WILLS.*

PART II. SECT. 10, SUB-SECT. 5.

f. Clear description necessary.]—A document referred to in a will will not be included in the grant of probate unless it is clearly described in the will.—*Re GORTON'S WILL* (1910), 29 N. Z. L. R. 733.—N.Z.

SUB-SECT. 6.—WHERE WILL HAS BEEN ALTERED.

See Sect. 15, sub-sect. 2, B. (i.); & generally, WILLS.

SUB-SECT. 7.—WILL ALREADY PROVED ABROAD.

See Sect. 5, sub-sect. 5, ante.

SUB-SECT. 8.—WHERE TESTATOR LEAVES MORE THAN ONE WILL.

A. In General.

1378. Separate will of trust property.—Both wills incorporated in one probate.—Probate issued in duplicate.]—Where testator left two wills, one dealing solely with his own estate, & the other limited to an estate vested in him as trustee, the ct. ordered that the two wills should be included in the same probate, but that a duplicate copy of the probate should be issued to each set of exors.—*In the Goods of CLAUS* (1883), 47 J. P. 663; 31 W. R. 924.

Whether all executors entitled to probate.]—See Sect. 6, sub-sect. 1, B., ante.

Whether later appointment of executors revokes earlier appointments.]—See Part I., Sect. 8, ante.

Executors for particular & limited purposes.]—See Part I., Sect. 4, ante.

B. Separate Wills of English and Foreign Property.

(a) Whether Foreign Will incorporated in Grant.

1379. Foreign will not disposing of residue.—*In the Goods of NICKALLS*, No. 918, ante.

1380. Foreign executor renouncing.—Testator having an English domicile of origin died in Belgium possessed of property in England & in Belgium. He left two wills, one in the English form disposing of his property in this country, the other in the Belgian form disposing of his estate situate in Belgium. The ct., on the renunciation of the Belgian exor. & on an affidavit that according to the law of Belgium the Belgian will only applied to the property in that country, granted probate of both wills, as together constituting the last will of deceased to the English exor.—*In the Goods of BOLTON* (1887), 12 P. D. 202; 57 L. J. P. 12; 36 W. R. 287.

1381. Foreign will dealing with personalty.—*In the Goods of WINTER*, No. 707, ante.

1382. Foreign will not incorporated in grant.—Where testator left two wills, one disposing of his property in Australia, & the other of his property in England on the same trusts:—*Held*: it was unnecessary to incorporate the Australian will with the English will, but an affidavit of its contents was directed to be attached to the probate.—*In the Goods of COLE* (1869), 20 L. T. 758; 33 J. P. 535.

1383. —.]—An American, by a will & codicils disposed of his property generally, & by a second

will, by which he named separate exors., of moneys he had invested in the British funds. He expressed a distinct wish that the British will should take effect as a separate testamentary disposition of property independent of & disconnected from his general will:—*Held*: it was unnecessary to incorporate the American will, which was very bulky, in the English probate, but that an authenticated copy of the American will & codicils should be filed in the registry, & a note be added to the English probate to the effect that such copy had been so filed.—*In the Goods of ASTOR* (1870), 1 P. D. 150; 45 L. J. P. 78; 34 L. T. 856; 40 J. P. 617; 24 W. R. 539.

Annotations:—*Fold*. *In the Goods of Callaway* (1890), 15 P. D. 147; *In the Goods of Fraser*, [1891] 1. 285; *In the Goods of Seaman* (1891), 64 L. T. 805. *Refd*. *In the Goods of Crawford* (1890), 15 P. D. 212; *In the Goods of De la Rue* (1890), 63 L. T. 253; *In the Goods of Lockhart* (1893), 1 R. 481.

1384. —.]—Testator made a will in England which disposed only of English property. Subsequently he made abroad another will which disposed of property abroad & cancelled all previous dispositions. The ct., with the consents of all the parties interested, ordered probate of the English will only, & allowed the foreign will to be delivered out of the registry for probate abroad.—*In the Goods of SMART* (1884), 9 P. D. 64; 53 L. J. P. 57; 48 J. P. 456; 32 W. R. 724.

1385. — Wills purporting to be independent.]—Testator died possessed of property in England & South Africa. He executed two wills, one disposing of his English estate, & the other of his South African estate, each purporting to be independent of the other, & intended to have no operation on the property disposed of by the other:—*Held*: probate might be granted of the English will without requiring the South African will to be brought in, on an affidavit being filed exhibiting an attested copy of it, & a statement being inserted in the probate that such affidavit had been filed.—*In the Goods of CALLAWAY* (1890), 15 P. D. 147; 59 L. J. P. 73; 63 L. T. 227; 38 W. R. 528.

Annotations:—*Fold*. *In the Goods of Fraser* (1891), 64 L. T. 808; *In the Goods of Seaman* (1891), 64 L. T. 805. *Refd*. *In the Goods of Lockhart* (1893), 1 R. 481.

1386. — —.]—Testator executed two wills, one according to the English form, appointing exors., & disposing solely of his property in this country, the other according to the Swiss form, by which no exors. were appointed which purported to be entirely independent of the English will, & which affected only property in Switzerland & Italy:—*Held*: on an affidavit being filed that if the English exors. intermeddled with the Swiss estate, they would come into conflict with the Swiss ct., which by the law of the country had the administration of the estate, & on a copy of the Swiss will being filed, probate might be granted of the English will alone.—*In the Goods of DE LA RUE* (1890), 15 P. D. 185; 63 L. T. 253; 39 W. R. 64.

1387. — — Affidavit required as to location of chattels at death.]—Testator possessed of

PART II. SECT. 10, SUB-SECT. 8.—A.

g. *Separate will of trust property—Separate grants of probate.*—Where testator has made two independent wills, one dealing only with property to which he is entitled in his own right, & the other dealing only with property as to which he has a special power of appointment, & exercising that power, a separate grant of probate of each of the wills may be made.—*Re DOWALL'S WILL*, [1914] V. L. R. 12.—AUS.

PART II. SECT. 10, SUB-SECT. 8.—B. (a).

1381 i. Foreign will dealing with

personalty.—Where testatrix left two wills, by one of which she disposed of all her real & personal property in New Zealand & England, & by the other disposed of her personal estate in the United Kingdom, probate was granted to the New Zealand exors., including both instruments, conditional on an exemplification of the English probate, being lodged in the Registry of the Supreme Ct.—*Re MORSEHEAD* (1910), 29 N. Z. L. R. 1023.—N.Z.

1382 i. Foreign will not incorporated in grant.—Testator being domiciled in England made a will there relating

exclusively to property in Great Britain & appointed exors. in England. He then came to Victoria & made a second will relating exclusively to property in Victoria & Tasmania & appointed exors. of it, resident in Victoria. The ct. in England having granted probate of the first will without referring to the second, the Supreme Ct. of Victoria granted probate of the second will without referring to the first.—*In the Goods of MORSEHEAD* (1864), 1 W. W. & A.B. 70.—AUS.

b. *Limited grant made.*—Testator made two wills, one dealing

L. J. P. & M. 48 ; 22 L. T. 630 ; 34 J. P. 455 ; 18 W. R. 901.

*Annotations:—***Apld.** *In the Goods of Howden* (1874), 43 L. J. P. & M. 26. **Distd.** *In the Goods of Murray*, [1896] P. 65. **Follid.** *In the Goods of Western* (1898), 78 L. T. 49. **Refd.** *In the Goods of Crawford* (1890), 15 P. D. 212.

1400. ———.]—*In the Goods of HOWDEN (LORD)*, No. 1395, *ante*.

1401. ———.]—*In the Goods of LOCKHART*, No. 921, *ante*.

1402. ———.]—*In the Goods of WESTERN*, No. 894, *ante*.

1403. ———.]—**Residue to be transferred to English executors.**—*In the Goods of MURRAY*, No. 1389, *ante*.

1404. ———.]—**Foreign property to be realised by foreign executors—Proceeds to be handed over to English executors.**—*In the Goods of SCHENLEY* (1903), 20 T. L. R. 127.

(b) *Filing Foreign Will and Notification on Probate.*

1405. **Copy of foreign will filed in registry.**—*In the Goods of ASTOR*, No. 1383, *ante*.

1406. ———.]—*In the Goods of DE LA RUE*, No. 1386, *ante*.

1407. ———.]—*In the Goods of FRASER*, No. 1390, *ante*.

1408. ———.]—*In a probate action the jury found for the will & codicil propounded by plffs., & the ct. had accordingly pronounced for them. At the Probate registry the officials refused to deliver out probate until either an American will which testator had made dealing solely with his American property or an exemplification of probate thereof was lodged:—Held: probate of the English will & codicil should issue on plffs.' lodging a copy of the American will.*—*In the Estate of PAUL, GILMER v. OVERMAN* (1907), 23 T. L. R. 716.

1409. ———.]—**Verified by affidavit.**—*In the Goods of CALLAWAY*, No. 1385, *ante*.

1410. ———.]—*In the Goods of SEAMAN*, No. 1387, *ante*.

1411. **Affidavit of contents attached to probate.**—*In the Goods of COLE*, No. 1382, *ante*.

1412. **Note of filed copy added to probate.**—*In the Goods of ASTOR*, No. 1383, *ante*.

1413. **Statement of filing inserted in probate.**—*In the Goods of CALLAWAY*, No. 1385, *ante*.

1414. ———.]—*In the Goods of FRASER*, No. 1390, *ante*.

1415. **Statement endorsed on probate.**—*In the Goods of SEAMAN*, No. 1387, *ante*.

SUB-SECT. 9.—WILL OF MARRIED WOMAN.

See Sect. 7, sub-sect. 2, *ante*.

SECT. 11.—LETTERS OF ADMINISTRATION GENERALLY.

SUB-SECT. 1.—WHEN GRANTED.

1416. **What constitutes intestacy—Will with no residuary bequest.**—Where there is no doubt as to the *factum* of a will which contains no disposition

of the residue, the Ct. of Probate cannot pronounce deceased to be dead intestate as to the residue.—*SUTTON v. SMITH* (1753), 1 Lec, 275 ; 161 E. R. 102.

1417. ———.]—**Whether revocation of will—With declaration that estate to pass as on intestacy.**—*BRENCHLEY v. LYNN*, No. 2079, *post*.

———.]—*See, generally, WILLS.*

1418. **Partial intestacy—Will disposing of property abroad only.**—M. died possessed of property in England & America, leaving a will dealing with her American estate only, which was duly proved by her exors. in the American Ct. ; but she died intestate as to her English estate. The ct. granted administration of the property in this country to her sole next of kin.—*In the Goods of MANN*, [1891] P. 293 ; 60 L. J. P. 95 ; 40 W. R. 144.

Annotation:—Refd. In the Goods of Murray, [1896] P. 65.

1419. **When intestacy presumed—Deceased not heard of for many years.**—*In the Goods of TRASK*, No. 737, *ante*.

1420. ———.]—**No record of death or marriage.**—Where a man had gone to India more than forty years ago, & no trace of him could be found in the official returns, & search was made in the three presidencies, & no record could be found of his burial or of any grant of probate of his will or of letters of administration of his estate & effects, the ct. allowed a grant of administration to go, upon the presumption that he had died intestate, upon a search being made in the Indian register of marriages, & no entry being found to show that he had been married.—*In the Goods of DEATY* (1861), 25 J. P. 809.

SUB-SECT. 2.—JURISDICTION TO GRANT.

Jurisdiction—Formation of jurisdiction.—*See Nos. 701–703, ante.*

SUB-SECT. 3.—NATURE AND EFFECT OF GRANT.

1421. **Nature of grant—Ministerial act.**—The grant of letters of administration is a ministerial & not a judicial act.—*BOSWALL v. RAWSTONE* (1693), 1 Lut. 533 ; 125 E. R. 280.

Annotation:—Mentd. Smith v. Scott (1859), 6 C. B. N. S. 771.

1422. ———.]—**Judicial acts.**—*HEWSON v. SHELL-LEY*, No. 2878, *post*.

Effect of grant.—*See Sect. 15, post.*

Devolution on death of administrator.—*See Part I., Sect. 8, ante.*

What may be done by administrator before grant.—*See Part I., Sect. 8, ante.*

SUB-SECT. 4.—TO WHOM ADMINISTRATION GRANTED.

See Administration of Estates Act, 1357, Stat. I. (c. 11) ; Stat. Frauds, 1677 (c. 3), s. 25, repealed by Law of Property Act, 1922 (c. 16), s. 150 (3) ; see, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), ss. 161, 162 ; Administra-

tion in operation will not be granted.—Re CLAFFY (1886), 5 N. Z. L. R. 202 (S. C.).—N.Z.

PART II. SECT. 11, SUB-SECT. 3.

a. Validity of grant by surrogate court.—Deceased was a resident of Buffalo, N.Y., being at the time of his death, which occurred in the county of Lincoln, Ontario, not possessed of any real or personal property in this Province: plff., his widow, obtained letters of administration from the surrogate ct. of York:—*Held: the grant of letters by the surrogate ct. of*

PART II. SECT. 10, SUB-SECT. 8.—B. (b).

k. Note added to probate—Certified copy of foreign will attached.—Where testator has made separate wills as to his English & Australian property, probate may be granted of the Australian will only, but the probate should bear on its face a note referring to the fact that an affidavit is on the file of the ct. giving date & particulars of the English probate & certifying an attached copy of the English will.—*Re RYDER'S WILL* (1903), 29 V. L. R. 143.—AUS.

PART II. SECT. 11, SUB-SECT. 1.

l. Deceased's property escheated to Crown.—The fact that apparently deceased's property has escheated to the Crown is no ground for refusing the issue of letters of administration.—*CRANSTON v. NATIONAL TRUST CO., LTD.*, [1920] 1 W. W. R. 852 ; 51 D. L. R. 474 ; 16 Alta. L. R. 284.—CAN.

m. No personal estate & no debts.—Where there is no personal estate, & no debts, administration of the real property of intestate who died before *Estate Descent Act, 1874*, came

Sect. 11.—Letters of administration generally: Sub-sect. 4, A., B. & C.]

tion of Estates Act, 1925 (c. 23), s. 46; Non-Contentious Probate Rules, 1925, rr. 123, 124.

A. In General.

1423. Party with greater interest entitled.]—Administration of a *feme covert*, granted to the daughter of the third husband, revoked, & granted to the grand-children by her first husband; it being shown that an estate would come to them.—*ST. AUBYN v. PAGE* (1719), 2 Hag. Ecc. App. 163; 162 E. R. 1051.

1424. —.]—In cases of administration, the constant rule is, to grant the administration to the greater interest.—*ELWES v. ELWES* (1728), 2 Lec, 573; 161 E. R. 444.

1425. —.]—(1) Where the ct. is not bound by the statute of 21 Hen. 8, c. 5, it always grants the administration to those who have the interest.

(2) Administration *de bonis non* granted to a person, entitled under a deed of gift from the first administratrix to the whole beneficial interest, in preference to one who was not next of kin at the time of the death, & who consequently had no statutable right.

A. was not next of kin at the time of the death, & had no right or interest then, nor had he any interest in the effects now (*SIR WILLIAM WYNNE*).—*ALMES v. ALMES* (1796), 2 Hag. Ecc. App. 155; 162 E. R. 1047.

Annotation:—As to (2) Reidd. Dépit v. Delevicleuse (1861), 30 L. J. P. M. & A. 86.

1426. —.]—*CRANE v. REBELLO*, No. 2103, *post*.

1427. —.]—(1) Of the two rules for the guidance of the discretion of the ct. in granting administration, where parties in equal degree dispute it, viz. "that, *ceteris paribus*, the male is preferred to the female," & "that the grant will follow the majority of interests"—the latter is the more stringent. The fact of a man having been bkpt. many years since is not to be pressed against him. *Qu.*: when he has been a second time a bkpt., & under the second bkpcy. no dividend has been paid, whether such bkpt. could be said to have any interest in the intestate's estate?

(2) The grant being made to persons representing three-fourths of the interest, their sureties were ordered to justify to the extent of the other fourth; their costs were directed to be paid out of the estate, & no order was made as to costs of the other party.—*IREDALE v. FORD & BRAMWORTH* (1859), 1 Sw. & Tr. 305; 33 L. T. O. S. 78; 23 J. P. 203; 5 Jur. N. S. 474; 7 W. R. 462; 164 E. R. 740.

Annotation:—As to (1) Reidd. Cordeux v. Trasler (1865), 4 Sw. & Tr. 48.

Next-of-kin in equal degrees of relationship.]—*See* Nos. 1618, 1621, 1622, *post*.

Who has greater interest.]—*See* Sub-sect. 4, *post*, & generally, DESCENT, Vol. XVIII., pp. 17 *et seq*.

1428. Where interests equal—Sole preferred to joint administrator.]—(1) The ct. never forces a joint administration, because if the administrators

were at variance it would almost put an end to the administration. Further, the ct. prefers *ceteris paribus* a sole to a joint administration, because it is infinitely better for the estate (*per CUR.*).

(2) Primogeniture gives no right; if things are precisely equal, if the scale is exactly poised, being the elder brother would incline the balance, but it would not weigh against the wish of the majority of interests (*SIR JOHN NICHOLL*).—*WARWICK v. GREVILLE* (1809), 1 Phillim. 123; 161 E. R. 934.

See, further, Sub-sect. 3, C., post.

1429. — Man accustomed to business preferred.]—*Ceteris paribus*, a man accustomed to business preferred as an administrator.—*WILLIAMS v. WILKINS* (1812), 2 Phillim. 100; 161 E. R. 1090.

1430. — Person unsuccessful in own affairs.]—(1) The ct. never forces a joint administration.

The ct. never forces a joint administration, & for an obvious reason, because it is necessary for the administrators to join in every act; there might be a complete contrariety of action, & it would be in the power of one of them to defeat the whole administration (*SIR JOHN NICHOLL*).

(2) If the ct. has an option as it undoubtedly has between these two parties I shall not think [the person] who has taken such bad care of his own affairs the preferable person to be entrusted with the management of the affairs of others (*SIR JOHN NICHOLL*).—*BELL v. TIMISWOOD* (1812), 2 Phillim. 22; 161 E. R. 1066.

1431. — Males preferred to females.]—*IREDALE v. FORD & BRAMWORTH*, No. 1427, *ante*.

Next of kin in equal degrees of relationship.]—*See* Nos. 1623, 1624, *post*.

1432. Whether primogeniture gives prior claim.]—*WARWICK v. GREVILLE*, No. 1428, *ante*.

Whether elder preferred to younger—Next of kin in equal degrees of relationship.]—*See* Nos. 1627, 3217, *post*.

1433. Effect of renunciation in one character—Whether administration in another allowed.]—*In the Goods of LOFFUS*, No. 2262, *post*.

See Non-Contentious Probate Rules, 1925, r. 50.

B. Where Deceased domiciled abroad.

1434. General rule.]—When deceased is domiciled in a foreign country, & an application is made to this ct. either for an original or a *de bonis* grant of administration, this ct. will be prepared to make it to the person recognised by the proper ct. of the foreign country.—*In the Goods of HILL* (1870), L. R. 2 P. & D. 89; 39 L. J. P. & M. 52; 23 L. T. 167; 34 J. P. 567; 18 W. R. 1005.

1435. Deceased domiciled in Scotland.]—Administration of the effects of a party deceased, domiciled in Scotland, granted according to the law of Scotland, on proof of the law by affidavit from a Scotch solr.—*Re STEWART* (1838), 1 Curt. 904; 163 E. R. 313.

Annotations:—Apld. In the Goods of Probart (1867), 30 L. J. P. & M. 71. *Reidd. In the Goods of Earl* (1867), L. R. 1 P. & D. 450.

1436. Application of rule—Grant to Scottish factor loco tutoris.]—Administration of a domiciled

York was valid & effectual.—*JENNINGS v. GRAND TRUNK RY. CO.* (1887), 15 A. R. 477.—CAN.

PART II. SECT. 11, SUB-SECT. 4.—A.

1428 i. Party with greater interest entitled.]—It is a rule of the Probate Ct. that the grant follows the interest; & is not affected by the mere circumstances that the persons having the majority of interests reside out of the jurisdiction.—*Re SLATTERY'S ESTATE* (1909), 9 S. R. N. S. 577.—AUS.

1423 ii. —.]—PERRIN v. PERRIN (1871), 3 Ch. Ch. 452.—CAN.

o. Man & not woman.]—The ct. in granting administration to an intestate's estate, prefers a man to a woman.—*Re PARSONS' WILL* (1887), 13 V. L. R. 169.—AUS.

p. Party first applying.]—A rule of great force is that administration will be granted to party first applying.—*Re PARSONS' WILL* (1887), 13 V. L. R. 169.—AUS.

PART II. SECT. 11, SUB-SECT. 4.—B.

a. Deceased domiciled in New South Wales—Grant to executor according to tenor.]—Deceased died domiciled in New South Wales, in which country probate of his will was granted to A., as exor, according to its tenor. According to the practice of this ct. the words of the will did not constitute an exorship.; but in order to follow the colonial grant as near as possible, the ct. directed that administration should issue to A., as the person

Scotsman [a widower] granted to an agent appointed by the Ct. of Session *factor loco tutoris* to the infant children.—*In the Goods of JOHNSTON* (1832), 4 Hag. Ecc. 182; 162 E. R. 1413.

1437. —[Administration of the personal estate in England of a domiciled Scotsman granted to A., appointed by the Court of Session at Edinburgh *factor loco tutoris* to the infant children of the deceased.—*In the Goods of JONES* (1859), 28 L. J. P. & M. 80.

1438. —[Eldest brother preferred to parent.]—Intestate belonging to the Royal Navy left a father & mother, & brothers & sister him surviving at Jersey. Upon evidence being given that the father was domiciled at Jersey at the time of his son's death, that the son had not acquired any domicile different from that of his father, & that by the law of Jersey the property of intestate was divided among his brothers & sisters to the exclusion of his parents, the ct. granted administration to the eldest brother of deceased.—*In the Goods of PATTEN* (1860), 24 J. P. 150; 6 Jur. N. S. 151.

1439. —[Brother preferred to widow.]—Administration of the effects of a domiciled Scotsman granted to the brother, the next of kin of deceased, without citing the widow, a similar grant having been already made in Scotland.—*In the Goods of ROGERSON* (1840), 2 Curt. 656; 163 E. R. 540.

Annotation:—Reid. In the Goods of Earl (1867), L. R. 1 P. & D. 450.

1440. —[Brother preferred to widower.]—Administration of the estate & effects of the wife of a domiciled Frenchman was granted to her brother, upon evidence being laid before the ct. that her property had been settled in such a manner that by the law of France, the husband & his personal representatives had no interest in it.—*In the Goods of FREREJEAN* (1860), 24 J. P. 696.

1441. —[Deceased & her husband had their domicile at the Cape of Good Hope, & in accordance with the laws of that colony, previous to their marriage, they executed a deed of non-community of property, & such deed was duly registered. The Ct. of Probate granted administration to the brother & next of kin of deceased, to the exclusion & without the citation of the husband.—*In the Goods of PROBART* (1867), 36 L. J. P. & M. 71; 16 L. T. 298; 15 W. R. 798.

1442. —[Children preferred to widower.]—Where a married woman domiciled in Canada died intestate, leaving a husband & two minor children her surviving, the ct., on the affidavit of a member of the Canadian bar that by the law of Canada the children & not the widower had the first right to administer the estate of a married woman dying intestate, granted letters of administration to the attorney of the said two minor children.—*In the Goods of BABIN* (1890), 59 L. J. P. 46; 62 L. T. 185.

1443. —[Administration with will annexed.]—Where testator & his wife, domiciled in Scotland, had made mutual wills, bequeathing the whole estate to the survivor, & upon his or her death, to the children, upon trust for the survivor of them,

for life, & then, etc., appointing their children residuary legatees & exors.; upon the death of testator, a confirmed testamentative equivalent to administration with will having been granted by the Ct. of Scotland to the children, as only exors. dative *qua* nearest of kin, the court granted administration with the will to the children, as universal legatees in trust, limited during the life of the widow.

The party deceased was a domiciled Scotchman, & the grant must go by the law of Scotland (SIR H. JENNER FUST).—*In the Goods of THOMSON* (1849), 7 Notes of Cases, 320.

1444. —[Grant to person entitled by law of deceased's domicile.—In different capacity.]—Administration with will annexed following the grant of the Scottish ct. as to the person of the grantee, but varying the character in which he was entitled to such grant.—*In the Goods of MACKENZIE* (1856), Dea. & Sw. 17; 26 L. T. O. S. 276; 2 Jur. N. S. 168; 164 E. R. 488.

See, further, CONFLICT OF LAWS, Vol. XI., pp. 378, 379, Nos. 570–576.

1445. [Person entitled by foreign law disqualified by English law.]—By the law of Turkey a son nineteen years of age is entitled to administer the estate of his father, dead intestate. Administration refused to the son, on the ground that he could not give the usual bond, by reason of his minority, according to the law of this country.—*In the Goods of MANUEL* (1849), 13 L. T. O. S. 449; 13 Jur. 664.

See, further, CONFLICT OF LAWS, Vol. XI., p. 379, Nos. 577, 578.

1446. [Evidence of law of domicile.—Affidavit by foreign solicitor.]—*Re STEWART*, No. 1435, *ante*.

—[*See, generally, EVIDENCE, Vol. XXII., pp. 618 et seq.*

C. Joint Administrators.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), ss. 160, 161 (1) (b); Non-Contentious Probate Rules, 1925, r. 125.

1447. [Whether court will grant.—General rule.]—*WARWICK v. GREVILLE*, No. 1428, *ante*.

—[*BELL v. TIMISWOOD*, No. 1430, *ante*.

1449. —[*COPPIN v. DILLON*, No. 3217, *post*.

1450. —[The ct. never forces a joint administration.—*COR v. HUME & THOMPSON* (1833), 4 Hag. Ecc. 398; 162 E. R. 1491.

1451. —[*In the Goods of NAYLER*, No. 1769, *post*.

—[*To widow & another*.—*See Nos. 1540, 1549, 1550, post*.

1452. —[Creditors.]—The ct. does sometimes grant to more creditors than one; but it prefers that one should be fixed upon.

For the credit of the ct. I trust that improper contrivances will not be resorted to for the purpose of preventing the just administration of the estate; I must, therefore, intimate to practitioners, that to follow all instructions they receive from their clients may not be creditable. The proceeding here is extraordinary—an appearance has been

entitled by the grant from the proper ct. in N. S. Wales to administer the effects of deceased.—*In the Goods of EARL* (1867), L. R. 1 P. & D. 450; 36 L. J. P. & M. 127; 16 L. T. 799.—*AUS.*

r. Deceased domiciled in America Grant to administer in New Zealand.—Deceased was domiciled at the time of his death in California. He left a widow & child, but another person, P.,

was appointed administrator of his estate. P. appointed K. as his attorney in New Zealand to apply for letters of administration of the property of deceased in New Zealand. There was no evidence before the ct. as to how P. became entitled to letters of administration of the estate of deceased in California. The estate of deceased in New Zealand was a small one:—*Held*: letters of administration should in these circumstances be

granted to K. in New Zealand.—*Re MILLNER* (1907), 26 N. Z. L. R. 466.—*N.Z.*

PART II. SECT. 11, SUB-SECT. 4.—C.

1447.1. [Whether court will grant.—General rule.]—The ct. will, on special circumstances being shown, grant a joint administration of an estate.—*Re KERNAN'S ESTATE* (1877), 3 V. L. R. 50.—*AUS.*

Sect. 11.—Letters of administration generally: Sub-sect. 4, C., D. & E. (a), (b) & (c) i.]

given for this party to pray an administration with the will annexed—the will now is brought in, & the same party appears under a protest. If he appears under a protest, I must hear him; but I must look to practitioners to satisfy themselves as to the grounds of the steps which they take (*per Cur.*).—**HARRISON v. ALL PERSONS IN GENERAL** (1815), 2 Phillim. 249; 161 E. R. 1134.

1453. — Separate attorneys appointed by next of kin.]—Testator left three next of kin, one of whom was resident in Calcutta, & another at New York. These two each nominated an attorney in this country for the purpose of taking a grant. The ct. however refused to make a joint grant to these attorneys.—*In the Goods of SHEPHERD* (1872), 26 L. T. 404; 36 J. P. 536.

1454. Grounds for granting or refusing—Application by daughter of deceased to be joined with son.]—**LEGGATT v. LEGGATT** (1753), 1 Lec. 348; 161 E. R. 129.

1455. — Application by married daughter to be joined with two sons.]—The application of a married sister to be joined in an administration with her two brothers, overruled.—**DAMPIER v. COLSON** (1812), 2 Phillim. 54; 161 E. R. 1076.

1456. — Consent of next of kin—Some of next of kin minors.]—The consent of next of kin, who are minors, & some of them of tender years, is not sufficient to justify the ct. in making a joint grant of administration to the widow & one of the other next of kin, unless there are special circumstances for departing from the general practice of the ct.—*In the Goods of NEWBOLD* (1866), L. R. 1 P. & D. 285; 36 L. J. P. & M. 14; 15 L. T. 248; 15 W. R. 202.

Annotation:—Distsd. In the Goods of Dickinson (1891), 64 L. T. 808.

1457. — Testator's wish for business to be carried on by widow & two sons.]—A man who died intestate left a testamentary paper which he had signed, but which was not duly executed, in which he expressed a wish that his property should be divided equally between his wife & his five children, & that his business should be carried on by his wife & his two elder sons, whom he appointed his exors. All the children were of full age except the youngest, who was twenty years & six months old, & all the persons interested were desirous that a joint grant of administration should be made to the widow & the two elder sons:—*Held*: there were special circumstances to justify the ct. in making a joint grant as prayed.—*In the Goods of DICKINSON*, [1891] P. 292; 60 L. J. P. 94; 64 L. T. 808.

D. Persons having no Interest.

1458. General rule.]—Where there is an estate the ct. will not grant administration to a person who has no interest, even though the legatees desire it.

Where there has been only a trust the ct. has occasionally made such a grant (**LORD PENZANCE**).

The exor. being dead, the persons entitled to administration were four young ladies. There being many trusts to discharge, they were anxious that the administration should be granted to their attorney but the ct. declined to make the grant.—

PART II. SECT. 11, SUB-SECT. 4. —D.

1458 i. General rule.]—*In the Goods of GIBRON* (1858), 30 L. T. O. S. 353.—**IR.**

PART II. SECT. 11, SUB-SECT. 4. —E. (a).

1465 i. Prior claim—General rule.]—**HARDING v. HOWELL** (1889), 14 App. Cas. 307.—**AUS.**

In the Goods of BULLAR (1870), 39 L. J. P. & M. 26; 22 L. T. 140; 34 J. P. 264.

Annotation:—Consd. In the Goods of Hale (1874), L. R. 3 P. & D. 207.

1459. Where next of kin renounce—Grant to person entitled after next of kin.]—Administration granted to the nephew on the renunciation of his father, the brother & sole next of kin of the deceased.—*In the Goods of KEANE* (1828), 1 Hag. Ecc. 692; 162 E. R. 721.

Annotations:—Consd. In the Goods of Cookson (1841), 5 Jur. 1041. *Fold. In the Goods of Johnson* (1862), 2 Sw. & Tr. 595. *Refd. In the Goods of Brotherton*, [1901] P. 139. *Mentd. In the Goods of Burrell* (1858), 1 Sw. & Tr. 64.

1460. — —.]—The next of kin of deceased intestate, were very old & infirm; they had renounced their right to administration in favour of a nephew of deceased. The ct. on motion granted the administration to such nephew.—*In the Goods of WYNNE* (1850), 16 L. T. O. S. 85.

1461. — —.]—In case of an intestacy, where the persons who are sole next of kin & the only persons entitled in distribution renounce their title to administration, the ct. will make the grant to a person who would have been next of kin if the sole next of kin had been out of the way, although such person has no interest.—*In the Goods of JOHNSON* (1862), 2 Sw. & Tr. 595; 7 L. T. 337; 64 E. R. 1128.

Annotations:—Fold. In the Goods of Trigg, [1901] P. 42. *Refd. In the Goods of Allen* (1864), 34 L. J. P. M. & A. 1.

1462. — —.]—Administration granted to person without interest.—*In the Goods of COOKSON* (1841), 5 Jur. 1041.

1463. — —.]—The ct. granted administration to a person who had no interest in the estate of an intestate, where the only next of kin, the sole person entitled in distribution, had renounced the right to the grant.—*In the Goods of TRIGG*, [1901] P. 42; 69 L. J. P. 47; 82 L. T. 626; 44 Sol. Jo. 329.

1464. Under Domicile Act, 1861 (c. 121), s. 4—Death of foreigner—Consul of foreign state.]—General grant of administration was made to the Japanese consul of the goods of a Japanese subject, who had died a bachelor & intestate, leaving no person in this country entitled by the laws of Japan to take charge of & administer his estate.—*In the Goods of AIKYO* (1923), 130 L. T. 32.

Whether consent a special circumstance under Court of Probate Act, 1857 (c. 77), s. 73.]—*See Sub-sect. 5, D. (f), post.*

E. The Widower.

(a) In General.

1465. Prior claim—General rule.]—The administration of her goods belongs of right to her husband.—**OGNEL'S CASE** (1587), 4 Co. Rep. 48B; 76 E. R. 1000.

Annotations:—Refd. Jones v. Roe (1628), W. Jo. 175; *Harding v. Howell* (1889), 14 App. Cas. 307. *Mentd. Anon.* (1584), Owen, 3; *Lillingston's Case* (1608), 7 Co. Rep. 38 a; *Clay & Barnett's Case* (1613), Godb. 236; *Stukeley v. Butler* (1614), Hob. 168; *Chambrlaine v. Turner* (1628), Cro. Car. 129; *Robins v. Warwick* (1661), 1 Keb. 72; *Manby v. Scott* (1663), 1 Keb. 337; *Dixon v. Harrison* (1669), Vaugh. 36; *Witherhead v. Harrison* (1670), T. Jo. 2; *Shuttleworth v. Garnett* (1688), Carth. 90; *Hool v. Bell* (1696), 1 Ld. Raym. 172; *St David's (Bp.) v. Lucy* (1699), 1 Salk. 134; *Longman v. Fenn* (1791), 1 Hy. Bl. 541; *Prescott v. Boucher* (1832), 3 B. & Ad. 849; *Thomas v. Sylvester* (1873), L. R. 8 Q. B. 368; *Aspden v. Seddon*, *Preston v. Seddon* (1876), 46 L. J. Q. B. 353; *Re Herbage Rents, Greenwich, Charity Comrs. v. Green*, [1896] 2 Ch. 811.

s. Necessity for grant.]—On the death of a married woman, married since *Married Women's Property Act*, 1882, the husband is entitled, *jure mariti*, to chattels real to which deceased was entitled for her separate use, & o

1466. ———.]—**STONER v. GIBBONS** (1616), Moore, K. B. 871; Hob. 81; 72 E. R. 963.

Annotations:—Mentd. Sparkes v. Crofts (1696), 1 Ld. Raym. 265; Martin v. Wyvill (1722), 1 Stra. 492; Vaughan v. Brown (1739), 7 Mod. Rep. 274; Wagner v. Imbrie (1851), 6 Exch. 380; Solomon v. Graham (1855), 24 L. J. Q. B. 332.

1467. ———.]—If a *feme covert* die intestate, the ordinary is compellable to grant administration *de jure* of her goods & chattels to her husband or his representatives.—**JOHNS v. ROWE** (1628), Cro. Car. 106; 79 E. R. 694; *sub nom.* **JONES v. ROE**, W. Jo. 175.

Annotation:—Refd. Harding v. Howell (1889), 14 App. Cas. 307.

1468. ———.]—The administration of the goods of a *feme covert* ought to be granted to the husband for he is the next & nearest friend.—**ANON.** (1628), 3 Salk. 21; 91 E. R. 667.

1469. ———.]—**BACON v. BRYANT**, No. 1503, *post*.

1470. ——— **Priority to parents.**]—**ANON.** (1669), 1 Sid. 409; 82 E. R. 1185.

1471. **Where testatrix domiciled abroad—Husband taking no interest under foreign law.**]—*In the Goods of FREREJEAN*, No. 1440, *ante*.

1472. ——— **Husband not entitled to first right under foreign law.**]—*In the Goods of BABIN*, No. 1442, *ante*.

1473. **Extent of right—Deceased wife a legal personal representative.**]—A married woman who was surviving legal personal representative of testator, in exercise of a power reserved to her by her marriage settlement, made her will & appointed her husband sole exor. The husband proved the will, & also obtained letters of administration to all other his wife's personal estate. He also applied for supplemental letters of administration, to enable him to continue the chain of representation to testator; but they were refused by the Ct. of Probate.

The ct. made an order, appointing the husband trustee of the trust funds which were standing in testator's name, & vesting in him the right to transfer them.—*Re HERBERT'S WILL* (1860), 8 W. R. 272.

(b) *Right to Administration with Will Annexed.*
See Sect. 12, sub-sect. 1, *post*.

(c) *Where Widower dies or does not administer.*
i. *In General.*

1474. **Death of widower without administering—Who entitled to administer—Whether next of kin of wife or representative of widower.**]—Administration of the wife's goods to the exor. of the husband, who died without taking administration to her.—**REES v. CART** (1719), 2 Hag. Ecc. App. 161; 162 E. R. 1050; *sub nom.* **CART v. REES**, cited 1 P. Wms. 381.

Annotations:—Consd. Squib v. Wyn (1717), 1 P. Wms. 378. *Apld.* Betts v. Klinton (1831), 2 B. & Ad. 273. *Consd.* Smart v. Tranter (1890), 43 Ch. D. 587. *Refd.* Humphreys v. Bullen (circa 1750), 2 Eq. Cas. Abr. 446; *In the Goods of Bryant*, [1896] P. 159.

1475. ——— **Chose in action not reduced into possession.**]—A legacy to a wife not received by her or her husband, nor administration taken to the wife by the husband; his exor. & not the next of kin to have administration to the wife.—**PLAIDEL v. HOWE** (1723), 2 Hag. Ecc. App. 164; 162 E. R. 1052.

Compare Nos. 1493, 1494, *post*.

which she has not disposed, & administration is unnecessary to perfect his title.—*Re EVANS' ESTATE*, [1910] 1 I. R. 95; 44 I. L. T. 88.—**IR.**
t. *Sale by husband—Consent of official guardian.*—*Re HART'S ESTATE J.*—VOL. XXIII.

1476. ———.]—**BACON v. BRYANT**, No. 1503, *post*.

1477. ———.]—An original administration to a *feme covert* decreed to her next of kin in preference to the representative of the husband who survived her.—**HOLE v. DOLMAN** (1736), 2 Hag. Ecc. App. 165; 162 E. R. 1052.

Annotation:—Distd. Savage v. Blythe (1796), 2 Hag. Ecc. App. 150.

1478. ———.]—The husband's right of administration to his wife is transmissible to his representative, & shall not go to hers.—**ELLIOT v. COLLIER** (1747), 1 Wils. 168; 3 Atk. 526; 1 Ves. Sen. 15; 95 E. R. 554, L. C.

Annotations:—Refd. A.-G. v. Partington (1864), 3 H. & C. 193; *Re Lambert's Estate*, Stanton v. Lambert (1888), 39 Ch. D. 626; Elliot v. North, [1901] 1 Ch. 424.

1479. ———.]—There is no difference between the first administration & the administration *de bonis*. If the husband forgets to administer & dies, the next of kin will have the administration (*per cur.*).—**WALTON v. JACOBSON** (1765), 1 Hag. Ecc. 346; 162 E. R. 609.

Annotation:—Distd. Savage v. Blythe (1796), 2 Hag. Ecc. App. 150.

1480. ———.]—**REECE v. STRAFFORD** (1800), 1 Hag. Ecc. 347; 162 E. R. 609.

1481. ——— **Where widower takes no interest.**]—**FIELDER & FIELDER v. HANGER**, No. 1497, *post*.

1482. ——— **Administration with will annexed.**]—The legal representative of a husband deceased, who survived his wife, is entitled to a general grant of administration of her will made in virtue of a power, when there is no exor. of the wife's will to take probate, even though the husband has no interest under that will.—**DEMSEY v. KING** (1851), 2 Rob. Eccl. 397; 163 E. R. 1358.

1483. ——— **Property settled on wife's next of kin.**]—Administration to a *feme covert*, after the death of her husband who survived but took no grant, decreed to her next of kin entitled by settlement to her property.—*In the Goods of POUNTNEY* (1832), 4 Hag. Ecc. 289; 162 E. R. 1452.

1484. ——— **Property passing to wife's next of kin.**]—Husband covenanted on his marriage, that in the event of his surviving his wife his exors. or administrators should pay to her personal representatives the sum of £850 for distribution amongst her next of kin. He did survive her, & upon his death administration of the wife's estate & effects was claimed on the one hand by his exor., & on the other hand by the representative of one of her next of kin, who was also the representative of the obligee of the bond. It did not appear that the wife died possessed of any property other than the sum secured by the bond. The ct. held that the grant must follow the beneficial interest, & decreed administration to the representatives of the wife's next of kin.—**AUSTIN v. HODGES** (1860), 25 J. P. 24.

1485. ———.]—The course now in the Ecclesiastical Ct. is, in all cases where the wife has predeceased her husband, to grant to the representative of the husband alone, letters of administration to the wife. There was a time when the Ecclesiastical Cts. thought themselves justified, & even bound, to give letters of administration to the next of kin of the wife; but it was determined that the next of kin of the wife in that

(1907), 9 O. W. R. 285; 13 O. L. R. 379.—**CAN.**

PART II. SECT. 11, SUB-SECT. 4.—
E. (6) i.

1475 i. Death of widower without

administering—Who entitled to administer—Whether next of kin of wife or representative of widower—Chose in action not reduced into possession.—**SMITH v. IRWIN** (1828), 1 Ir. L. Rec. 1st ser. 302.—**IR.**

Sect. 11.—Letters of administration generally: Sub-sect. 4, E. (c) i. & ii., (d) & (e).]

case, holding such letters of administration, were only trustees for the administrator of the husband, & it was finally concluded that the right & proper course in all such cases was to grant the letters of administration only to the person who invested himself with the character of administrator of the husband (LORD HATHERLEY, C.).—*PARTINGTON v. A.-G.* (1869), L. R. 4 H. L. 100; 38 L. J. Ex. 205; 21 L. T. 370, H. L.; *affg.* S. C. *sub nom.* A.-G. *v.* *PARTINGTON* (1864), 3 H. & C. 193, Ex. Ch.

Annotations:—*Refd.* *Fleet v. Perrins* (1869), 9 B. & S. 575; *In the Goods of Harding* (1872), L. R. 2 P. & D. 394; *Smart v. Tranter* (1888), 40 Ch. D. 165. **Mentd.** *Lord v. Colvin* (1867), L. R. 3 Eq. 737; *A.-G. v. Cleave* (1873), 31 L. T. 86; *Hell v. Master in Equity of Supreme Court of Victoria* (1877), 2 App. Cas. 560; *Colquhoun v. Brooks* (1888), 21 Q. B. D. 52; *Trevor v. Hutchins*, [1896] 1 Ch. 844; *A.-G. v. De Préville*, [1900] 1 Q. B. 223; *A.-G. v. Selborne*, [1902] 1 K. B. 383; *Northumberland v. I. R. Comrs.*, [1911] 2 K. B. 343; *Dyson v. A.-G.*, [1912] 1 Ch. 158; *A.-G. v. Milne*, [1914] A. C. 765; *Drummond v. Collins* (1915), 84 L. J. K. B. 1690; *I. R. Comrs. v. Sheffield & South Yorkshire Navigation Co.*, [1916] 1 K. B. 882; *Re Abergavenny*, *Nevill v. I. R. Comrs.*, [1923] 2 K. B. 18.

1486. — — — — —. **Necessity for grant in respect of widower's estate.]—**Where the husband has survived the wife & died intestate, without administering to her estate, his next of kin must constitute themselves his legal personal representatives, before they have any claim to administer to the wife's estate.—*In the Goods of ORAUSE* (1858), 1 Sw. & Tr. 146; 31 L. T. O. S. 284; 104 E. R. 668.

Annotation:—*Refd.* *Partington v. A.-G.* (1869), L. R. 4 H. L. 100.

1487. — — — — —. **Deceased, being entitled to a legacy on the death of another person, married & died in the lifetime of her husband, who also died before the legacy had become payable, & without having taken out administration to his wife:—***Held:* the legacy formed part of the estate of the husband, & administration to deceased in respect of such legacy could only be granted to the representative of the husband.—*In the Goods of HARDING* (1872), L. R. 2 P. & D. 394; 41 L. J. P. & M. 65; 26 L. T. 668; 36 J. P. 696; 20 W. R. 615.

Annotation:—*Refd.* *In the Goods of Sergeant* (1872), 26 L. T. 669.

Compare Sub-sect. 4, E. (c), ii., *post*.

1488. — — — — —. **Property accruing after death of widower—Limited grant to next of kin of wife.]—**Deceased, a legatee under the will of her father, died in his lifetime, leaving issue living at his death. She also left a husband surviving her, who, however, died before the father, having made a will, in which he appointed exors. who took probate of the same. The ct. granted administration to the son of deceased limited to the personal estate bequeathed to her by the will of her father, & dispensed with the renunciation or citation of the surviving exor. of the will of the husband of deceased.—*In the Goods of COUNCELL* (1871), L. R. 2 P. & D. 314; 41 L. J. P. & M. 16; 25 L. T. 763; 36 J. P. 89.

Annotation:—*Fold.* *Re Allen's Trusts*, [1909] W. N. 181.

1489. — — — — —. **Grant to next of kin as at date when property accrued.]—***Re ALLEN'S TRUSTS*, [1909] W. N. 181.

1490. Where widower has disappeared—Whether notice to representatives necessary—Disappearance of husband before death of intestate.]—A married woman, whose husband was last heard of in 1853, died intestate in 1856. The ct. refused to grant administration to her next of kin without citing

the husband or his representatives.—*In the Goods of NICHOLLS* (1872), L. R. 2 P. & D. 461; 41 L. J. P. & M. 88; 27 L. T. 323; 36 J. P. 808; 21 W. R. 161.

1491. Where widower takes no steps to administer—No appearance to citation—Administration granted to son.]—Where the husband of intestate had been cited to take out letters of administration to the personal estate & effects of his wife & had entered no appearance to the citation the ct. passed him over & made a grant of administration to the only son of the intestate.—*In the Goods of MOORE*, [1891] P. 299; 60 L. J. P. 98.

Annotation:—*Refd.* *In the Goods of Harper*, [1899] P. 59.

Wife deserted.]—*See* Nos. 1512, 1513, *post*.

1492. — — — — —. **Whether entitled to notice.]—**Moneys belonging to or now vested in the mother of deceased, her daughter, were, under a misapprehension, paid into a savings bank account standing in the name of deceased, who died more than six years ago, leaving a husband, who, although he knew of the account, took no steps to obtain administration, & left this country for Hamburg & thence for America:—*Held:* the ct. would not grant letters of administration to the mother without notice to the husband.—*In the Goods of RUSCH* (1894), 42 W. R. 304; 6 R. 538.

ii. Death of Widower after Grant.

1493. Who entitled to grant de bonis non—Whether representatives of widower—Or next of kin of wife—Chose in action not reduced into possession.]—Chose in action to wife. Husband, administrator, dies without altering property, & makes a will; his administrator with will annexed takes administration *de bonis* to the wife; that administration called in by her next of kin & revoked, the property not being altered by the husband.—*KINASTON v. MILLS* (1701), 2 Hag. Ecc. App. 158; 162 E. R. 1048.

1494. — — — — —. **Estate not vested by law or equity, administration de bonis non to the next of kin.**

As it is an intestate's estate of a chose in action not recovered, it must go to the next of kin (SIR CHARLES HEDGES).—*AMHURST v. AMHURST & BAWDES* (1713), 2 Hag. Ecc. App. 158; 162 E. R. 1049.

Compare No. 1475, *ante*.

1495. — — — — —. **Administration de bonis non to a feme covert granted to the representative of the husband, administrator, in exclusion of the wife's kin.—***DARLEY v. WHADDON* (1734), 2 Hag. Ecc. App. 165; 162 E. R. 1052.

1496. — — — — —. **After the death of the husband, administrator of his wife, administration de bonis non granted to her next of kin in preference to the husband's representative.—***KINLESIDE v. CLEAVER* (1745), 2 Hag. Ecc. App. 169; 162 E. R. 1055.

Annotation:—*Distd.* *Savage v. Blytho* (1796), 2 Hag. Ecc. App. 150.

1497. — — — — —. **Administration de bonis non to a feme covert granted to the representatives of the husband, an appearance having been given & administration prayed by the next of kin of the wife; the ct. directing that though the modern practice had been otherwise, such grants should for the future pass to the husband's representatives, unless cause to the contrary was shown.**

I should have done the same if the husband had not taken out administration, unless it could be shown that he had not the interest, but that the property belonged to the wife's next of kin (*per*

CUR.—**FIELDER & FIELDER v. HANGER** (1832), 3 Hag. Ecc. 769; 162 E. R. 1339.

Annotations :—**Fold.** *In the Goods of Pountney* (1832), 4 Hag. Ecc. 289. **Consd.** *In the Goods of Dawson* (1849), 2 Rob. Ecc. 135. **Reid.** *In the Goods of Crause* (1858), 1 Sw. & Tr. 146; *Partington v. A.-G.* (1869), 21 L. T. 370. **Mentd.** *Barrs v. Jackson* (1842), 1 Y. & C. Ch. Cas. 585.

1498. — **Rule as to original administration applies.**—**WALTON v. JACOBSON**, No. 1479, *ante*.

See Sub-sect. 4, E. (c) i., ante.

Grants de bonis non generally.—**See Sect. 12, sub-sect. 2, post.**

(d) Effect of Invalid or Irregular Marriage.

1499. Marriage void.—**Marriage by a minister who is a mere layman & cohabitation will not entitle the man to administration to the woman. Qu.** : as to the woman & issue.—**HAYDON v. GOULD** (1710), 1 Salk. 119; 91 E. R. 113.

Annotations :—**Consd.** *Killott v. Gurr* (1812), 2 Phillim. 16; *R. v. Mills* (1844), 10 Cl. & Fin. 534.

1500. Effect of mere irregularity—Widower's right not affected.—When a marriage has been solemnised in a registrar's office in the presence of the registrar & deputy registrar, the presumption of law is that the requisites of Marriage Act, 1836 (c. 85), s. 21, have been complied with.

If it appeared from the evidence that such a marriage took place with closed doors it would not on that account be held to be invalid, so as to disentitle the husband after the wife's death to have administration granted to him of her effects, a marriage so celebrated not being specified in sect. 42 as one that is null & void.—**CAMPBELL v. CORLEY** (1856), 28 L. T. O. S. 109; 4 W. R. 675, P. C.; *subsequent proceedings, sub nom.* **CORLEY v. STAFFORD (LORD)**, **CAMPBELL v. CORLEY** (1857), 1 De G. & J. 238, L. JJ.

Annotation :—**Mentd.** *Sichel v. Lambert* (1864), 12 W. R. 312.

1501. — **Administration of the effects of a wife refused to the husband on the ground that his marriage has been illegally contracted.**—**BROWNING v. REANE** (1812), 2 Phillim. 69; 161 E. R. 1080.

Annotation :—**Mentd.** *Moss v. Moss*, [1897] P. 263.

1502. Marriage voidable—Objection must be taken in lifetime of parties.—The next of kin of a married woman are not at liberty to question her husband's right to administer to her estate on the ground of the nullity of the marriage by reason of the impotence of the husband.—**A. v. B.** (1868), L. R. 1 P. & D. 559; 17 W. R. 14; *sub nom.* **P. v. S.**, 37 L. J. P. & M. 80; *sub nom.* — **v. —**, 19 L. T. 22; 32 J. P. 743.

Annotation :—**Mentd.** *Halpin (otherwise Boddington) v. Boddington* (1881), 29 W. R. 444.

Validity of marriage generally.—**See HUSBAND & WIFE.**

(e) Effect of Divorce or Desertion.

1503. Divorce—On wife's petition—Widower not entitled.—(1) A woman, whose marriage had been dissolved on the ground of her husband's adultery & desertion, died intestate, leaving issue of the marriage one child, a minor. The ct. decreed administration to the grandmother of the child, passing by the father, upon a copy of the decree dissolving the marriage being filed, & also copies of letters from him showing that he was unfit to take the grant.

(2) In a grant of administration of the effects of a divorced woman the name by which deceased should be described in the grant is that by which she was known at the time of her death.—*In the Goods of HAY* (1865), L. R. 1 P. & D. 51; 35

L. J. P. & M. 3; 13 L. T. 335; 11 Jur. N. S. 936; 14 W. R. 147.

1504. — **A husband or wife surviving the other spouse has, after the dissolution of the marriage, no such interest in the estate of the other spouse as to entitle him or her to a grant of administration, & will be passed over without citation.** The same principle applies whether the party to be passed over has been petitioner or resp. in the proceedings for dissolution of marriage. In such a case there must, however, be justifying security.—*In the Estate of WALLAS*, [1905] P. 320; 75 L. J. P. 8; 94 L. T. 102; 54 W. R. 172.

1505. Desertion by husband—& protection order obtained under Matrimonial Causes Act, 1857 (c. 85), s. 21—To whom administration granted.—*In the Goods of WORMAN*, No. 1509, *post*.

1506. — **Where the wife had obtained a magistrate's order protecting her property & earnings, since Apr. 1851, & died intestate, leaving minor children, the ct. granted administration to the uncle of the children, elected by them guardian for the purpose, though the husband was alive.**—*In the Goods of WEIR* (1862), 2 Sw. & Tr. 451; 31 L. J. P. M. & A. 88; 6 L. T. 131; 26 J. P. 375; 8 Jur. N. S. 393; 164 E. R. 1071.

Annotations :—**Fold.** *In the Goods of Stephenson* (1866), 36 L. J. P. & M. 20. **Reid.** *In the Goods of Burchmore* (1873), 37 J. P. 792.

1507. — **Whether citation of husband necessary.**—In order to obtain administration of the effects of a married woman who dies intestate after obtaining a protection order from the Ct. of Divorce [under Matrimonial Causes Act, 1857 (c. 85), s. 21], it is not necessary that the husband should be cited.—*In the Goods of BRIGHTON* (1865), 34 L. J. P. M. & A. 55; 29 J. P. 503.

1508. — **Where a married woman, living separate from her husband, having obtained a protection order [under Matrimonial Causes Act, 1857 (c. 85), s. 21], died, leaving him & a minor son her surviving, the ct. made a grant of administration of her effects to a guardian elected by the son for his use & benefit without citing the father, requiring justifying securities.**—*In the Goods of STEPHENSON* (1866), L. R. 1 P. & D. 287; 36 L. J. P. & M. 20; 15 L. T. 296; 15 W. R. 286.

Annotation :—**Reid.** *In the Goods of Jones* (1904), 71 L. J. P. 27.

1509. — **Form of grant.**—Upon the death, in the lifetime of her husband, of a married woman, intestate, who has obtained a protection order under above sect. on the ground of the desertion of her husband, administration will be granted to her next of kin, limited to such property as she may have become possessed of since the commencement of the desertion. Such grant must be in general terms, & must not include specific property.—*In the Goods of WORMAN* (1859), 1 Sw. & Tr. 513; 29 L. J. P. M. & A. 164; 5 Jur. N. S. 687; 164 E. R. 838.

1510. — **Protection order under Summary Jurisdiction (Married Women) Act, 1895 (c. 39)—Whether citation of husband necessary.**—When a married woman has obtained an order under above Act, sect. 5 (a), a general grant with justifying sureties may be made to her estate passing over her husband without citing him.—*In the Goods of JONES* (1904), 74 L. J. P. 27; *subsequent proceedings* (1905), 74 L. J. P. 164.

1511. — **Form of grant.**—In this case, on application in the Probate Registry to draw up the order objection was taken that the grant made in ct. exceeded the terms of sect. 25 of the Matrimonial Causes Act, 1857 (c. 85), & the order as finally drawn up was limited in the

Sect. 11.—Letters of administration generally: Sub-sect. 4, E. (e), (f), (g) & (h) & F. (a).]

ordinary form to property acquired by deceased since the date of the separation order.—*In the Goods of JONES* (1905), 74 L. J. P. 164.

1512. — Husband not heard of for many years—Discretion of court under Court of Probate Act, 1857 (c. 77), s. 73.]—Upon an application for administration with the will annexed, it appeared that testatrix has been deserted by her husband fifteen years prior to her death, & had not heard of or from him after such desertion.

The ct. passed over the husband without citation of any kind, & granted administration with the will annexed under above sect. to a son of testatrix, who by the will was nominated trustee & manager of a certain partnership interest which represented substantially the whole of the estate of testatrix.—*In the Goods of SHOOSMITH*, [1894] P. 23; 63 L. J. P. 64; 70 L. T. 809; 6 R. 567. *Annotation:—Distd. In the Goods of Callicott* (1899), 68 L. J. P. 67.

1513. — — — — —]—The ct. passed over the husband of testatrix without citation, & granted administration with the will annexed to her daughter where it appeared that the husband of testatrix had left her many [twenty-five] years before her death, & had never since been heard of, the daughter swearing that she believed herself to be the sole next of kin.—*In the Goods of BYRNE* (1901), 84 L. T. 570; 17 T. L. R. 452.

1514. — — — — — Whether citation of husband necessary.]—*In the Goods of SHOOSMITH*, No. 1512, *ante*.

1515. — — — — —]—*In the Goods of BYRNE*, No. 1513, *ante*.

See, also, Nos. 1490, 1491, *ante*.

1516. Husband petitioner in divorce proceedings.]—*In the Estate of WALLAS*, No. 1504, *ante*.

1517. Husband respondent in divorce proceedings.]—*In the Estate of WALLAS*, No. 1504, *ante*.

(f) Effect of Separation Deed.

1518. Whether widower must be cited—Husband's claims to wife's property resigned.]—*Qu.*: whether a husband who, by a deed of separation, has resigned all claim to the property of his wife is thereby excluded upon her death, in his lifetime, from taking any interest as her representative. In such a case the ct. will not grant administration to the next of kin of the wife unless the husband be cited.—*In the Goods of ORANMORE & BROWNE (LORD)* (1861), 30 L. J. P. M. & A. 183; 25 J. P. 504.

1519. — — — — — Right of administration not specifically excluded—Law of foreign domicile applied.]—*In the Goods of PROBART*, No. 1441, *ante*.

1520. — — — — — Payments to wife under deed in arrear.]—A married woman executed a deed of separation, which provided that on her death her property should go as though her husband were already dead, & died while the deed was alleged to be still in operation, & while the husband was said to be largely indebted to the estate of deceased for payments due under the deed:—*Held*: letters of administration ought not to be granted to deceased's next of kin without citing the husband, on the ground that he might dispute the deed.—*In the Goods of MEGSON* (1899), 80 L. T. 295.

1521. — — — — — Separate property acquired under deed—Grant limited to property under the deed.]—

A husband agreed by deed of separation that if his wife died intestate her next of kin should be entitled to her property. She died intestate, leaving separate property of which she had become possessed by virtue of the deed, & the ct., notwithstanding that the husband objected, granted letters of administration to her father limited to that property.—*In the Goods of HUMPHREYS, ALLEN v. HUMPHREYS* (1882), 8 P. D. 16; 52 L. J. P. 24; 48 L. T. 125; *sub nom.* HUMPHREYS v. ALLEN, 47 J. P. 24; 31 W. R. 292.

Annotation:—Reid. In the Goods of Megson (1899), 80 L. T. 295.

1522. — — — — — Right of administration specifically excluded.]—Deceased intestate was a married woman, living apart from her husband, &, by the deed of separation, the husband covenanted, in the case of the wife's death, to allow administration to go as if he were dead. She left two children minors, who elected their maternal grandmother as their guardian for the purpose of taking a grant. The ct., notwithstanding the husband's covenant, declined to make a grant to the grandmother without citing the father.—*In the Goods of PIGOTT* (1873), 42 L. J. P. & M. 77; 29 L. T. 45; 37 J. P. 616; 21 W. R. 823.

(g) Effect of Protection Order.

See Matrimonial Causes Act, 1857 (c. 85), s. 21; Summary Jurisdiction (Married Women) Act, 1895 (c. 39).

1523. Under Summary Jurisdiction (Married Women) Act, 1895 (c. 39)—Whether husband must be cited.]—*In the Goods of JONES*, No. 1510, *ante*.

1524. — — — — — Form of grant.]—*In the Goods of JONES*, No. 1511, *ante*.

Under Matrimonial Causes Act, 1857 (c. 85), s. 21—*After* desertion.]—*See* Nos. 1506–1509, *ante*.

(h) Effect of Bankruptcy of Widower.

1525. Grant to widower's trustee—Widower not appearing to citation—Discretionary grant under Court of Probate Act, 1857 (c. 77), s. 73.]—Deceased intestate was a married woman, & at her death was entitled to a share in the residuary estate of her grandmother. Her husband after her death became a bkpt., but refused to renounce administration, & did not appear to a citation issued on behalf of his trustee in bkpcy. The ct. under above sect. made a grant of letters of administration to the trustee in bkpcy., limited to deceased's share of the residuary estate of her grandmother.—*TILLEY v. TRUSSLER* (1878), 42 J. P. 584; 26 W. R. 760.

1526. — — — — — Whether as of right—Discretionary grant under Court of Probate Act, 1857 (c. 77), s. 73.]—A husband's right to administer to his wife's estate is not such a right as will vest in the trustee under his bkpcy. Where the husband of deceased intestate had left this country & had been adjudicated bkpt. before he had administered to his wife's estate the ct. refused to regard his right to administer as property divisible among his creditors under Bkpcy. Act, 1883 (c. 52), s. 44, but made a grant of administration to the wife's estate to the trustee, under above sect.—*In the Goods of TURNER* (1886), 12 P. D. 18; 56 L. J. P. 41; 57 L. T. 372; 35 W. R. 384.

Annotations:—Folld. In the Goods of Conolly (1896), 74 L. T. 461. *Reid. In the Goods of Morgan* (1896), 75 L. T. 190.

1527. Whether widower must be cited—Wife's estate small.]—In a case of the estate of a married

PART II. SECT. 11, SUB-SECT. 4.—E. (i).

a. General rule.]—The ct. will grant administration of the estate of a married woman to her husband, although they had by agreement lived separate for several years.—*Re WHITNEY'S ESTATE* (1885), 11 V. L. R. 752.—**AUS.**

woman who had died intestate, leaving her husband, who survived her, an undischarged bkpt., whose estate was vested in the hands of the Chief Official Receiver in Bkpcy., under the Bkpcy. Act, 1883 (c. 52), s. 121, the ct., upon motion by the Chief Official Receiver, made a grant to him of the personal estate & effects of deceased intestate & on account of the smallness of the estate dispensed with any citation upon the husband or deceased, & as the administrator applied in his official capacity, accepted the administrator's personal bond without sureties.—*In the Goods of CONOLLY* (1896), 74 L. T. 461.

1528. *S. P. In the Goods of ADAMS* (1896), 74 L. T. 462, n.

1529. ——— **Assets claimed for bankrupt's creditors.**—One of the official receivers in bkpcy., as trustee of the estate of the husband of deceased intestate, applied for administration without citing the husband. The amount of the estate was £105 2s. 10d., which was claimed by the official receiver on behalf of the creditors of the bkpt.:—*Held*: notice of some kind must be given to the husband, but upon the registrar being satisfied as to this, the grant might go, & as appct. moved in his official capacity, sureties might be dispensed with.—*In the Goods of MORGAN* (1896), 75 L. T. 190.

F. The Widow.

(a) In General.

See 21 Hen. 8, c. 5, s. 3; Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 102; Administration of Estates Act, 1925 (c. 23), s. 46.

1530. **As between widow & next of kin—Discretion of court.**—Administration may be granted to the next of kin or to the wife.—*ANON.* (1692), 12 Mod. Rep. 16; 88 E. R. 1135.

1531. ———.]—21 Hen. 8, c. 5, s. 3, leaves it to the discretion of the ordinary to grant administration to the widow or the next of kin.—*DEW v. CLARK & CLARK* (1828), 1 Hag. Ecc. 311; 162 E. R. 596.

Annotation:—*Consd.* *Fritchley v. Fritchley* (1867), 16 L. T. 267.

1532. ———.]—The grant of administration to the widow is discretionary, & the next of kin may be preferred, sufficient cause, in this case, the lunacy of the widow being shown, but the ct. called for an inventory & directed the securities to justify.—*In the Goods of WILLIAMS* (1830), 3 Hag. Ecc. 217; 162 E. R. 1136.

Annotation:—*Fold.* *In the Goods of Anderson* (1864), 3 Sw. & Tr. 489.

1533. ———.]—On a petition respecting the grant of administration, the asserted widow having married, during deceased's lifetime, another man since convicted of felony, had a daughter by him, & continuing to cohabit with him, the ct. granted administration to the sister & condemned the widow in costs.—*CONYERS v. KITSON* (1831), 3 Hag. Ecc. 556; 162 E. R. 1262.

Annotation:—*Consd.* *Brown v. Brown* (1854), 1 Ecc. & Ad. 423.

1534. ———.]—Administration, in the exercise of the discretion of the ct., granted to a brother of deceased, entitled in distribution to one-fourth of the estate, in preference to the widow entitled to a moiety, the remaining parties in distribution being infants of tender years, & misconduct being imputable to the widow, who also claimed to be a creditor on deceased's estate.

The question is who is entitled to the grant of administration? According to the practice of this ct. the rule is to grant it to the widow; undoubtedly, however, it is in the discretion of the ct. to grant it to the brother (*SIR H. JENNER FUST*).—*CHAPPELL v. CHAPPELL* (1843), 3 Curt. 429; 7 Jur. 243; 163 E. R. 780.

Annotation:—*Consd.* *Brown v. Brown* (1854), 1 Ecc. & Ad. 423.

1535. ———.]—Where the widow of deceased intestate was of unsound mind, administration granted to a brother of deceased.

The Act of Parliament gives a discretion to the ct. to grant the administration to the widow or to the next of kin. It is always accustomed to give priority to the widow to accept or refuse administration, or to show cause why it should not be granted to the next of kin (*SIR H. JENNER FUST*).—*In the Goods of DUNN* (1846), 5 Notes of Cases, 97.

1536. ———.]—For sufficient cause, e.g. the misconduct of the widow in having eloped from her husband & lived in adultery, the ct. will grant administration to the next of kin in preference to the widow.—*In the Goods of ANDERSON* (1864), 3 Sw. & Tr. 489; 33 L. J. P. M. & A. 149; 11 L. T. 21; 28 J. P. 600; 164 E. R. 1365.

Annotations:—*Fold.* *In the Goods of Hodder* (1873), 28 L. T. 368; *In the Goods of Stevens*, [1898] P. 126.

1537. ——— **Whether creditor's wishes considered.**—(Creditors have no right to interpose in the grant of an administration between a widow & the next of kin: the practice is to grant administration to a widow, unless some objection exists against her.—*STRETCH v. PYNN* (1752), 1 Lee, 30; 161 E. R. 13.

1538. ——— **Equal right to grant.**—(1) The next of kin of an intestate has by law the same title to administration as has the widow, though, under ordinary circumstances, the practice is to make the grant to the widow. Therefore, under Court of Probate Act, 1857 (c. 77), s. 73, which gives the ct. a discretion to grant administration to a person other than the one entitled to the grant, administration cannot be granted to the next of kin, passing by the widow.

(2) A person who is entitled to administration as next of kin cannot take the grant as a creditor.—*In the Goods of COUSER* (1859), 31 L. J. P. M. & A. 170; 23 J. P. 263.

1539. **Exercise of court's discretion—Widow usually preferred.**—*STRETCH v. PYNN*, No. 1537, *ante*.

1540. ———.]—(1) Widow usually preferred to the next of kin in a grant of administration notwithstanding her having married again.

(2) Next of kin being also a creditor, a reason against his being preferred in a contest for the administration, either with the widow or probably any other next of kin.—*WEBB v. NEEDHAM* (1823), 1 Add. 494; 162 E. R. 175.

Annotation:—*As to* (2) *Refd.* *John v. Bradbury* (1866), 31 J. P. 23.

Annotation:—*Consd.* *CHAPPELL v. CHAPPELL*, No. 1534, *ante*.

1542. ———.]—*In the Goods of DUNN*, No. 1535, *ante*.

1543. ———.]—*In the Goods of COUSER*, No. 1538, *ante*.

1544. ——— **Though intestacy successfully set up by next of kin.**—(1) Where in a testamentary suit a next of kin, who resisted probate

PART II. SECT. 11, SUB-SECT. 4.—F. (a).

b. *As between widow & next of kin—Unborn child only next of kin.*—When intestate dies leaving a widow

& child *en ventre sa mere*, letters of administration may be granted to the widow, upon an affidavit verifying her pregnancy, & stating that the unborn child is the only next of kin of intestate; this entitling the ad-

ministratrix to the issue of the letters.—*Re KERSHAW* (1878), 4 V. L. R. 62.—*AUS.*

Widow generally pre-granting administration

Sect. 11.—Letters of administration generally: Sub-sect. 4, F. (a), (b), (c) & (d).]

on the ground of undue execution, proceeded to trial, despite of notice by the exor., that it was not intended to support the will, the ct. refused to allow him costs out of the estate, other than such as the registrar, having regard to the duty cast upon him, might think reasonable.

(2) The disposition of the ct. is to grant administration to the party who has upset a will, provided it has the discretion, & testator has left no other will; but, in the absence of special circumstances, it refused to pass over a widow in favour of a next of kin who established the intestacy.—*FRITCHLEY v. FRITCHLEY* (1867), 16 L. T. 267.

1545. — Unless strong case of unfitness made out.]—The ct. will not exercise its discretion given by 21 Hen. 8, c. 5, s. 3, to pass over the widow of deceased & grant administration to the next of kin, unless a very strong case of unfitness is made out against her.—*In the Goods of CORY* (1901), 84 L. T. 270.

1546. — Preference extends to committee of lunatic widow.]—A. died intestate, without child or parent, leaving his widow, his brother & others entitled in distribution, him surviving. The widow became lunatic, & a committee of her person & estate was appointed by the Ct. of Ch. On the question of grant of administration:—*Held*: the ordinary preference exercised by the discretion of the ct. in favour of the widow would extend to such committee, unless the next of kin could show special cause to the contrary.

The practice in the registry is to make the grant to the committee of the widow without citing the next of kin; the ct. is not bound by that practice, but may, where the next of kin appears & shows sufficient reason, grant administration to them (*SIR JOHN DODSON*).—*ALFORD v. ALFORD* (1857), Dea. & Sw. 322; 20 L. T. O. S. 284; 3 Jur. N. S. 990; 164 E. R. 590.

1547. — In favour of next of kin—Jurisdiction to grant under Court of Probate Act, 1857 (c. 77), s. 73.]—*In the Goods of CORSEY*, No. 1538, *ante*.

1548. Joint administration—To widow & next of kin—Whether granted—Next of kin also a creditor.]—*WEBB v. NEEDHAM*, No. 1540, *ante*.

1549. — With widow—Who may be joined.]—(1) Under 21 Hen. 8, c. 5, s. 3, a person who is not next of kin of an intestate cannot be joined in a grant of administration to the widow.

(2) Where the estate was large, & required the management of a person conversant with business, & all persons interested consented to a joint grant of administration being made to the widow, & a person entitled in distribution, but not next of kin, the ct. refused to make such a grant under Court of Probate Act, 1857 (c. 77), s. 73.—*In the Goods of BROWNING* (1861), 2 Sw. & Tr. 634; 31 L. J. P. M. & A. 161; 7 L. T. 217; 10 W. R. 96; 164 E. R. 1144.

1550. — Circumstances justifying grant.]—Deceased died intestate leaving a widow & several minor children by a former wife. During his lifetime he had been assisted in his business by his brother. On the other hand, his widow, to whom he had been married but a short time, was entirely unacquainted with its management. These circumstances were held not to be sufficient

to authorise the ct. to grant a joint administration to the widow & to the brother as guardian of the minor children.—*In the Goods of RICHARDS* (1871), L. R. 2 P. & D. 216; 40 L. J. P. & M. 29; 24 L. T. 142; 35 J. P. 311; 19 W. R. 449.

See, generally, Sub-sect. 3, C., ante.

1551. Effect of grant—Husband dying without administering to estate of former wife—Necessity for de bonis grant.]—Administration of the effects of a former wife of party deceased intestate, refused to the representative of the second wife (widow) deceased, in the first instance, without a decree against the next of kin of the husband.

Wherever the representative of the administratrix of the husband applies for administration to the first wife, the husband cannot be passed over; there must be a representation to him *de bonis non*. There should be a representation of the husband in the first instance, & then his representative would be entitled to a grant of administration to the first wife, who was the possessor of the property; these party are entitled in the first instance (*SIR H. JENNER*).—*In the Goods of SOWERBY* (1841), 2 Curt. 852; 1 Notes of Cases, 107; 163 E. R. 607.

Annotation:—*Reid. A.-G. v. Partington* (1864), 3 H. & C. 193.

1552. — Whether cessate—Remarriage of widow.]—Where administration with will had been granted to the widow of deceased, as one of the residuary legatees not in terms limited during widowhood, & she married continuing to administer the effects after her second marriage, the ct. held that the grant was not a cessate grant; but altered the practice in future, so that the grant in such cases should continue during widowhood only.—*In the Goods of TEED* (1850), 7 Notes of Cases, 384; 14 Jur. 401.

1553. Where husband marries twice—First wife divorced.]—Administration granted to a second wife, the first having been divorced *a vinculo* by a royal ordinance in Denmark, the parties divorced being both Danish subjects.—*RYAN v. RYAN* (1816), 2 Phillim. 332; 161 E. R. 1161.

1554. — First wife dead—Estate of former wife unadministered—Necessity for de bonis grant to husband's estate.]—*In the Goods of SOWERBY*, No. 1551, *ante*.

1555. — Reversionary property of first wife coming into possession after husband's death—Who entitled to grant.]—A. died in 1831, being at the time of her death entitled to the reversion of a share of £200, leaving B., her husband, & several children by him her surviving. The husband subsequently married C. & died in 1832 intestate, leaving C. & several children by his two marriages him surviving. D., a creditor, took out administration to his effects. In 1857, A.'s reversion came into possession; D. renounced his right to administer to A.'s estate. On application to the ct. to grant administration of it to C. as B.'s relict:—*Held*: the children of A. & not C., were entitled to the administration.—*In the Goods of BELL* (1859), 1 Sw. & Tr. 288; 29 L. J. P. M. & A. 162; 33 L. T. O. S. 61; 5 Jur. N. S. 473; 7 W. R. 349; 164 E. R. 733.

(b) Effect of Death or Remarriage.

1556. Effect of death—Before proving husband's will—Who entitled to administer.]—If a husband died, leaving his wife his extrix., & she dies before

to the estate of an intestate the widow is generally preferred to the next of kin.—*Re SILL'S ESTATE* (1886), 12 V. L. R. 276.—*AUS.*
d. —.—*Re DRAGON* (1880), 8

P. R. 330.—*CAN.*

e. *Sufficiency of interest of u*
The widow of intestate entitled under Intestates' Estates Act, 1890, to a charge for £500 upon his real &

personal estate, has a sufficient interest in the real estate to entitle her to maintain an action for administration.—*M'FERRAN v. M'FERRAN*, [1897] 1 I. R. 66.—*IR.*

probate, administration of the husband's effects must be to the next of kin of the husband & not the next of kin of the wife.—*HARRIS'S CASE* (1676), 2 Mod. Rep. 101; 86 E. R. 965.

1557. — Before grant—Husband's effects under five hundred pounds—Who entitled to grant.]—A husband died intestate, without issue, leaving a widow. His estate did not exceed £500. Subsequently his widow died intestate without having taken out letters of administration to her husband. Letters of administration to the widow's estate were granted to her sister, who thereupon applied for letters of administration to the husband's estate:—*Held*: as the widow was entitled to the whole of her husband's estate, letters of administration would be granted without citing the next of kin.—*In the Goods of GREEN* (1901), 84 L. T. 61; 17 T. L. R. 242; 45 Sol. Jo. 260.

1558. Effect of remarriage—Before grant—Whether disqualification.]—*WEBB v. NEEDHAM*, No. 1540, *ante*.

1559. — After grant.]—*In the Goods of TEED*, No. 1552, *ante*.

(c) *Effect of Immorality or Divorce.*

1560. Widow guilty of adultery.]—*FLEMING v. PELHAM* (1807), 3 Hag. Ecc. 217, n.; 162 E. R. 1136, n.

1561. — With felon.]—*CONYERS v. KITSON*, No. 1533, *ante*.

1562. —.]—*CHAPPELL v. CHAPPELL*, No. 1534, *ante*.

1563. —.]—*In the Goods of ANDERSON*, No. 1536, *ante*.

1564. —.]—Where the widow of an intestate, whose estate was small, was shown to have been a woman of dissipated habits, who had eloped with another man sixteen years before the application & had not since been heard of, the ct. made a grant of administration to the only son of the intestate, without the citation of the widow.—*In the Goods of STEVENS*, [1898] P. 126; 67 L. J. P. 60; 78 L. T. 389; 14 T. L. R. 327.

Annotation:—*Follid. In the Estate of WALLAS*, [1905] P. 326.

1565. —.]—It is not the practice of the ct. to pass over the widow of intestate & to grant letters of administration to the next of kin without citing her, even when allegations of grave misconduct are made against her. But where misconduct has been clearly established against her in a matrimonial suit brought by intestate, even though there has been no dissolution of the marriage, the grant may be made to the next of kin, & the ct. will not require the widow to be cited.—*In the Estate of FROST*, [1905] P. 140; 74 L. J. P. 53; 92 L. T. 667.

1566. Wife divorced—Wife guilty party.]—The ct. will grant administration to a son, in preference to a widow who had been divorced for adultery committed by her.—*In the Goods of DAVIES* (1840), 2 Curt. 628; 163 E. R. 530.

Annotation:—*Refd. Rolfe v. Perry* (1863), 1 New Rep. 428.

1567. —.]—Intestate, a domiciled Englishman, had been married in Ireland, & had obtained in the High Ct. of Bombay a decree dissolving his marriage on the ground of his wife's adultery. She subsequently married the co-resp. in that suit, & survived the intestate.

The ct. on the application of the brother of intestate, made a grant of administration to him as next of kin, without citing the divorced wife of the intestate.—*In the Goods of NARES* (1888), 13

P. D. 35; 57 L. J. P. 19; 58 L. T. 529; 52 J. P. 231; 36 W. R. 528.

Annotation:—*Refd. In the Estate of Frost*, [1905] P. 140.

1568. —.]—*In the Estate of WALLAS*, No. 1501, *ante*.

1569. Widow separated from husband—Widow guilty of cruelty.]—The ct. will not, at any rate without notice, pass over the widow, who has been legally separated from her husband by reason of her cruelty, in granting administration to his estate.—*In the Goods of IHLER* (1873), L. R. 3 P. & D. 50; 42 L. J. P. & M. 18; 28 L. T. 479; 37 J. P. 425; 21 W. R. 550.

1570. Widow leading immoral life.]—Intestate left a widow & two infant children. The children elected their mother's father their guardian. The ct. granted administration to him instead of to the widow, on the ground that since her husband's death she had been leading an immoral life.—*In the Goods of CREED* (1860), 24 J. P. 392; 6 Jur. N. S. 590.

1571. — & convicted of felony.]—Intestate left a widow & two children surviving. He had been separated for some time before his death from the widow, & she had been convicted of felony, & was now leading a life of prostitution.

The ct. passed her over, & made a grant to the son.—*In the Goods of BODDAN* (1873), 28 L. T. 308; 37 J. P. 312.

Annotation:—*Refd. In the Goods of Stevens*, [1898] P. 126.

1572. Former immoral life of widow—Co-habitation with intestate before marriage.]—Administration will not be refused to a widow of her deceased husband's effects in favour of the next of kin, on the ground that an improper intimacy existed between her & intestate previous to their marriage. In establishing her right to administration she is entitled to the costs of suit.—*HAINES v. GRAY* (1863), 1 New Rep. 293.

1573. Whether widow must be cited—Alleged adultery & bigamy.]—Where the widow of an intestate was absent from England & was alleged to have been guilty of adultery & bigamy, the ct. refused to grant letters of administration to the father of intestate, without first citing the widow.—*In the Goods of MIDDLETON* (1888), 14 P. D. 23; 58 L. J. P. 28; 60 L. T. 237; 53 J. P. 103.

1574. —.]—*In the Estate of FROST*, No. 1565, *ante*.

1575. — Misconduct proved—Widow of dissipated habits.]—*In the Goods of STEVENS*, No. 1564, *ante*.

1576. — — Marriage dissolved.]—*In the Goods of NARES*, No. 1567, *ante*.

1577. — — Though marriage not dissolved.]—*In the Estate of FROST*, No. 1565, *ante*.

(d) *Effect of Incapacity.*

1578. Lunacy.]—*In the Goods of WILLIAMS*, No. 1532, *ante*.

1579. —.]—*In the Goods of DUNN*, No. 1535, *ante*.

1580. — Detention as criminal lunatic.]—The widow of deceased, being confined under the Queen's warrant as a criminal lunatic, letters of administration were granted absolutely to a cousin german as next of kin, no medical certificate of insanity being required.—*In the Goods of OGDEN* (1853), 1 Ecc. & Ad. 113; 164 E. R. 66.

1581. —.]—The widow of deceased intestate being absent in the colonies, & confined in a lunatic asylum, the ct. allowed the grant of administration

PART II. SECT. 11, SUB-SECT. 4.—F. (b).

1559 i. Effect of re-marriage—After grant.]—*FURNIVALL v. CORNWELL'S EXECUTORS* (1895) 12 S. C. 6 5 C. T. R. 14.—S. AF.

Sect. 11.—Letters of administration generally: Sub-sect. 4, F. (d) & (e) & G. (a), (b) & (c).]

to go to one of the children without citing her.—*In the Goods of JAMESON* (1881), 46 J. P. 40.

1582. — *Grant to committee.*—*ALFORD v. ALFORD*, No. 1546, *ante*.

1583. *Whether citation necessary—Widow in lunatic asylum abroad.*—*In the Goods of JAMESON*, No. 1581, *ante*.

1584. *Evidence of incapacity—Widow detained as criminal lunatic—Whether medical certificate necessary.*—*In the Goods of OGDEN*, No. 1580, *ante*.

(e) *Other Grounds for Passing over Widow.*

1585. *Absence of interest.*—Administration granted to a daughter in preference to a widow who had by her marriage settlement barred herself of all interest in her husband's property.—*WALKER v. CARLESS* (1758), 2 Lee, 560; 161 E. R. 439.

1586. — *Under law of intestate's domicil.*—By the law of Scotland a widow is not entitled to any share of the property of her husband, or to letters of administration, unless at the time of his death she has been married to him one year & a day. Following a decree of the commissary ct. of Perthshire, the ct. granted letters of administration to the sister of deceased in preference to the widow.—*In the Goods of SHOOLBRAID* (1851), 1 Ecc. & Ad. 246; 164 E. R. 142.

1587. *Administration granted to next of kin—In country of intestate's domicil.*—*In the Goods of ROBERTSON*, No. 1439, *ante*.

See, further, Sub-sect. 4, B., ante, & generally, CONFLICT OF LAWS, Vol. XI., pp. 378, 379, Nos. 570 et seq.

1588. *Allegation that personal estate insolvent.*—The heir-at-law & next of kin of intestate objected to the grant of administration being made to the widow on the ground that the personal estate was insolvent. The evidence of insolvency was not very conclusive either way, & the ct. declined to depart from the usual custom, & made the grant to the widow.—*PEAT v. PEAT* (1871), 25 L. T. 108; 35 J. P. 424; 19 W. R. 856.

1589. *Conviction of felony.*—*In the Goods of BODDAN*, No. 1571, *ante*.

1590. *Hostility to next of kin.*—The ct., being of opinion that the widow of deceased testator was hostile to the next of kin, & that she was going abroad for some time, passed over her, notwithstanding her opposition, & made a grant to a son of testator by a former marriage, under Ct. of Probate Act, 1857 (c. 77), s. 73.—*In the Goods of SHIRLEY* (1892), 66 L. T. 590.

1591. *Disappearance—Uncertainty as to survivorship.*—W. died in 1891 intestate. It was not known whether his wife, whom he married in 1848, & who thereafter immediately left him & had not been heard of by him for some years prior to his death, survived him or not. The ct. refused to grant administration to intestate's brother, without

citing the widow.—*In the Goods of WHITE* (1892), 66 L. T. 861; 56 J. P. 409.

1592. *Propounding forged will—Adverse claims against estate.*—On Feb. 3, 1916, P., widow, & others propounded an alleged will of her husband, dated Aug. 18, 1915. The will having been found to be a forgery there was an intestacy. Deceased's daughter & sole next of kin applied for a grant of administration, & asked that the widow should be deemed unfit to have a grant owing to her having supported the alleged will, & also having made claims against the estate:—*Held*: as the widow had fought against the intestacy, & had adverse claims against the estate, she was unfit to have a grant, which should therefore be made to the daughter.—*In the Estate of PAINE* (1916), 115 L. T. 935; 33 T. L. R. 98; 61 Sol. Jo. 116.

G. The Next of Kin.

See Administration of Estates Act, 1925 (c. 23), s. 46.

(a) In General.

1593. *Who are—Father.*—If a son dies intestate, or a wife, the husband of such wife & the father of such son are entitled to administration; & if such husband or father dies before administration granted to them administration shall be granted to the representative of such husband or father.—*BACON v. BRYANT* (1729), 2 Eq. Cas. Abr. 425; 22 E. R. 361.

—*See, generally, DESCENT, Vol. XVIII., pp. 17 et seq.*

1594. *Time for ascertaining.*—21 Hen. 8, c. 5, applies only to such as are next of kin at the time of the death. Therefore the ct. made the *de bonis non* grant to the exor. of the administrator, the sole next of kin at the death in preference to persons entitled in distribution who had received their shares & signed releases.—*SAVAGE v. BLYTHE* (1796), 2 Hag. Ecc. Supp. 150; 162 E. R. 1044.

Discretion of court to grant to.—*See Sub-sect. 4, B., ante.*

1595. — *Under Court of Probate Act, 1857 (c. 77), s. 73.*—*In the Goods of CORSER*, No. 1538, *ante*.

See, also, No. 1600, post, & generally, Sub-sect. 5, post.

1596. *Where widow renounces.*—*Mandamus* to grant administration on widow's renouncing.

The *mandamus* must go. The Act of Parliament [21 Hen. 8, c. 5] is express that administration must be granted to the widow or next of kin. When therefore the widow renounces, the next of kin is entitled *ex debito justitiæ* (*HARDWICKE, C.J.*).—*R. v. BETTESWORTH* (1733), Kel. W. 156; 25 E. R. 543; *sub nom. SUFFOLK'S (LORD) CASE*, Lee temp. Hard. 9.

Annotation:—Mentd. R. v. Surry JJ. (1731), 2 Barn. K. B. 410.

1597. *Whether entitled to take grant as creditor.*—*In the Goods of CORSER*, No. 1538, *ante*.

1598. *Death of next of kin before grant—Right*

PART II. SECT. 11, SUB-SECT. 4.—F. (e).

1. Assets consisting of farm—Requiring superintendence of a man—Widow advanced in age.—It is no ground for passing over the widow in the choice of an administrator that the assets consist principally of a farm, which would require the superintendence of an active & intelligent farmer, the widow being advanced in life.—*KELLY v. KELLY* (1863), 9 L. T. 91.—*IR.*

PART II. SECT. 11, SUB-SECT. 4.—G. (a).

1596 i. *Where widow renounces.*—Where a widow has renounced administration in favour of another person, an absolute grant of administration to the next of kin applying therefor is a proper one to make rather than a limited grant conditional on the custody of the widow.—*RE SHULMAN'S ESTATE*, [1919] 1 W. W. R. 62.—*CAN.*

1597 i. *Whether entitled to take grant*

as creditor.—If one of the next of kin proceeds for administration as a creditor, proves his debt, takes out & advertises a summons calling on the next of kin to show cause why administration should not be granted to him as a creditor, & another of the next of kin appears to show cause, & also applies for administration, the creditor cannot recede from his position as creditor, & ask for administration as next of kin.—*RE MAYNARD'S ESTATE* (1886), 12 V. L. R. 313.—*AUS.*

g. *Daughter by former marriage—*

of representatives.]—*BACON v. BRYANT*, No. 1593, *ante*.

1599. Where next of kin uncertain—Death of intestate presumed—Date of death uncertain—Grant by consent.—*In the Goods of FARRINGTON* (1843), 2 Notes of Cases, 468.

1600. Grounds for passing over—Whether age—Estate alleged to be insolvent.—The fact that the next of kin of a deceased intestate was a lady over eighty years of age, who had held no communication with deceased, & that the estate was said to be insolvent:—*Held*: insufficient grounds for passing over the next of kin & granting administration to a creditor under Court of Probate Act, 1857 (c. 77), s. 73.—*In the Goods of MALKIN* (1894), 70 L. T. 811; 6 R. 568.

Whether preferred to widow.—*See* Sub-sect. 4, B., *ante*.

Whether joint administration granted to next of kin & widow.—*See* Nos. 1540, 1549, 1550, *ante*.

Rights of next of kin inter se.—*See* Sub-sect. 4, G. (d), *post*.

(b) Where Next of Kin Renounces.

1601. Renunciation of interest by one of next of kin—Subsequent death of other before grant—Grant to executor & legatee.—A. died intestate, leaving issue B. & C.; C. for a valuable consideration released all right to the personal estate; B. died, making D. his exor. & legatee of all his personalty:—*Held*: D. was entitled to administration of A.'s effects in preference to C.—*YOUNG v. PEIRCE* (1689), *Freem. K. B.* 496; 89 E. R. 372.

Annotations:—*Mentd.* *Barrs v. Jackson* (1842), 1 Y. & C. Ch. Cas. 585; *Withy v. Mangles* (1843), 10 Cl. & Fin. 215; *De Mora v. Concha* (1885), 52 L. T. 282.

1602. To whom grant made—Party with derivative interest.—Administration to A. granted to the son of B., the brother & sole next of kin; those entitled in distribution to A., & the widow, sole extrin. & residuary legatee of B., having renounced.—*In the Goods of BLAgrave* (1828), 2 Hag. Ecc. 83; 102 E. R. 793.

Annotation:—*Mentd.* *In the Goods of Burrell* (1858), 1 Sw. & Tr. 64.

Whether to party without interest.—*See* Sub-sect. 3, D., *ante*.

Date of death of intestate uncertain.—*See* No. 1599, *ante*.

1603. Sufficiency of renunciation—Married woman living apart from husband—Husband not joined.—The ct. granted administration to the sister of a bachelor intestate, upon a proxy of renunciation from the mother, a married woman, without her husband joining in it, she living separate from her husband, & all right to the estate & effects of deceased having been conveyed to her under a deed of separation.—*In the Goods of HARDINGE* (1840), 2 Curt. 640; 163 E. R. 534.

Annotations:—*Consd.* *Lover v. Lover* (1841), 6 Jur. 156; *Bubbers v. Harby* (1842), 3 Curt. 50.

1604. ——— Necessity for citing husband.—Where an infant, under two years, died, intestate, entitled to a share of the residue of the estate of his father, who had predeceased him, the interest of such residue being bequeathed to the widow, deceased's mother for her life, the ct. refused to grant administration of the infant's effects to his mother, who had re-married, a representation

being required to carry on proceedings in Chancery, her husband, who had separated from her, being unwilling to execute the usual bond.

There must be a decree against the husband. The wife cannot abandon his right without his consent, or without giving him the means of knowing, so as to enable the ct. to decree the administration in his absence (*SIR H. JENNER FUST*).—*In the Goods of JAKES* (1847), 5 Notes of Cases, 294.

Annotation:—*Consd.* *In the Goods of Sutherland* (1862), 4 Sw. & Tr. 189.

(c) Where Next of Kin Infants.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 160.

1605. To whom granted—Next of kin of infants aged & infirm—Next nearest relation.—Where the next of kin of two minors is an infirm grandmother, ninety-three years old, the next nearest relation selected by the children will be appointed guardian to take out the administration.—*In the Goods of RICE* (1844), 2 L. T. O. S. 335.

1606. ——— Testamentary guardian preferred to guardian chosen by infants.—Testamentary guardian of minor children is entitled to a grant of administration for their use & benefit, preferably to a guardian elected by the children. Grant made to the latter revoked, & a fresh grant made to the testamentary guardian.

Semble: where a general grant of administration is properly made, the practice is against revoking it, even with consent of the grantee, unless the grantee has become incapable by the act of God. Grants to creditors, however, are an exception to this rule.—*In the Goods of MORRIS* (1862), 2 Sw. & Tr. 360; 31 L. J. P. M. & A. 80; 5 L. T. 768; 26 J. P. 263; 161 E. R. 1035.

1607. ——— Nearest relations renouncing or abroad—Stranger in blood chosen by infants.—Intestate left two next of kin, both minors. There were no next of kin of the father surviving, & on the mother's side two uncles & two aunts. Three of these had been cited, & had renounced their right to the guardianship; & the fourth had been for some years abroad, & his whereabouts was not known. Under the circumstances the ct. allowed the minors to elect a stranger in blood their guardian for the purpose of taking the grant without citing the fourth next of kin.—*In the Goods of LANGHAM* (1872), 25 L. T. 951; 36 J. P. 296; 20 W. R. 319.

1608. ——— Or in poor circumstances—Guardian chosen by infant.—The next of kin of a minor, the universal legatee, were an uncle who was abroad, an aunt who was in poor circumstances, & another aunt who had renounced. The ct. granted letters of administration with will annexed for the use & benefit of the minor to a guardian elected by her.—*In the Goods of GARDINER* (1884), 9 P. D. 66; 53 L. J. P. 31; 48 J. P. 456; 32 W. R. 756.

Annotation:—*Consd.* *In the Goods of Webb* (1888), 13 P. D. 71.

1609. ——— Where infant has no known relations—Creditor.—A creditor appointed guardian to minors, the only children of P., who had no known relations, for the purpose of taking out administration to the estate of P., who had died intestate & insolvent.—*In the Goods of PECK* (1858), 1 Sw. &

Preferred to widower.—Where the personality of intestate would be exhausted by their debts the ct. granted administration to the duly next of kin, the daughter by a former marriage, in preference to the widower.—*D'ARCY v. MORAN* (1890), 11 N. S. W. Eq. 120; 6 N. S. W. N. 152.—*AUS.*

h. Who are—Commission obtained to investigate.—After notice of motion served for an order to administer the estate of intestate, a commission may be obtained to establish the fact that the party applying for the order is one of the next of kin.—*FARRELL v. CRUICKSHANK* (1859), 1 Ch. Ch. 12.—*CAN.*

k. Grounds for [passing over].—The ct. under 20 & 21 Vict. c. 79, s. 74, cannot set aside the right of the next of kin to administration merely because the next of kin is the mother of a person who claims the property of deceased as his own.—*McLOUGHLIN v. FERRY* (1861), 4 L. T. 685.—*IR.*

Sect. 11.—Letters of administration generally: Sub-sect. 4, G. (c) & (d) i. & ii., H. & I. (a).]

Tr. 141; 27 L. J. P. & M. 106; 31 L. T. O. S. 318; 6 W. R. 793; 164 E. R. 666.

Annotation:—*Reid. Coombs v. Coombs* (1866), L. R. 1 P. & D. 288.

1610. — Intestate domiciled in Scotland—Factor loco tutoris appointed by Scottish Court.]—*In the Goods of JOHNSTON*, No. 1436, *ante*.

1611. — — — — —.]—*In the Goods of JONES*, No. 1437, *ante*.

Guardianship of infants generally, *see* INFANTS.

1612. Practice—Where mother alive—Renunciation of guardianship by mother—Nomination of proposed administrator as guardian.]—Where it is desired that a third party shall take a grant on behalf of minors, the regular course is for the mother to renounce her right to the guardianship, & for the children to nominate the third party as their guardian to take the grant.—*In the Goods of MOLINEUX* (1871), 25 L. T. 162; 35 J. P. 600; 19 W. R. 568.

1613. — Nomination of guardian—One of several minors restrained from nominating—Nomination by majority.]—Four out of five minor children of deceased intestate & a widower having signed a proxy electing a guardian to take administration of their father's effects, the other child being restrained from joining in the proxy by the intervention of a friend with whom she resided, the appointment held to be sufficient for the grant.—*SPRIGGS v. BANKS* (1845), 4 Notes of Cases, 102.

(d) *Priority of Next of Kin inter se.*
i. *In General.*

1614. Whether whole blood preferred to half blood.]—*GLASCOCK v. WINGATE* (1625), cited *Aleyn* at p. 36; 82 E. R. 902.

1615. — — — — —.]—Administration was granted to the sister of the half blood of the intestate & her husband, by the prerogative Ct., & the brother of the whole blood sued there to have the letters repealed; & upon motion for a prohibition, upon this suggestion it was agreed by the ct., that the sister of the half blood is in equal degree of kindred with the brother of the whole blood, within the statute.—*BROWN v. WOOD* (1617), *Aleyn*, 36; 82 E. R. 902.

1616. — — — — —.]—By the rule of the ct. this day, cause was offered to be shown why a prohibition should not be granted to the Ecclesiastical Ct., for granting letters of administration to a sister of the half blood, when there was a brother of the whole blood who sued for them, & was denied. The cause showed was, that it is the power of the ordinary to grant administration, either to the brother of the whole blood, or to the sister of the half blood, at his election, because they are in equal degree of kin to intestate.—*ANON.* (1648), *Sty.* 74; 82 E. R. 541.

1617. — — — — —.]—The half blood is equally entitled to administration with the whole blood.—*SMITH v. TRACY* (1677), *Freem. K. B.* 294; 1 *Eq. Cas. Abr.* 249; 3 *Keb.* 831; 1 *Mod. Rep.* 209; 2 *Mod. Rep.* 204; 1 *Vent.* 323; 89 E. R. 212; *sub nom.* *SMITH'S CASE*, 3 *Keb.* 601, 620; *sub nom.* *TRACY v. SMITH*, 2 *Lev.* 173.

Annotations:—*Reid. Winchelsea v. Norcliffe* (1686), 1 *Vern.* 435; *R. v. Raines* (1699), 1 *Ld. Raym.* 571; *Blackborough v. Davis* (1701), 1 *P. Wms.* 41; *Wallis v. Hodson* (1740), *Barn. Ch.* 272. **Mentd.** *Brown v. Brown*, *Brown v. Farndale* (1689), *Holt*, K. B. 258.

1618. — Whole blood preferred.]—Where administration is contested by two persons of the whole blood in equal degree of relationship, the rule is to grant it to the one who unites the majority of interests.

But where the contest is between one of the whole blood & one of the half blood, the one of whole blood is to be preferred.—*MERCER v. MORLAND* (1758), 2 *Lee*, 499; 161 E. R. 418.

Annotation:—*Folld. Stratton v. Linton* (1861), 31 L. J. P. M. & A. 48.

1619. — — — — —.]—The guardian of a minor of the whole blood is entitled to a grant of administration in preference to the half blood.—*STRATTON v. LINTON* (1861), 31 L. J. P. M. & A. 48; 26 J. P. 57.

1620. Persons in equal degree of relationship—Person with greater interests preferred.]—*MERCER v. MORLAND*, No. 1618, *ante*.

1621. — — — — —.]—Where there are several next of kin in equal degrees, administration is granted to the person who unites the majority of interests, unless there is some ground of objection some reason for preferring another.—*BUDD v. SILVER* (1813), 2 *Phillim.* 115; 161 E. R. 1094.

1622. — — — — —.]—Where it is discretionary in the ct. to grant administration to either of two claimants it always decrees it *cateris paribus* to that claimant who has the greater interest in the effects to be administered.—*TUCKER v. WESTGARTH* (1824), 2 *Add.* 352; 102 E. R. 323.

See, also, Nos. 1424, 1427, *ante*.

Death before grant.]—*See* No. 1601, *post*.

1623. — Male preferred to female.]—*Cateris paribus*, the male is preferred to the female, in a contest for a grant of administration; but the female, when with the consent of the male she is *prior petens*, is preferred to the male, who afterwards opposes her taking the grant.—*CORDEUX v. TRASLER* (1865), 4 *Sw. & Tr.* 48; 34 L. J. P. M. & A. 127; 11 *Jur. N. S.* 587; 104 E. R. 1433.

1624. — — — — —.]—The ct. will adhere to its usual practice in granting administration, unless a strong case is shown against its doing so.

Accordingly, although charges of intemperance & misconduct were alleged against the eldest male next of kin, who represented the majority of interests, & who was the prior applicant, the ct. granted administration to him in preference to a female representative of the deceased.—*ELLISON v. MCCORMICK* (1866), 14 *W. R.* 742.

See, also, No. 1427, *ante*.

1625. — Whether elder preferred to younger—Whether primogeniture gives prior claim.]—*WARWICK v. GREVILLE*, No. 1428, *ante*.

1626. — — — — — Sisters.]—*COPPIN v. DILLON*, No. 3217, *post*.

1627. — — — — — Elder son trustee under will of intestate's husband.]—Deceased left a will, in which he made his wife extrix. & gave her a life interest in the whole of his property; on her death he directed it should be sold, & the proceeds divided amongst his children; & he appointed his eldest son & another person, trustees, to carry such division into effect. The widow took probate of the will, & subsequently sold the property of her husband for £600: & with that sum, & £130 of her own moneys, purchased two leasehold houses. On her death, the ct. granted administration of her effects to the eldest son, the trustee named in her father's will, in preference to the nominee

PART II. SECT. 11, SUB-SECT. 4.—
G. (d) i.

1. *Persons having equal right to apply for administration—Necessity for*

*consent of others—To application for administration by one.]—*Where there are several next of kin of equal degree, although each has an equal right to

apply for administration, administration ought not to be granted to one unless either the consent of the majority of those interested is pro-

of the other next of kin, five in number.—*In the Goods of STAINTON* (1871), L. R. 2 P. & D. 212; 40 L. J. P. & M. 25; 24 L. T. 320; 35 J. P. 391; 19 W. R. 567.

1628. — British subject preferred to alien enemy.]—Where a British subject resident in an enemy country dies in that country intestate, & some of the next of kin are alien enemy subjects resident in that country, & one of them is a British subject resident in this country, the ct. will grant letters of administration to the next of kin resident in this country where no good cause is shown against the application, although all the next of kin are equally entitled to the estate.—*In the Estate of WOOLF* (1918), 34 T. L. R. 477; 62 Sol. Jo. 621.

1629. Grounds for departing from normal rule.—Whether intermeddling before grant.]—Administration decreed to a son in preference to a married daughter, although there was an affidavit from the daughter to show that the son had intermeddled in the effects without competent authority.—*CHITTENDEN v. KNIGHT* (1758), 2 Lee, 559; 161 E. R. 439.

1630. — Prior application by female.—With consent of male.]—*CORDEUX v. TRASLER*, No. 1623, ante.

1631. — Whether allegation of intemperance & misconduct sufficient.]—*ELLISON v. MCCORMICK*, No. 1624, ante.

1632. Procedure to determine.]—The selection from among next of kin, *primâ facie* equally entitled to administration, of the person best fitted to take a grant is a matter for the registrar, & a party who brings forward such a matter on motion in ct. will be referred to the registry, & will be condemned in the costs of any other party brought into ct. contrary to the practice in such cases.—*In the Goods of JOHN* (1888), 58 L. T. 683; 52 J. P. 232.

ii. Particular Degrees.

1633. Half-sister preferred to mother.]—A. had issue by B., his first wife, a daughter, & by C., his second wife, a son, & devised goods to his son & died, & afterwards the son died intestate. The administration to C. was revoked & administration granted to the half sister on the ground that C. was not next of kin to the intestate for children *sunt de sanguine patris et matris sed frater et mater non sunt de sanguine puerorum.*—*Re SUFFOLK (DUKE)* (1551), Bro. N. C. 8; 73 E. R. 850.

1634. Brother & married half-sister.]—*ANON.* (1628), No. 1640, post.

1635. —.]—*BROWN v. WOOD*, No. 1615, ante.

1636. Aunt preferred to cousins.]—Administration shall be granted to an aunt & not distribution to the children of the uncle.—*PETT v. PETT* (1700), 3 Salk. 138; 1 Salk. 250; 1 Com. 87; 2 Eq. Cas. Abr. 435; Holt, K. B. 259; 12 Mod. Rep. 409; 1 P. Wms. 25; 91 E. R. 738; sub nom. *R. v. RAINES*, 1 Ld. Raym. 571.

Annotations.—*Reid.* Bowers v. Littlewood (1719), 1 P. Wms. 594. *Mentd.* *R. v. Litchfield* (Bp.) (1734), Ridg. temp. H. 73.

1637. Father preferred to sister.]—The father shall have administration of his son's goods, in preference to his sister.—*COPESTONE v. COPESTONE* (1683), 2 Show. 307; 89 E. R. 956.

1638. Son preferred to grandfather.]—If there be grandfather, father & son, & the father dies

intestate, the son shall have the administration, & not the grandfather.—*CROOKE v. WATT* (1690), as reported in 2 Vern. 124; 23 E. R. 689; *affd.* on other grounds, sub nom. *WATTS v. CROOKE*, Show. Parl. Cas. 108, H. L.

Annotation.—*Mentd.* *Walli. v. Hodson* (1740), Barn. Ch. 272.

1639. Grandmother preferred to aunt.]—*BURTON v. SHARPE* (1699), 2 Lut. 1055; 125 E. R. 587.

Annotation.—*Reid.* *Blackborough v. Davies* (1700), 1 Ld. Raym. 684.

1640. Brother preferred to married sister.]—Where there is a brother & sister of the half blood, administration may be granted to the sister because she is in equal degree of kindred, but if the sister is married then it must be granted to the brother & not to her & her husband because in effect it makes the husband administrator, who is not of kin to intestate, & if she die the husband would continue administrator & so might possess himself of the whole personal estate which is contrary to the statute.—*ANON.* (1628), 3 Salk. 21; 91 E. R. 667.

1641. Grandmother preferred to aunt.]—*BLACKBOROUGH v. DAVIS*, No. 2901, post.

H. The Heir-at-Law.

See, now, Land Transfer Act, 1897 (c. 65), s. 2 (4); (repealed by Law of Property Act, 1922 (c. 16), s. 156 (11)); *Supreme Court of Judicature (Consolidation) Act, 1925* (c. 49), s. 162.

1642. Preferred to widower.—Discretion of court under Probate Act, 1857 (c. 77), s. 73—& Land Transfer Act, 1897 (c. 65) s. 1 (1).]—A wife died intestate. Her husband survived her, & she left a son by a former marriage, a minor, who was her heir-at-law. On it appearing that the husband was a dissipated man, who was mismanaging a public-house which was part of the estate, & of which he refused to give up possession, the ct., acting under the above sub-sect. & Court of Probate Act, 1857 (c. 77), s. 73, granted administration of the estate to the guardian *ad litem* of the infant heir-at-law.—*In the Goods of ARDERN*, [1898] P. 147; 67 L. J. P. 70; 78 L. T. 536.

1643. Application by heir-at-law.—Whether citation of next of kin necessary.—Applicant's title clear.—No personality.]—Where the title of the person applying under the sub-sect. [Land Transfer Act, 1897 (c. 65), Part I., s. 2 (4)] for administration as heir-at-law is clear, & there is no personality, a grant may be made to appct. without notice to the next of kin; but where the title of appct. is doubtful, or the amount of the personality large as compared with the realty, notice should be given to the next of kin.—*In the Goods of BARNETT*, [1898] P. 145; 67 L. J. P. 85; 78 L. T. 391.

1644. — — — Applicant's title doubtful.—Personality large compared to realty.]—*In the Goods of BARNETT*, No. 1643, ante.

I. The Crown.

(a) In General.

1645. When Crown entitled to grant.—General rule.]—If a person dies intestate, & without leaving any sort of relations in blood, administration is granted to the nominee of the Crown, but the most remote relation defeats the King's title.—

duced or notice of the application has been given to the others.—*Re PARKER* (1905), 25 N. Z. L. R. 640.—N.Z.

m. *Whether male preferred to female.*]—*Re HEARST* (1906), 40 I. L. T. 198.—IR.

PART II. SECT. 11, SUB-SECT. 4.—G. (d) ii.

n. *Administration granted to nephew.*]—*In the Goods of BAILIE* (1916), 53 I. L. T. 208.—IR.

PART II. SECT. 11, SUB-SECT. 4.—I. (a).

1645 i. *When Crown entitled to grant.—General rule.*]—Where a person possessed of real & personal estate dies leaving no known relatives within

Sect. 11.—Letters of administration generally: Subsect. 4, I. (a), (b), (c) & (d) & J.]

STONE v. TYNDALL (1757), 2 Lec. 394; 161 E. R. 381.

Annotation:—Mentd. *Dyke v. Wallis* (1862), 2 Sw. & Tr. 466.

1646. — *In respect of realty—Effect of Land Transfer Act, 1897 (c. 65).*—Land Transfer Act, 1897 (c. 65), does not bind the Crown, & therefore, the legal estate in escheated land does not, under sect. 1, vest in the Solr. to the Treasury as the Crown's nominee. Where a widow died, after the commencement of the Act, without issue, a bastard & intestate, entitled to both real & personal estate, a grant was made by the ct. to the Solr. to the Treasury of administration of her personal estate only, as before the Act.—*In the Goods of HARTLEY*, [1899] P. 40; 68 L. J. P. 16; 47 W. R. 287.

Annotation:—Mentd. *Talbot v. Jevors*, [1917] 2 Ch. 363.

1647. — *Deceased seaman in royal navy without next of kin—Statutory requirements not complied with—Pay & prize-money excepted from grant.*—Where a seaman died a bachelor, a bastard, & intestate, leaving a sum due for wages, as well as other personal estate, the ct. declined to decree a general grant of administration of his personal estate to the Solr. for the Treasury, the provisions of 11 Geo. 4, c. 20, not having been complied with, but decreed a grant save & except deceased's pay & prize-money.—*In the Goods of BEAVAN* (1865), L. R. 1 P. & D. 15; 35 L. J. P. & M. 25; 13 L. T. 608; 11 Jur. N. S. 982; 14 W. R. 147.

1648. — *Estate of felon—Property vesting before conviction—Payable after certificate of freedom granted.*—The wife became entitled to a legacy of £100 in 1827. In 1833, she was convicted of felony & transported for seven years. In 1843, she received a certificate of freedom, & was not heard of afterwards. The legacy, which was the only property to which she was entitled, became payable in 1870:—*Held*: notice must be served in the Queen's Proctor before granting administration of her personal estate & effects to her husband.—*In the Goods of STEVENS* (1873), 42 L. J. P. & M. 23; 28 L. T. 143; 12 Cox, C. C. 382; *sub nom.* *In the Goods of STEPHENS*, 21 W. R. 345.

—*See, now*, Forfeiture Act, 1870 (c. 23), s. 1.

Competition with creditors.—*See* Nos. 1712, 1715, 1734, *post*.

1649. *Necessity for consent.*—Where a party dies intestate, & without relations, there must be an express consent of the Crown to the grant of administration.—*In the Goods of GIBBS* (1842), 6 Jur. 41.

1650. *Evidence of death bastard & intestate—Necessity for.*—The ct. expressed the intention to alter the practice hitherto followed, of allowing grants to go to the Crown before oath sworn that deceased died a bastard & intestate.—*In the Goods of FRENCH* (1892), 66 L. T. 380.

(b) *Liability of the Crown or the Crown's Nominee.*

1651. *Liability for debts.*—The effects of an intestate having vested in the Crown by forfeiture, if letters of administration are granted to A. in consequence of a warrant from the King, & they run in the usual form, viz. "to pay debts, etc." but with this additional clause, "for the use & benefit

of His Majesty," A. shall be answerable as administrator for the debts of intestate, & shall not be permitted to give evidence tending to question the validity of the letters of administration.—*MEGILL v. JOHNSON* (1780), 2 Doug. K. B. 542; 99 E. R. 344.

1652. *Liability to refund—On next of kin establishing claim.*—(1) On the death of an intestate no next of kin appeared. The Crown nominated the Crown solr. to take out administration; the administrator held the fund, paid all outgoing, & after a certain time, handed over the fund to the King's Proctor for the use of His Majesty; afterwards plffs. established their title:—*Held*: the Crown must restore the fund, with interest, the interest to be computed from the time when all payments on the part of the estate had been made.

(2) When administration is granted to a person as nominee of a party abroad, who is entitled to administration, such administrator is, as to the claims of third parties, administrator to all intents & purposes, exactly as if the person entitled to administration had himself obtained it (*KINDERSLEY, V. C.*).—*Re DEWELL, EDGAR v. REYNOLDS* (1858), 4 Drew. 269; 27 L. J. Ch. 562; 31 L. T. O. S. 50; 4 Jur. N. S. 399; 6 W. R. 404; 62 E. R. 104.

Annotations:—As to (1) *Consd.* *Lawrence v. Maule* (1859), 4 Drew. 472. *Folld.* *A.-G. v. Köhler* (1861), 9 H. L. Cas. 655. *Consd.* *Re Gosman* (1880), 15 Ch. D. 67. *Reid.* *Partington v. Reynolds* (1858), 6 W. R. 615; *Bauer v. Mitford* (1860), 3 L. T. 575. *As to (2)* *Consd.* *Re Rendell, Wood v. Rendell*, [1901] 1 Ch. 230. *Reid.* *Lawrence v. Maule* (1859), 4 Drew. 472.

1653. — — —.]—(1) In 1813, letters of administration of the personal estate of General K., who died in 1800, intestate, were granted to W. for the use of King George III., it being supposed that the general had died without leaving any next of kin. W. realised the assets, & after paying the debts paid the balance in 1814 to the Prince Regent on behalf of the King. An administration suit was commenced by some of the next of kin, & certain inquiries were directed. W. died pending the proceedings, when G., on the nomination of the Crown, took out administration to the estate. He also died before the suit was determined, & R. administered on behalf of the Crown. Appls. claimed to be entitled to the estate of the intestate as next of kin:—*Held*: they, having established their right as next of kin, were entitled to the fund, together with interest.

(2) A succeeding Sovereign cannot be held responsible for money paid over in error to, & spent by, a predecessor.—*A.-G. v. KÖHLER* (1861), 9 H. L. Cas. 654; 5 L. T. 5; 8 Jur. N. S. 467; 9 W. R. 933; 11 E. R. 885, H. L.

Annotations:—As to (1) *Reid.* *Re Gosman* (1880), 15 Ch. D. 67 (see 17 Ch. D. 771); *Re Hulkes, Powell v. Hulkes* (1886), 33 Ch. D. 552; *Re Sharpe, Re Bennett, Masonic & General Life Assoc. v. Sharpe*, [1892] 1 Ch. 154. *Generally, Mentd.* *James v. Hacon* (1880), 16 Ch. D. 407.

1654. — *Whether liable for interest.*—*Re DEWELL, EDGAR v. REYNOLDS*, No. 1652, *ante*.

1655. — — —.]—*A.-G. v. KÖHLER*, No. 1653, *ante*.

1656. — — —.]—The trustees & exors. of a will administered the estate, & upon its being decided in a suit instituted for the purpose that there was an intestacy, & no heir or next of kin being discovered, the trustees assigned the leasehold property to the Solr. for the Treasury, to be

the Province, the A.-G. on behalf of Her Majesty may maintain an action to set aside letters probate of that person's will; but a grant of administration should be obtained by a

separate proceeding.—*R. v. BONNAR* (1897), 24 A. R. 220.—*CAN.*

1645 ii. — — —.]—Administration of the goods, etc., of a *felo de se* granted

to the nominee of the Crown, though there was a will appointing exors.—*In the Goods of URE* (1863), 9 L. T. 60. —*IR.*

held for the benefit of the Crown. Claimants, six years afterwards, established their claim as next of kin of testator, & the ct. declared them entitled:—*Held*: the Crown was not chargeable with interest on the rents & profits received from the property while in its possession.—*Re GOSMAN* (1881), 17 Ch. D. 771; 50 L. J. Ch. 624; 45 L. T. 267; 29 W. R. 793, C. A.

1657. — *Assets received by predecessor.*—*A.-G. v. KÖHLER*, No. 1653, *ante*.

(c) *Effect of Death of Sovereign.*

1658. *Death after grant—Practice to obtain fresh grant.*—*In the Goods of JOHNSON* (1901), 17 T. L. R. 402.

Where intestate domiciled in Royal Duchy.—*See* Sub-sect. 4, 1. (d), *post*.

(d) *Intestate Domiciled in Duchy or County Palatine of Lancaster or Duchy of Cornwall.*

1659. *Duchy of Lancaster—Conflict of Crown & Duchy rights.*—*In the Goods of WARBRICK* (1805), cited in 6 Notes of Cases, at p. 319.

1660. — *Effect of death of Sovereign—Before issue of warrant appointing nominee.*—*In the Goods of RICHARDSON* (1901), 17 T. L. R. 720.

See, also, No. 1663, *post*.

1661. — *Before grant ordered.*—*In the Goods of PYE* (1901), 17 T. L. R. 720.

1662. — *After grant ordered but before issue.*—*In the Goods of RAE & STEPHENSON* (1901), 17 T. L. R. 720.

1663. — *Effect of general warrant by Crown.*—*In the Goods of HOLDEN* (1901), 17 T. L. R. 721.

1664. *County Palatine of Lancaster—Effect of death of Sovereign—Grant to nominee of executors of deceased Sovereign—Whether bond & sureties necessary.*—The ct. allowed the exors. appointed under the will of her late Majesty Queen Victoria to nominate a person to take a number of grants for their use in the estates of persons who had died domiciled in the County Palatine of Lancaster, & which had been either wholly or partially unadministered.

The ct., however, while consenting to dispense with sureties, required that, inasmuch as the administrator was not to take for the use of the Sovereign, but for the use of the late Sovereign's exors., he should enter into the usual administration bond.—*In the Goods of BEST*, [1901] P. 333; 71 L. J. P. 9; 85 L. T. 640; 17 T. L. R. 720.

1665. *Duchy of Cornwall—Conflict of Crown & Duchy rights.*—(1) In making a grant, with the consent of the Solr. to the Treasury, of letters of administration of the estate of a person who had died domiciled in the county of Cornwall intestate, a bachelor, & without any known relations, to the solr. for the Duchy of Cornwall, as nominee of the Prince of Wales, the ct. dispensed with sureties to the administration bond.

(2) *Qu.*: whether the Prince of Wales, as Duke

of Cornwall, is entitled as against the Crown, to a grant of administration of the estates of all persons dying intestate, domiciled in the county of Cornwall, & bastards, or without known relations.—*In the Goods of CANNING, CORNWALL, DUCHY (SOLICITOR) v. CANNING* (1880), 5 P. D. 114; 41 L. T. 737; 28 W. R. 278.

Annotation:—*As to* (1) *Apld. In the Goods of Cope* (1890), 15 P. D. 107.

1666. — *Grant without notice to Crown.*—(1) On motion for grant of letters of administration of an intestate's effects to His Royal Highness the Prince of Wales, as Duke of Cornwall, it is not necessary, if the facts are sufficiently set forth in the warrant, that they should be verified by affidavit.

(2) A grant of administration was made to the Prince of Wales of the goods of an intestate, a bastard & bachelor, who died in the Duchy of Cornwall, without notice to the Queen's Proctor being required.—*In the Goods of GRIFFITH* (1884), 9 P. D. 63; 53 L. J. P. 30; 48 J. P. 312; 32 W. R. 524.

1667. — *Whether sureties necessary.*—*In the Goods of CANNING, CORNWALL, DUCHY (SOLICITOR) v. CANNING*, No. 1665, *ante*.

1668. — *Whether affidavit of facts necessary—Facts set out in warrant.*—*In the Goods of GRIFFITH*, No. 1666, *ante*.

J. The Public Trustee.

See Public Trustee Act, 1906 (c. 55), s. 6; Public Trustee Rules, 1912, r. 6; Non-Contentious Probate Rules, 1925, r. 114.

1669. *Grant ad colligenda bona—Death of enemy subject during hostilities.*—A German died during the war possessed of property in England, & a grant of administration *ad colligenda* was made to the Public Trustee, who had collected the assets in England, paid the estate duty & English claims, & had a large surplus in his hands. The Public Trustee had notice of a German will & had been in communication with the exors. & beneficiaries, who were German. He now applied for a full grant of administration alleging that the assets were subject to the charge created by the Treaty of Peace of 1919, & the Treaty of Peace Order, 1919, s. 1, which had precedence over the claims under the will. The ct. made a full order in favour of the Public Trustee with the will annexed & dispensed with further notice to the exors. & beneficiaries under the German will.—*In the Estate of VON DEM BUSCHE*, [1922] P. 30; 91 L. J. P. 62; 126 L. T. 384; 38 T. L. R. 171.

1670. *Administration with will annexed—Executors & sole relative in enemy country.*—The ct. granted administration to the Public Trustee in a case where the exors. named in the will & the only known relative of testator were resident in territory occupied by the enemy.—*In the Estate of KREJEWSKY* (1918), 34 T. L. R. 184; 62 Sol. Jo. 269.

PART II. SECT. 11, SUB-SECT. 4.—J.

o. When granted.—*Re JONES, BENNETT v. JONES* (1921), 17 Tas. L. R. 121.—*AUS.*

p. —.—The official administrator is not allowed to take out letters of administration in opposition to the heirs of deceased, such heirs being resident out of the jurisdiction.—*Re LELAIRE* (1903), 9 B. C. R. 429.—*CAN.*

q. —.—*Re HENDERSON*, [1918] 3 W. W. R. 896.—*CAN.*

r. —.—The personal estate of one who dies intestate being at the time of his death resident outside of

the Province, & having no relations within the Province, should be administered by the official administrator unless special circumstances are shown that the estate by the appointment of another would be appreciably benefited.—*Re BATES* (1919), 27 B. C. R. 1.—*CAN.*

s. —.—T. was injured by an accident while in defts.' employ in the Moosomin judicial district resulting in his death. His home was in Manitoba where he died. He had no assets in Saskatchewan. Plff. as official administrator of the judicial district of Regina, & claiming to be administrator of deceased's estate, brought

an action against defts. for compensation to deceased's wife & child.—*Held*: plff. was not such administrator. His power & duty as an official administrator was limited to its own judicial district.—*WESTERN TRUST CO. v. CANADIAN NORTHERN RY CO.*, [1919] 2 W. W. R. 291.—*CAN.*

t. —.—Public Trust Office Act, 1908, s. 14, does not take away or displace the rights of the next of kin, of deceased intestate to a grant of letters of administration, but only gives administration to the Public Trustee where no application for administration is made by the next of kin, or the ct. for any reason refused

Sect. 11.—Letters of administration generally: Sub-sect. 4, J. & K. (a) & (b) i. & ii.]

1671. — Executors & beneficiaries in ex-emy country—Assets subject to charge under Treaty of Peace, 1919.]—In the Estate of VON DEM BUSCHE, No. 1669, ante.

Discretionary grants to the Public Trustee.]—See Sub-sect. 5, E. (d), post.

K. Creditors.

(a) In General.

1672. Right to grant—Only when no other representation available.]—WEBB v. NEEDHAM, No. 1540, ante.

1673. — Debt exceeding amount of assets.]—E., being a married woman & having an interest under her father's will expectant on the death of his widow, joined with her husband in 1841 in executing a mtge. of such interest to B., to secure a running account. E. died in 1851, & her husband in 1853, neither possessed of any other property. On the death of her father's widow, a representative to E. was required to release the trustees. B.'s debt being larger than the amount of E.'s interest under the will, the ct. granted administration to the goods of E. to B.—In the Goods of GODFREY (1861), 2 Sw. & Tr. 133; 3 L. T. 895; 9 W. R. 499; 164 E. R. 944.

Annotation:—Folld. In the Goods of Lowe (1898), 78 L. T. 566.

1674. — —.]—Deceased in 1871 charged a reversionary interest in personalty in favour of a creditor. He died intestate in 1878, leaving his father his next of kin. His father died in 1888, having appointed A. his extrix. A. died in 1896, having appointed L. her extrix. No letters of administration had been taken out to the estate of deceased. The reversionary interest fell into possession in 1897. The charge had been assigned to appts. & the sum due on it exceeded the property charged. L. consented to the application:—Held: a grant ought to be made to appts.—In the Goods of LOWE (1898), 78 L. T. 566.

1675. — Apart from Court of Probate Act, 1857 (c. 77), s. 73.]—A creditor has an interest in the estate of his deceased debtor, & as such is entitled to a general grant of administration without invoking the above Act, & without justifying security.—In the Goods of HAKE (1920), 89 L. J. P. 113; 123 L. T. 141.

1676. Whether joint administration granted.]—HARRISON v. ALL PERSONS IN GENERAL, No. 1452, ante.

See, generally, Sub-sect. 3, ante.

(b) Who are Creditors.

i. In General.

1677. Surviving partner—Partnership affairs left unsettled.]—Where a partner dies leaving the

to make an order on such an application.—Re CRAIG (1911), 30 N. Z. L. R. 1212.—N.Z.

a. —.]—C., who was murdered by her husband, died intestate, leaving no issue, her husband being entitled to her estate as next of kin. The Public Trustee was appointed administrator of her estate, & asked for directions as to who was entitled to deceased's estate:—Held: the Public Trustee should stand possessed of the estate for deceased's next of kin other than her husband.—Re CASH (1911), 30 N. Z. L. R. 577.—N.Z.

PART II. SECT. 11, SUB-SECT. 4.—K. (a).

1672 i. Right to grant—Only when no other representative available.]—A

creditor's right to administration depends on the principle that as he cannot be paid until a representative is constituted, it may be granted to him in the absence of any other representative.—Re BUCKLEY'S GOODS (1872), 3 V. R. 49.—AUS.

b. — On application of mortgagee.—In mortgage action.]—McLAREN v. RIVETT, 7 C. L. T. Occ. N. 202.—CAN.

c. — Discretion of court.]—The appointment of a creditor as administrator is not as of right, but rests in the discretion of the judge who appoints.—Re O'BRIEN (1882), 3 O. R. 326.—CAN.

d. — Application by other parties beneficially entitled.—To stay proceedings—On payment of creditor's claim

partnership unsettled, the Ecclesiastical Ct. will grant administration of his effects to the surviving partners, or any persons claiming under them, if his next of kin decline it.—CAWTHORN v. CHALIE (1824), 2 Sim. & St. 127; 3 L. J. O. S. Ch. 125; 57 E. R. 294.

Annotation:—Refd. Faulkner v. Daniel (1843), 3 Hare, 199.

1678. Ante-nuptial creditor of wife.]—Administration of a wife's effects, who had lived with her husband until her death, was granted to an ante-nuptial creditor where a decree had been personally served on the husband, but no appearance had been given.—HUDLESTON v. HUDLESTON (1852), 2 Rob. Eccl. 424; 163 E. R. 1367.

1679. Surety—Debt paid after principal's death.]—A surety who, after the death of the principal, pays off the debt is, in case of intestacy, entitled to administration as a creditor.—WILLIAMS v. JUKES (1864), 34 L. J. P. M. & A. 60.

1680. Administrator of estate with which intestate has intermeddled.]—A., by his will, appointed his wife, B., & C., as his extrix. & exors., & named his wife universal legatee for life. After his death, B. & C. renounced probate, & the widow, without taking out probate, sold a portion of the estate, & paid the proceeds into a bank in her own name. The widow having died intestate, letters of administration with the will of A. annexed were granted to D., his brother. The next of kin of the widow having been cited, & not having appeared:—Held: letters of administration of her estate would be granted to D., as a creditor.—In the Goods of MELLOR, MELLOR v. DYSON (1883), 8 P. D. 108; 52 L. J. P. 62; 47 J. P. 280; 31 W. R. 476.

1681. Limited liability company—Call on unpaid shares after death.]—Intestate was the holder of share in a co. on which a call was made after his death:—Held: administration would be granted to the nominee of the co. as a creditor of the estate of deceased.—TOMLINSON v. GILBY (1885), 54 L. J. P. 80; 49 J. P. 632; 33 W. R. 800.

1682. Remitter of bill of exchange never paid—Bill not endorsed by intestate.]—In the Goods of RIVERS (LORD) (1832), 4 Hag. Ecc. 355; 162 E. R. 1476.

1683. Mortgagee — Of leasehold property.]—ROXBURGH v. LAMBERT (1829), 2 Hag. Ecc. 557; 162 E. R. 955.

1684. Creditor whose debt is statute-barred—Right to grant.]—The creditor of an intestate is entitled to a grant of administration, although his right of action is barred by Stat. Limitations.—COOMBS v. COOMBS (1866), L. R. 1 P. & D. 288; 36 L. J. P. & M. 21; 15 L. T. 329; 31 J. P. 118; 15 W. R. 286.

1685. — — Whether next of kin must be cited.]—A creditor may be entitled to administration to the estate of a deceased person, even

d. costs.]—In a suit by a creditor for the administration of his deceased debtor's estate, any party beneficially interested in the estate may apply to stay proceedings on payment of the creditor's claim & costs. The right to do so is not confined to the personal representative.—FITTON v. DAWSON (1871), 3 Ch. Ch. 461.—CAN.

e. —.]—An application for an administration order was made within a year from the death of testator, by a legatee who claimed to be also a creditor of the estate, but whose claim, as such, had always been disputed by the exors. & was only supported by the uncorroborated affidavit of claimant. The ct., refused the application. *VIVIAN v. WESTBROOKE* (1872), 19 Gr. 461.—CAN.

though his debt is barred by Stat. Limitations, but he certainly cannot under any circumstances obtain such a grant without due notice to the next of kin. Therefore where a deceased person at the time of his death was an inmate of a county lunatic asylum, & indebted to the guardians for his maintenance, the ct. refused to grant administration to the nominee of the guardians, without due notice to the next of kin of deceased, although his only next of kin was a daughter who had herself been confined as a hopeless lunatic, in the same asylum, for fifteen years, & was likewise personally indebted to the guardians for maintenance.—*In the Goods of DRUCE* (1899), 68 L. J. P. 120; 81 L. T. 458.

1686. Person claiming through creditor—Assignee—Assignment of debt after death of intestate.]—After the death of an intestate A. procured from B. an assignment of a debt due to B. by intestate. Motion for administration to such assignee rejected.

It would be a dangerous practice to decree administration of an intestate's estate to a person who had brought up a debt after the death of that intestate, especially where, as in this case, the assets considerably exceed the amount of the debt (SIR J. DONSON).—*BAYNES v. HARRISON* (1856), Dea. & Sw. 15; 2 Jur. N. S. 72; 164 E. R. 487.

Annotations:—Consd. Macnín v. Coles (1863), 33 L. J. P. M. & A. 175. *Distd.* Day v. Thompson, *In the Goods of Frampton* (1863), 3 Sw. & Tr. 169; *Downward v. Dickinson, In the Goods of Chune* (1864), 3 Sw. & Tr. 564. *Refd.* Depit & Chapot v. Delerieleuse (1861), 2 Sw. & Tr. 131.

1687. ———.]—After the death of A., who died domiciled in France intestate, his estate was, by a decree of a French ct., declared bkpt., & B. was appointed syndic, or assignee, & authorised to dispose of the debts due to deceased. Pursuant to this decree, the debts, including one due from a person in England, were sold to C. By the law of France, C. could sue in his own name for the debts without obtaining letters of administration to A., & without any other judicial act. The persons entitled in distribution to deceased's effects having been cited & not appearing, application was made for a grant of administration to C., limited to the debt due in England:—*Held*: as C. derived his title from the syndic as a purchaser, & not as representing deceased, he was not entitled to a grant of administration.

Semble: there is no authority for granting administration to a purchaser of any part of deceased's estate after his death.—*DEPIT & CHAPOT v. DELERIELEUSE* (1861), 2 Sw. & Tr. 131; 30 L. J. P. M. & A. 86; 3 L. T. 894; 25 J. P. 280; 7 Jur. N. S. 196; 164 E. R. 942.

Annotations:—Distd. Day v. Thompson, *In the Goods of Frampton* (1863), 3 Sw. & Tr. 169. *Consd.* Macnín v. Coles (1863), 33 L. J. P. M. & A. 175. *Refd.* Lindsay v. Lindsay (1872), 42 L. J. P. & M. 32.

1688. ———.]—A., who was indebted to B., & who, as a security for the debt, held certain negotiable instruments in trust for B., died intestate, & no administration was granted. In 1862, the official assignee of the estate of B., who had become bkpt. in the lifetime of A., assigned to C. the outstanding debts due to B.'s estate, & C. assigned them to D. Moneys being due in respect of some of the negotiable instruments for which the personal representative of A. could alone give a discharge, the ct., upon the next of kin of A. being cited, & not appearing, granted to C. administration of the effects of A. limited to moneys due, or to become due, in respect of the said negotiable instruments, but refused to make such a grant to D.—*In the Goods of COLES, MACNIN v. COLES* (1863), 3 Sw. & Tr. 181; 33 L. J. P. M. & A.

175; 9 L. T. 519; 9 Jur. N. S. 1080; 164 E. R. 1243.

Annotation:—Apld. *In the Goods of Burdett* (1876), 45 L. J. P. 71.

1689. ——— In bankruptcy.]—A. died leaving a will, whereof he appointed B. exor. & residuary legatee. B. proved the will, & afterwards became bkpt., & subsequently died intestate, leaving part of the estate of A. unadministered. At the time of his bkpcy. B. was a creditor of A.:—*Held*: administration would be granted, with the will annexed, of the unadministered estate of A. to the assignee in bkpcy. of B. in the character of assignee of a residuary legatee.

Semble: the assignee would also have been entitled to the grant as assignee in bkpcy. of a creditor of A.—*DOWNWARD v. DICKINSON, In the Goods of CHUNE* (1864), 3 Sw. & Tr. 564; 34 L. J. P. M. & A. 4; 11 L. T. 641; 28 J. P. 825; 10 Jur. N. S. 1084; 164 E. R. 1394.

1690. Creditor becoming so after death of intestate—Payment on behalf of intestate.]—Two creditors of an insolvent estate having applied for a *ceterorum* grant of administration:—*Held*: preference would be given to one who already had a limited grant under the circumstances of the case & as a matter of convenience.

A person cannot make himself a creditor of deceased by paying money on his account after his death.—*MAYHEW v. MARTIN & FINNEY* (1861), 25 J. P. 182.

1691. ——— Assignee of debt.]—*BAYNES v. HARRISON*, No. 1686, *ante*.

1692. ———.]—*DEPIT & CHAPOT v. DELERIELEUSE*, No. 1687, *ante*.

1693. ———.]—*In the Goods of COLES, MACNIN v. COLES*, No. 1688, *ante*.

ii. Poor Law Guardians.

1694. In respect of cost of relief—Under Poor Law Amendment Act, 1849 (c. 103), s. 16.]—The ct. granted administration in the goods & effects of a deceased pauper dying intestate, without known relations, to the guardians of the union, as creditors, on which she was chargeable, the above Act empowering them, in the event of a pauper dying possessed of property, to "reimburse themselves the expenses incurred by them in & about the burial of such pauper, & in & about the maintenance of such pauper, at any time during the twelve months previous to the decease."—*In the Goods of M'KENNA, CLEAVER v. M'KENNA* (1865), 35 L. J. P. & M. 91; 13 L. T. 411.

1695. ———.]—An intestate died, having been in receipt of outdoor relief for twelve months & more before his death. He was then found to be possessed of certain property, & upon the application of the guardians:—*Held*: administration would be granted to their nominee, as creditors for the amount of outdoor relief afforded to deceased during the last twelve months of his life.—*In the Goods of M'KNIGHT* (1894), 59 J. P. 135.

See, generally, POOR LAW.

1696. ——— Pauper lunatic—No order made in lifetime of lunatic.]—A pauper lunatic died in an asylum entitled to £440 3 per cent. consols. The board of guardians, at whose cost he had been maintained, applied for a grant of administration as creditors, & cited the next of kin, who was a lunatic also. There had been no order in the lifetime of the deceased lunatic. The ct. refused the grant. But on proof being given that the next of kin had been cited by advertisement, & notice had been given to the Queen's Proctor, who had declined to interfere on the part of the Crown, the

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ct., under above Act, granted administration for the use & benefit of the lunatic's sister to the guardians of the union to which deceased was chargeable, as creditor of his estate.—*In the Goods of SHARLAND, WINDEATT v. SHARLAND* (1871), L. R. 2 P. & D. 266; 41 L. J. P. & M. 9; 25 L. T. 574; 35 J. P. 808; 20 W. R. 211.

1697. — — — Grant to use of next of kin—Queen's Proctor not objecting.]—*In the Goods of SHARLAND, WINDEATT v. SHARLAND*, No. 1696, *ante*.

1698. — — — Next of kin & Queen's Proctor not appearing to citation.]—The ct., upon the application of the guardians of the union in which a deceased pauper lunatic had died, made to their nominee a grant of administration in respect of the personal estate & effects of such pauper, the said guardians being creditors for maintenance & burial expenses, & the next of kin, if any, & the Queen's Proctor having failed to appear to citations calling upon them respectively to take the grant.—*In the Goods of REEVES* (1890), 55 J. P. 24.

1699. — — — —.]—Upon the application of the guardians of the united parishes of St. Giles-in-the-Fields & St. George, Bloomsbury, the ct. made a grant of administration in favour of their nominee to the estate of a pauper lunatic who had died in the county lunatic asylum, & who, at the time of his death, & for some time previously, was chargeable to the said united parishes.—*In the Goods of LUCE* (1890), 54 J. P. 695.

1700. — — — Husband not appearing to citation—Whereabouts unknown.]—The whereabouts of both the husband & son of a woman, who had died as a pauper lunatic, were unknown, & the husband was cited, by advertisements, to accept or renounce administration to her estate, but had not appeared. Upon the motion of the guardians, as creditors for maintenance & funeral expenses, the ct. granted administration to the nominee of the guardians, subject to an affidavit that the husband outlived deceased.—*In the Goods of KING* (1893), 58 J. P. 404.

1701. — — — Assets exceeding debts—Next of kin renouncing.]—A woman was taken into the Paddington Workhouse Infirmary, & died the following day, a spinster & intestate. Her only known relative was a sister. The guardians expended a sum of £7 15s. upon her funeral, & she was found to be possessed of property amounting to over £200. The sister did not wish to take administration. Upon the application of the guardians, as creditors:—*Held*: administration would be granted to their nominee.—*In the Goods of JOWERS* (1894), 54 J. P. 465.

(c) *Priority of Claim to Grant.*

i. *As against Others.*

1702. As against next of kin—Estate insufficient to pay debts.]—*HAWKSWORTH & SIMPSON v. WARNER* (1731), cited in 3 Phillim. App. 380; 161 E. R. 1359.

*Annotation:—**Consd. West & Smith v. Wilby* (1820), 3 Phillim. 374.

1703. — — —.]—Notwithstanding the statute of Hen. 8, administrations have been granted to the principal creditor from the next of kin, by the opinion of both civil & common

lawyers, where it is visible that the next of kin cannot have any advantage or benefit of the estate; & this has been always taken to be out of the statute.—*ANON.* (1725), 2 Eq. Cas. Abr. 425; 22 E. R. 361, L. O.

1704. — — —.]—*FURLONGER v. COX* (1811), cited in 3 Phillim. at p. 381; 161 E. R. 1359.

*Annotations:—**Consd. West & Smith v. Wilby* (1820), 3 Phillim. 374. *Distd. Menzies v. Pulbrook & Ker* (1841), 2 Curt. 845.

1705. — — — Necessity for citing next of kin—Ground for revocation.]—*ANON.* (undated), cited in 4 Notes of Cases, at p. 456.

*Annotation:—**Consd. Harrison v. Harrison* (1846), 4 Notes of Cases, 434.

1706. — — —.]—Where an intestate died insolvent, & the only assets were a fund in Chancery which bore no interest, while the two principal debts which exceeded it in amount bore interest at the rate of 5 per cent., the ct., notwithstanding, declined to grant administration to a creditor until the next of kin, who were in India, were cited.—*In the Goods of GERRARD* (1867), 6 L. T. 267.

1707. — — — Delay by next of kin in applying.]—*COLE v. REA* (1817), 2 Phillim. 428; 161 E. R. 1189.

1708. — — — Next of kin cited but not appearing.]—Administration of the effects of a deceased intestate, in the Province of York, granted to the public officer of a banking co., as a principal creditor, on the non-appearance of the widow & child.—*DRESSER v. ROBINSON* (1845), 4 Notes of Cases, 44.

1709. — — —.]—*CRANE v. REBELLO*, No. 2103, *post*.

1710. — — — Father—Grant to mother a creditor.]—The ct. granted administration to the mother of intestate as a creditor, passing over the father.—*In the Goods of POTBURY* (1909), 25 T. L. R. 440.

1711. As against widow—Creditor also next of kin.]—*WEBB v. NEEDHAM*, No. 1540, *ante*.

1712. As against wife's representatives—Com-morientes.]—Administration of the goods of an intestate bastard, drowned together with his wife & only child, will be granted to a creditor, the King's Proctor having been cited, but not the representatives of the wife, on presumption that the husband survived, & the debt being large & the property small.—*COLVIN v. H.M. PROCURATOR GENERAL* (1827), 1 Hag. Ecc. 92; 162 E. R. 518.

See, generally, Sect. 2, ante.

1713. As against Crown—Intestate a bastard.]—*COLVIN v. H.M. PROCURATOR GENERAL*, No. 1712, *ante*.

1714. — — — Creditor preferred—Grant to Crown decreed but not extracted.]—*In the Goods of GOLD-AM* (1850), cited in *Dea. & Sw.* at p. 271; 28 L. T. O. S. 148; 3 Jur. N. S. 72; 5 W. R. 123; 164 E. R. 573.

*Annotation:—**Consd. In the Goods of Steinorth* (1856), *Dea. & Sw.* 270.

1715. — — —.]—Administration to the Crown's nominee decreed, but not extracted, revoked at the instance of a creditor, without a fresh warrant; & an administration granted to the creditor, with the consent of the Queen's Proctor, & upon the original decree & advertisements on behalf of the Crown.—*In the Goods of STEINORTH* (1856), *Dea. & Sw.* 270; 28 L. T. O. S. 148; 3 Jur. N. S. 72; 5 W. R. 123; 164 E. R. 573.

1716. As against residuary legatee.]—*DIMES*

PART II. **SECT. 11, SUB-SECT. 4.—**
K. (a) i.

1702 i. As against next of kin—Estate

*insufficient to pay debts.]—*Where the estate of deceased intestate was admittedly insolvent, the ct. granted administration to a creditor, in pre-

ference to the next of kin.—*HAMILTON v. MORELAND, In the Goods of HAMILTON*, [1879] 3 L. L. Ir. 257.—*IR.*

v. CORNWELL, In the Goods of WATERS, No. 2100, *post*.

1717. —[.]—CRANE *v.* REBELLO, No. 2103, *post*.

1718. **As against legatees.**—CRANE *v.* REBELLO, No. 2103, *post*.

ii. *Inter sc.*

1719. **Bond creditor preferred.**—Administration decreed to a bond creditor, in preference to another creditor.—KEARNEY *v.* WHITAKER (1756), 2 Lee, 324; 161 E. R. 356.

Annotation :—**Consd.** Ernest *v.* Eustace (1856), Dea. & Sw. 271.

See Administration of Estates Act, 1869 (c. 40); & *see, now*, Administration of Estates Act, 1925 (c. 23), s. 34.

1720. **Preference for judgment creditor—Whether absolute—Simple contract creditor preferred—Creditor for larger amount & preferred by majority.**—

(1) Where a judgment creditor & a simple contract creditor are both applying for administration, the ct. will decree the administration to the simple contract creditor if his debt be the largest, & the majority of interests be in his favour.

(2) A judgment creditor has not by the practice of the ct., any absolute preference over a simple contract creditor in a question of granting letters of administration.—*In the Goods of* EUSTACE, ERNEST *v.* EUSTACE (1856), Dea. & Sw. 271; 28 L. T. O. S. 207; 2 Jur. N. S. 1172; 5 W. R. 123; 164 E. R. 574.

1721. **As between judgment creditors—Judgment creditor to whom administration decreed preferred—Though majority oppose before grant sealed.**—

On the renunciation of the exors. & residuary legatees named in a will, joint letters of administration with the will annexed were decreed to H., L., & C., three judgment creditors. On a subsequent day, but before the grant had passed the seal, W., also a judgment creditor, prayed letters of administration to be granted to him, with the consent of H. & C., but against the consent of L. No personal objection was taken to L. The ct. refused to alter its decree & granted the administration to L., the other parties having refused to be joined with him in the grant.—CORFIELD *v.* MALLOCK & MOORE (1846), 10 Jur. 575.

1722. **On application for ceterorum grant—Creditor already having limited grant.**—MAYHEW *v.* MARTIN & PINNEY, No. 1690, *ante*.

1723. **Larger creditor preferred—To smaller though prior petens.**—In an insolvent estate the ct. made a grant to the creditor for the largest amount, in preference to one, who claimed for a much smaller sum, but who was *prior petens*.—*In the Goods of* SMITH (1892), 67 L. T. 503.

1724. **Creditor first applying.**—An intestate died by his own hand, after murdering his wife & child, & all three persons were buried at the expense of the parish. A creditor having applied for administration, the guardians of the parish, supported by three other creditors, opposed, & the guardians asked for a grant to their nominee :—**Held** : the fact of the guardians having had the duty of burial cast upon them gave them no prior right to administration, & the creditor who had first applied to the ct. was entitled to the grant, subject to the usual conditions.—*In the Goods of* WEARE (1892), 66 L. T. 860; 56 J. P. 394.

1725. — **Postponed to larger creditor.**—*In the Goods of* SMITH, No. 1723, *ante*.

• 1726. **Whether poor law guardians have prior claim—Claim for burial expenses.**—*In the Goods of* WEARE, No. 1724, *ante*.

(d) *Practice.*

i. *In General.*

1727. **Form of grant—Whether joint administration granted.**—HARRISON *v.* ALL PERSONS IN GENERAL, No. 1452, *ante*.

1728. — **General rule.**—Upon a motion by a creditor for a limited grant of administration, the ct. while thinking that in this particular case it might be a convenient course to make a limited grant to the creditor, declined to depart from the practice in such cases, which requires that a creditor who applies for administration shall take a general grant.—*In the Goods of* SHEATHER (1894), 71 L. T. 848.

ii. *Substitution.*

1729. **Substitution of one creditor for another—Whether allowed.**—The ct. will make a grant of administration to a creditor who has been substituted for the creditor who extracted the citation, & will allow the latter such costs as he necessarily incurred prior to the former one taking up the application.—ANDREWS *v.* MURPHY (1860), 4 Sw. & Tr. 198; 30 L. J. P. M. & A. 37; 25 J. P. 42; 164 E. R. 1492.

1730. — **Grounds for granting—Application by undertaker.**—Administration to an undertaker, as creditor, on mere affidavit of debt, refused. Decree at instance of one creditor not sufficient for another creditor.—*In the Goods of* FOWLER (1852), 16 Jur. 891.

Annotation :—Newcombe *v.* Beloe (1867), L. R. 1 P. & D. 314.

1731. — **Whether fresh decree necessary.**—*In the Goods of* FOWLER, No. 1730, *ante*.

1732. — **Right of first applicant to costs.**—ANDREWS *v.* MURPHY, No. 1729, *ante*.

1733. **Substitution of creditor for Crown—Whether fresh decree or advertisements necessary.**—*In the Goods of* STOCKWELL (1847), cited Dea. & Sw. 270; 3 Jur. N. S. 72; 5 W. R. 123; 164 E. R. 573.

Annotation :—**Folld.** *In the Goods of* Steinorth (1856), Dea. & Sw. 270.

1734. — — — — —. — *In the Goods of* GOLDHAM (1850), cited in Dea. & Sw. at p. 271; 28 L. T. O. S. 148; 3 Jur. N. S. 72; 5 W. R. 123; 164 E. R. 573.

Annotation :—**Folld.** *In the Goods of* Steinorth (1856), Dea. & Sw. 270.

1735. — — — — —. — *In the Goods of* STEINORTH, No. 1715, *ante*.

iii. *Citations and Notice.*

Sec, generally, Sect. 16, sub-sect. 3, E., *post*.

1736. **Who must be cited.**—Where administration is applied for by the creditor of a person who died intestate without any known relation, a citation, calling upon the next of kin, if any, & all persons having interest in the estate of deceased, should be issued, & an abstract of it advertised twice, with an interval of a fortnight, notice also being given to the Queen's Proctor. After the lapse of thirty days from the last advertisement, if there is no appearance, & the Queen's Proctor declines to interfere, administration will be granted to a creditor.—CLAYTON *v.* BROWN, *In the Goods of* BROWN (1859), 28 L. J. P. & M. 126.

PART II. SECT. 11, SUB-SECT. 4.—K. (c) II.

f. *Discretion of judge of probate.*—*Re* BRAINE'S ESTATE (1868), 7 N. S. R. 390.—CAN.

PART II. SECT. 11, SUB-SECT. 4.—K. (d) I.

g. *Form of grant.*—*Re* MCKEOWN (1874), 22 W. R. 292.—IR.

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1737. Necessity for—Estate exceeding interest of applicants.]—AITKIN v. FORD (1829), 3 Hag. Ecc. 193; 162 E. R. 1127.

Annotation:—*Reid. Hudleston v. Huddleston* (1852), 2 Rob. Eccl. 424.

1738. — Next of kin abroad—Application long after death of intestate.]—When administration to a person long dead was prayed by a creditor, & there had been no personal service on the next of kin, who had no known agent in this country, the ct. required full information as to the debt & the cause of the delay, & that notice should be given to the next of kin in the West Indies.—*MILLER v. WASHINGTON* (1830), 3 Hag. Ecc. 277; 162 E. R. 1157.

1739. — Next of kin minors—Intention of not taking administration announced.]—*In the Goods of BRADLEY*, No. 1748, *post*.

1740. — Application by creditor in respect of statute-barred debt.]—*In the Goods of DRUCE*, No. 1685, *ante*.

1741. — All persons interested in distribution of estate.]—(1) The affidavits on which application is made for a grant of letters of administration to a creditor should state that all persons entitled in distribution of the effects of deceased had been cited. Therefore, when the affidavits only stated that the deceased died a widower & intestate, leaving A. his natural & lawful son & only next of kin, & that he, though cited, had not appeared, but omitted to state that A. was the only person entitled in distribution, the ct. refused to grant administration to a creditor.

(2) Service of citation on a minor is effected by serving it on him in the presence of his natural or legal guardian, or of some person upon whom the care & custody of the minor has for the time being devolved.—*BROWN v. WILDMAN* (1859), 28 L. J. P. & M. 54.

Annotation:—*Generally, Mentd. Quin v. Quin* (1919), 89 L. J. P. 38.

1742. When dispensed with—One of next of kin abroad—Need for immediate sale of assets.]—*In the Goods of DURHAM, MEEK v. DURHAM*, No. 1879, *post*.

1743. Advertisement of—Necessity for.]—*CLAYTON v. BROWN, In the Goods of BROWN*, No. 1736, *ante*.

1744. Of Crown—When return dispensed with—Original lost or destroyed by absconding clerk.]—When the estate of deceased, who died without any known relation, was barely sufficient to pay his liabilities, & a citation had been issued & served on behalf of a creditor upon the Queen's Proctor & by advertisement, but had been lost or destroyed by his solr.'s clerk, who had absconded for embezzlement, the ct. dispensed with the rule requiring the citation to be returned into the Registry, & made the grant of administration to the creditor.—*MASON v. ROBINSON, In the Goods of ROBINSON* (1865), 4 Sw. & Tr. 43; 164 E. R. 1431.

iv. Evidence Required.

1745. Evidence of intestate's estate—Necessity for.]—Before granting letters of administration to a creditor the ct. always requires an affidavit as to the amount of the property to be administered; where there has been no personal service of the usual citation on the parties entitled to the administration in the first instance.—*MARTINEAU v. REDE* (1825), 2 Add. 455; 162 E. R. 361.

1746. — — —.]—AITKIN v. FORD (1829), 3 Hag. Ecc. 193; 162 E. R. 1127.

Annotation:—*Mentd. Hudleston v. Huddleston* (1852), 2 Rob. Eccl. 424.

1747. — — —.]—Before administration to a creditor will be granted an affidavit of the amount of the personal estate of deceased must be filed.—*BRIGGS v. ROOPE* (1860), 29 L. J. P. M. & A. 96.

1748. — — —.]—Where the estate of deceased was insolvent & the subject of a suit for administration in Chancery, but which was suspended by the death of administratrix, & could not be proceeded with without the appointment of an administrator by this ct., & it appeared that the children of deceased were all minors except one, & he was in New Zealand, & the solrs. for the family had intimated that none of the children, or any one on their behalf, would take out administration, the ct. on an application to grant administration, under Court of Probate Act, 1857 (c. 77), s. 13, to a creditor who had proved his debt in the administration suit, declined to grant administration until the children should be cited, & the particulars of the debt, as well as of the estate of deceased, brought before the ct. by affidavit.—*In the Goods of BRADLEY* (1866), 14 W. R. 409.

1749. Evidence of debt—Necessity for.]—AITKIN v. FORD (1829), 3 Hag. Ecc. 193; 162 E. R. 1127.

Annotation:—*Mentd. Hudleston v. Huddleston* (1852), 2 Rob. Eccl. 424.

1750. — — — Application by secretary of association.]—(1) The ct. will not make a grant of administration under Court of Probate Act, 1857 (c. 77), s. 73, to a party entitled to a grant in another character.

(2) The ct. declined to make a grant *de bonis non* with the will annexed under above sect. to a creditor without citing certain residuary legatees named in the will, who were resident in Australia.

(3) Where an application is made for a grant of administration to the secretary of an assocn., on the ground that deceased was indebted to the assocn., the ct. ought to have such information of the constitution of the assocn. as would show that the secretary can be treated as a creditor.—*In the Goods of FAIRWEATHER* (1862), 2 Sw. & Tr. 588; 6 L. T. 788; 10 W. R. 862; 164 E. R. 1126.

1751. — — — Debt proved in administration action.]—*In the Goods of BRADLEY*, No. 1748, *ante*.

1752. — — — Next of kin not appearing.]—(1) An application by a creditor for a grant of administration of the estate of a deceased intestate, in default of appearance by the next of kin, must be accompanied by an affidavit of the amount & nature of his debt, & of the date when it occurred.

(2) When a deceased intestate's next of kin are abroad, or have no known address, & fail to appear to a citation by advertisement, an affidavit that service of the citation has been attempted & failed, & that deceased's next of kin have no known agent in England, is requisite.—*In the Goods of VON DESEN* (1880), 43 L. T. 532.

1753. — — — When dispensed with.]—Where all the persons entitled in distribution renounce their right to administration, a creditor applying does not make an affidavit of debt.—*In the Goods of RIDDLE* (1850), 14 Jur. 988.

1754. — — — What must be proved—Date when debt became due.]—The ct. will not grant administration to a creditor without an affidavit of the date when the debt became due.—*RAWLINSON v. BURNELL* (1864), 3 Sw. & Tr. 479; 33 L. J. P. M. & A. 123; 164 E. R. 1361.

1755. ————.]—*In the Goods of VON DESEN, No. 1752, ante.*

1756. ———— **Amount & nature of debt.**]—*In the Goods of VON DESEN, No. 1752, ante.*

1757. Evidence of citation of necessary parties—Necessity for.]—*BROWN v. WILDMAN, No. 1741, ante.*

1758. Evidence of attempted citation of next of kin—Necessity for—Next of kin abroad or of unknown address.]—*In the Goods of VON DESEN, No. 1752, ante.*

v. Security.

1759. Necessity for—Person with prior claim not served.]—*AITKIN v. FORD (1829), 3 Hag. Ecc. 193; 162 E. R. 1127.*

Annotation:—Mentd. Huddleston v. Huddleston (1852), 2 Rob. Eccl. 424.

L. Effect of Death in Common Disaster.

1760. Husband & wife—Grant to next-of-kin.]—*In the Goods of WAINWRIGHT, No. 832, ante.*

1761. ————.]—When husband & wife die by the same calamity, & there is no evidence that the one survived the other, administration of their personal estate will be granted to their respective next of kin.—*In the Goods of WHEELER (1861), 31 L. J. P. M. & A. 40; 26 J. P. 57.*

— — — —.]—*In the Goods of BEYNON, No.*

1763. — Substituted executor appointed in case of executor predeceasing—Grant to next of kin.]—A husband & wife executed identical wills, each appointing the other universal legatee & sole exor., & substituting exors. in case of the other dying first. They started together upon a voyage in the same ship, which was supposed to have been lost at sea with all on board. There was no evidence that either of them survived the other:—*Held: a grant of administration with the will annexed of the estate of each, as in case of an intestacy, might be made to one of the next of kin of each.*—*In the Goods of ALSTON, [1892] P. 142; 61 L. J. P. 92; 66 L. T. 591.*

1764. Testator & executor—Grant to widow of executor.]—Testator & his exor., father & son, both died, as was supposed, at the same moment. Administration with the will of the former annexed was granted to the widow of the latter, who had died intestate.—*In the Goods of SHILLING (1856), Dea. & Sw. 183; 27 L. T. O. S. 307; 5 W. R. 8; 164 E. R. 543; sub nom. In the Goods of SHELLING, 2 Jur. N. S. 1052.*

See, also, No. 1763, ante.

M. Other Persons.

1765. Trustees—Without other claim.] (1) The ct. does not grant administration to trustees, merely as such.

(2) Where a minor is sole next of kin & residuary

legatee, she may select a guardian for all purposes in law, & especially for taking administration *cum testamento annexo*.

Here the whole interest was in the minor, both as next of kin & as residuary legatee; & if she had been of age the administration *cum testamento annexo* must have been granted to her, & while she was in minority, her guardian, duly chosen & admitted by the ct., stood in her place (*SIR GEORGE LEE*).—*FAWKENER v. JORDAN (1756), 2 Lee, 327; 161 E. R. 358.*

Annotations:—As to (2) Consd. Hughes v. Richards (1758), 2 Loc. 543. Refd. In the Goods of Morris (1862), 31 L. J. P. M. & A. 80.

1766. Secretary of Jewish synagogue—Next of kin a Jew & lunatic—Next of kin of lunatic cited.]—Administration of the effects of a Jew granted to the secretary of the Great Synagogue, for the use & benefit of the next of kin, a Jewess, who was of unsound mind, during her lunacy, her next of kin having been first cited.—*In the Goods of JOSEPH (1838), 1 Curt. 907; 163 E. R. 314.*

1767. Husband of wife renouncing—Husband with beneficial interest in property.]—A wife refusing to take an administration, to which she was entitled, & being cited by her husband, who had a beneficial interest in the property, to accept or refuse, or show cause, etc., & not appearing, administration was decreed to the husband.—*WENHAM v. WENHAM (1818), 6 Notes of Cases, 17.*

1768. — In favour of third party.]—The husband is entitled to take out administration in right of the wife, to her next of kin deceased intestate, & her renunciation in favour of a third person, e.g. a creditor of deceased, will not deprive the husband of his right.—*HAYNES v. MATTHEWS, In the Goods of CLARK (1850), 1 Sw. & Tr. 460; 34 L. T. O. S. 60; 23 J. P. 328; 8 W. R. 76; 161 E. R. 813.*

1769. Representatives of deceased person entitled—One co-executor.]—(1) Testator, who survived his wife, died & left a will of which his three sons, as residuary legatees, took administration; subsequently a representation to the wife became necessary in Chancery, at which time one of the co-administrators of the husband was in foreign parts unknown, a second was bkpt., & the third applied for a general, & then for an administration limited to the proceedings in Chancery; both applications were refused.

Had the Rev. Thomas Nayler been a co-exor. of the will of his father he might alone have become the representative of his mother, but he is no more than a co-administrator, which alters the case (*SIR H. JENNER FUST*).

(2) The ct. never forces a joint administration, that parties may not have reason to complain of any inconvenience that may result from that form of grant (*SIR H. JENNER FUST*). *In the*

PART II. SECT. 11, SUB-SECT. 4.—M.

h. Legatee.]—*WOODSIDE v. LOGAN (1868), 15 Gr. 145.—CAN.*

k. —.]—The ct. refused to make a decree for the administration of an estate, at the instance of a legatee, whose claim, including interest, amounted to only £28; & that although it was alleged there were other legacies remaining unpaid, amounting in the aggregate to a considerable sum.—*REYNOLDS v. CORPIN (1873), 19 Gr. 627.—CAN.*

l. —.]—More than a year after the grant of the probate to the sole extrix, named in the will of testator, three legatees applied summarily for an administration order, upon the ground that the extrix, who for several years before the death of testator had managed his business

affairs, had refused to account for her dealings with his moneys, & now claimed an allowance from the estate for her services before the death & as extrix, denying that any sum was due by her to the estate:—*Held: the legatees were entitled to the usual administration order.*—*Re BAGWELL, ANDERSON v. HENDERSON (1896), 17 P. R. 100.—CAN.*

m. Committee of lunatic.]—*Re BRILLINGER (1871), 3 Ch. Ch. 290.—CAN.*

n. Infant.]—An infant cannot lawfully be appointed administrator of an estate, & therefore a grant of probate or of letters of administration to an infant is void.—*MERCHANTS BANK v. MONTEITH (1884), 10 P. R. 334.—CAN.*

o. Stranger.]—The mere fact that contending appcts. for administration fail to agree affords no ground for the

appointment of a stranger.—*Re SMITH'S ESTATE (1866), 28 N. S. R. (16 L. & G.) 221.—CAN.*

p. —.]—*Re O'NEILLY, [1920] 2 I. R. 254.—IR.*

q. —.]—Letters of administration may be granted to a stranger in blood with the consent of the majority of the next of kin; the ordinary security being required.—*In the Goods of GUNN, 3 J. R. N. S. 56.—N.Z.*

r. Executors—Legatee absent from jurisdiction.]—Where one of the legatees was absent from the jurisdiction, & the exors. had been unable to discover him:—*Held: a sufficient ground for the exors. obtaining an administration of the estate.*—*Re WADE, DEK v. WADE (1871), 18 Gr. 485.—CAN.*

s. Person absent from colony—At time of application.]—Letters of

Sect. 11.—Letters of administration generally: Sub-sect. 4, M.; sub-sect. 5, A., B. & C.]

Goods of NAYLER (1851), 2 Rob. Eccl. 409; 17 L. T. O. S. 259; 15 Jur. 686; 163 E. R. 1361.

1770. — One of three co-administrators—Others bankrupt or abroad.]—In the Goods of NAYLER, No. 1769, ante.

1771. — — — Others lunatic or abroad.]—In the Goods of CROOK (1855), Tristram & Coote's Probate Practice, 15th ed. p. 111, n.

Annotation:—Apld. Hancock v. Lightfoot (1864), 3 Sw. & Tr. 557.

1772. Person acquiring part of estate—After death of intestate.]—DEPIT & CHAPOT v. DELEHIEUSE, No. 1087, ante.

1773. Assignee of sole next of kin—Beneficiary under unexecuted will.]—Where the only surviving next of kin of a deceased intestate renounced all claim to a grant of administration & assigned the whole of her interest in his estate to the person he had intended to benefit by a will he had signed but never duly executed, the ct. granted letters of administration to his estate to such assignee.—In the Goods of QUILLIAM (1898), 68 L. J. P. 17; 79 L. T. 472.

SUB-SECT. 5.—DISCRETIONARY GRANTS.

NOTE.—The cases in this sub-section of the Title were decided under the discretionary power of the Court conferred by Court of Probate Act, 1857 (c. 77), s. 73, which was repealed as to deaths occurring on or after Jan. 1, 1926, by Administration of Estates Act, 1925 (c. 23), s. 56.

As to the power of the ct. to grant administration where an exor. renounces, or, when cited to prove, does not appear to the citation, *see, now*, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 159.

As to the power of the ct. to grant administration with the will annexed in cases where such grant has heretofore been customary, *see, now*, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 166.

As to the power to grant administration where a personal representative remains out of the jurisdiction, *see, now*, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 164.

As to the discretion of the ct. as to the person to whom administration shall be granted, *see* Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 162.

A. In General.

1774. Scope of section—Confined to substitution of persons—Not alteration of nature of administration.]—The ct. has no power, under Court of Probate Act, 1857 (c. 77), s. 73, to grant general administration to a person who, before that Act, would only have been entitled to a grant of administration during the minority of an infant, that sect. not conferring power to substitute one kind of administration for another, but merely to substitute another person as administrator in the place of the person who would by law be entitled to administration.—In the Goods of SMITH (1858), 27 L. J. P. & M. 105.

1775. — — — Whether joint grant included.]—(1) A joint grant of administration to the person by law entitled to administration, & to another,

administration should not be granted by the master of the Supreme ct. to any person who is absent from the Colony at the time of applying for the same.—*Re SCHOEMAN (1892), 10 S. C. 1.—S. AF.*

PART II. SECT. 11, SUB-SECT. 5.—B.

1. Executor out of jurisdiction—Security may be required by court.]—Supreme Ct. Act, 1890, s. 20, gives the

is a grant to a person other than the one entitled within Court of Probate Act, 1857 (c. 77), s. 73.

(2) A joint grant of administration *de bonis non* was made to the next of kin, & a person entitled in distribution under above sect., where the next of kin consented, & there were special circumstances rendering such a grant convenient.—*In the Goods of GRUNDY (1868), L. R. 1 P. & D. 459; 37 L. J. P. & M. 21; 17 L. T. 451; 32 J. P. 168; 16 W. R. 406.*
Annotation:—As to (2) Distd. In the Goods of Richardson (1871), L. R. 2 P. & D. 244.

See, generally, Sub-sect. 4, C., ante.

1776. — Foreign will—Whether court bound to grant executor according to the tenor.]—In dealing with a foreign will the ct. is not bound to grant probate as of right to an exor. according to the tenor, but has a discretion to make such grant as it thinks right in the circumstances, & in those of this case ordered a grant under Ct. of Probate Act, 1857 (c. 77), s. 73, requiring the administrator to give security.—In the Goods of GREWE (1922), 127 L. T. 371; 38 T. L. R. 440.

1777. Conditions of exercise of discretion—Notice to party entitled—Party entitled abroad.]—Administration will not be granted under Court of Probate Act, 1857 (c. 77), s. 73, to a person not by law entitled to the grant, when the person who is entitled to it is resident abroad, & has not received notice of the application, unless the ct. is satisfied that it is necessary & convenient that the grant should be made. A general statement upon affidavit that "it is necessary for the preservation of the personal estate" & effects of deceased that administration should be "granted," will not satisfy the ct., in the absence of such notice.—In the Goods of COOKE (1859), 1 Sw. & Tr. 267; 28 L. J. P. & M. 43; 164 E. R. 723.

1778. — — — — —.]—In the Goods of FAIRWEATHER, No. 1750, ante.

1779. Special circumstances of each case to be considered.]—The "special circumstances" of each particular case are to be considered by the ct. in granting or refusing administration under Court of Probate Act, 1857 (c. 77), s. 73, to a person not primarily entitled to a grant: &, where the "special circumstances" justify the conclusion that the person who would be entitled in priority to appct. may reasonably be presumed to be dead, the ct. should grant administration to appct., upon his swearing that he believes himself to be the next of kin of deceased.—In the Goods of CHAPMAN, [1903] P. 192; 72 L. J. P. 62; 89 L. T. 308.

1780. Power to impose limitations.]—The Ct. of Probate cannot pass over an exor. by reason of his bad character only; he must also be resident out of the United Kingdom at the time of the death of deceased, in which case it may make a grant of administration, under Court of Probate Act, 1857 (c. 77), s. 73, to some other person with such limitations as it may think fit.—In the Goods of SAMSON (1873), L. R. 3 P. & D. 48; 42 L. J. P. & M. 59; 28 L. T. 478; 37 J. P. 425; 21 W. R. 568.

1781. — — — As to duration of grant.]—In the Goods of BURGESS, No. 1806, post.

1782. — — — As to disposal of residue.]—In the Estate of GRUNDT, In the Estate of OETL, No. 1908, post.

B. No Executor Willing or Competent or Executor out of Jurisdiction.

See the note at the head of this sub-section.

ct. jurisdiction in any application for probate to require, or not to require, security from exors. residing out of the jurisdiction.—*Re KNIGHT'S WILL (1891), 17 V. L. R. 413.—AUS.*

1783. Executor unfit—Bankrupt—& abroad.]—*In the Goods of COOPER*, No. 1850, *post*.

1784. — By character—Whether alone ground for refusing grant.]—*In the Goods of SAMSON*, No. 1780, *ante*.

1785. — Criminal—Serving term of imprisonment—Refusal to renounce.]—Where the sole exor. named in a will was undergoing imprisonment for conspiracy & had refused to renounce his right thereunder, an application for a grant of letters of administration with the will annexed was made by one of the residuary legatees named therein:—*Held*: sect. 73 gave the ct. power to pass over the exor. & to make a grant to appet.—*In the Estate of DRAWMER* (1913), 108 L. T. 732; 57 Sol. Jo. 534.

See, also, No. 1797, *post*.

1786. — Seafaring man.]—A testator left two testamentary papers, the second of which varied the disposition of his property, but neither appointed new exors. nor revoked the appointment of the first will. The ct. included both papers in the probate, as together forming the last will of deceased, but as one of the exors. was insane, & the other was a seafaring man, engaged on a voyage to the East Indies, it passed them both over & made a grant of administration, with the will annexed, to a third person, under sect. 73.—*In the Goods of LEWIS* (1871), 25 L. T. 510; 35 J. P. 712; 19 W. R. 1038.

Annotation:—*Reid*. *In the Goods of Cooke* (1894), 72 L. T. 121.

1787. — By position or character—Executor also abroad.]—*In the Goods of SAMSON*, No. 1780, *ante*.

1788. — Ill health—Joint grant to nominees.]—Where a sole executrix & universal legatee was incapable, owing to ill health, of taking probate, the ct. allowed a joint grant of administration, with the will annexed, to be taken by her nominees. — *In the Estate of DAVIS*, [1906] P. 330; 75 L. J. P. 91.

1789. Executor becoming unfit—Lunacy supervening before will proved.]—*In the Goods of SHARLAND*, No. 1921, *post*.

1790. Executor incompetent—Executrix a married woman—Husband not consenting.]—A married woman having been appointed sole extrix. & universal legatee, her husband objected to her taking probate. The ct., under sect. 73, made the grant to her attorney.—*CLERKE v. CLERKE* (1881), 6 P. D. 103; 50 L. J. P. 69, 78; 29 W. R. 823; *sub nom.* *CLARKE v. CLARKE*, 45 J. P. 588.

See, now, Married Women's Property Act, 1882 (c. 75), s. 1 (2).

1791. Executor abroad—Limited grant.]—*In the Goods of HEATON*, No. 2693, *post*.

1792. — Bankrupt.]—*In the Goods of COOPER*, No. 1850, *post*.

1793. — One of two on voyage to East Indies—Other executor a lunatic.]—*In the Goods of LEWIS*, No. 1780, *ante*.

1794. — & unfitted by position & character.]—*In the Goods of SAMSON*, No. 1780, *ante*.

1795. — No intention to return.]—An exor., before the death of testator, left the country under an assumed name, having sold all his effects, & there was reason to believe that he did not intend to return:—*Held*: administration with the will annexed might be granted to testator's widow, who was the sole beneficiary, without requiring the exor. to be cited.—*In the Goods of CRAWSHAY*, [1893] P. 108; 62 L. J. P. 91; 68 L. T. 260; 41 W. R. 303; 1 R. 477.

1796. — Departure in embarrassed circumstances—Steps taken towards probate.]—The

exor. named in a will took some steps towards obtaining probate, but, after drawing a sum of £25 from the estate on account of costs, appeared to have departed from the country in embarrassed circumstances, leaving no address, & apparently with no intention of returning:—*Held*: although the estate was of substantial value, administration with the will annexed might be granted, upon motion, under sect. 73, to one of the persons named as residuary legatees without notice to the exor.—*In the Goods of MASSEY*, [1899] P. 270; 68 L. J. P. 127; 81 L. T. 493.

1797. — Departure in fear of criminal proceedings.]—A sole exor. appointed by testatrix's will fled the country under fear of criminal proceedings seven years before testatrix's death & had not since been heard of. On the application of one of two residuary legatees, with the consent of the other, the exor. was passed over without citation, & administration with the will annexed made to appet.—*Re WILLIAMS*, [1918] P. 122; 87 L. J. P. 56; 119 L. T. 494; 62 Sol. Jo. 309.

1798. — Urgent need for representation to estate.]—Upon an application for administration with the will annexed it appeared that testator by his will had appointed two exors., & made his daughter, a minor, his sole legatee. Of the two exors. one was dead, & the other at the time of testator's death was in Brazil, the date of his return being uncertain. The next of kin of the minor either renounced or were resident out of the jurisdiction. The ct., upon proof that there was urgent need of immediate administration, made a grant to the paternal aunt of the minor, whom she had elected her testamentary guardian. — *In the Goods of BATTERBEE* (1889), 14 P. D. 39; 58 L. J. P. 38; 60 L. T. 838; 53 J. P. 231; 37 W. R. 416.

1799. — — — — —.]—Testator by his will nominated two exors., both of whom at the time of his death were resident out of the United Kingdom. The will contained a paragraph requesting R., the partner of one of the exors., to act for him in the event of his absence. It appeared that there was urgent necessity for the appointment of an administrator of estate of deceased:—*Held*: administration with the will annexed might be granted to R. under Court of Probate Act, 1857 (c. 77), s. 73, until such time as one or other of the exors. should come & prove the will.—*In the Goods of TAYLOR*, [1892] P. 90; 61 L. J. P. 93; 66 L. T. 266.

1800. — — — — —.]—Where the exor. appointed under a will was out of the jurisdiction, & where there were urgent matters in connection with the estate of deceased testator that required immediate attention, the ct. made a grant of letters of administration with the will annexed to the widow of testator, who was the sole beneficiary.—*In the Goods of WOHLGERMUTH* (1910), 54 Sol. Jo. 460.

1801. — In territory in enemy occupation.]—*In the Estate of KREJEWSKY*, No. 1670, *ante*.

1802. — Whether presumed—Disappearance shortly before testator's death—& issue of warrant for arrest.]—A testator appointed a sole exor. The exor., shortly before testator's death, disappeared, & a warrant for his arrest had been issued, but his whereabouts was unknown:—*Held*: though residence abroad could not be presumed, the exor. might be passed over without citation, & administration with the will annexed might be granted.—*In the Goods of WRIGHT* (1898), 70 L. T. 473.

C. Intestate's Estate Insolvent.

See Sub-sect. 5, E. (b), post.

Sect. 11.—Letters of administration generally: Sub-sect. 5, D. (a), (b) & (c).]

D. Special Circumstances for Exercise of Discretion.

(a) Person Entitled Abroad.

See the note at the head of this sub-section.

1803. Urgent need for representation to estate.]—B. died a widower & intestate, his only son & the sole person entitled in distribution was resident in Australia. A legal representative being required immediately for the preservation of the property, administration for the use & benefit of the son was granted to his father-in-law under above sect.—*In the Goods of JONES* (1858), 1 Sw. Tr. 13; 27 L. J. P. & M. 17; 30 L. T. O. S. 311; 4 W. R. 276; 164 E. R. 607.

1804. —.]—*In the Goods of COOKE*, No. 1777, *ante*.

1805. — Estate perishable.]—Where the estate of an intestate was perishable, & the next of kin were in Australia, the ct., under above sect., granted administration for the use & benefit of the next of kin.—*In the Goods of YOUNG* (1866), 36 L. J. P. & M. 80; 15 L. T. 446.

Annotation:—Fold. In the Goods of Thomas (1873), 28 L. T. 677.

1806. — Only adult next of kin abroad.]—A. died intestate, leaving four children, of whom one was of age, but was abroad, & the other three were minors. An immediate grant of administration being necessary, the ct., under above sect., granted administration to the duly elected guardian of the minors for their use & benefit, limited until one of the children should apply for a grant.—*In the Goods of BURGESS* (1863), 4 Sw. & Tr. 188; 32 L. J. P. M. & A. 158; 9 L. T. 86; 9 Jur. N. S. 553; 11 W. R. 687; 164 E. R. 1488.

1807. Grant to guardian of infants entitled in distribution.]—*In the Goods of SEE*, No. 1900, *post*.

1808. Communication cut off by blockade—Property not perishable.]—A. died in England intestate, leaving two children, the only persons entitled to her effects, who were resident in Georgia. She left money in the funds & in a savings-bank, a small sum due to her, & a little furniture. The ct. refused to make a grant to B., her nephew, for the use & benefit of her children, although communication with her children from England was cut off by reason of the blockade of the southern ports of the States, on the ground that the property was not perishable, & that there were no special circumstances to justify the ct. in departing from the ordinary practice.—*In the Goods of WHITE* (1862), 2 Sw. & Tr. 457; 31 L. J. P. M. & A. 161; 6 L. T. 162; 26 J. P. 663; 10 W. R. 430; 164 E. R. 1074.

1809. —.]—*In the Goods of WYCKOFF*, No. 1927, *post*.

1810. Grant limited in time—Until application by or on behalf of next of kin.]—At the time of the death of an intestate his only next of kin was in New Zealand. The ct., upon being satisfied that an immediate representation was necessary for the preservation of the personal estate, made a grant of administration to the sister of intestate, under above sect., for the use & benefit of the next of kin, limited until such time as the grant should be made to the next of kin or his lawful attorney, & ordered the administratrix to give justifying security.—*In the Goods of CHOLWILL* (1866), L. R. 1 P. & D. 192; 35 L. J. P. & M. 75; 14 L. T. 338; 30 J. P. 647.

Annotations:—Fold. In the Goods of Young (1866), 36

L. J. P. & M. 90; *In the Goods of Thomas* (1873), 28 L. T. 677.

1811. Representation to estate of married woman—Widower abroad but address unknown.]—A married woman died in 1859, intestate, her husband her surviving. There were no children of the marriage. The husband, since the death of his wife, had resided abroad, & was indebted to the mother of his deceased wife in £122, for which sum a judgment had been some time obtained against him by default. Under the will of a third person deceased was entitled to a legacy of £100, "independent of her husband, & payable on the death of her mother." The husband, whose address was unknown, had not had notice of the present application. On motion for administration to the mother, of the personal estate of deceased:—*Held*: sufficient ground had not been laid for the grant under above sect. to the exclusion of the husband.—*In the Goods of GAROT* (1865), 5 New Rep. 321.

1812. — Separate estate.]—The ct. made a grant, under above sect., by reason of the "special circumstances" of the case, in respect of a married woman's separate estate, in favour of her father, passing over her husband, who was out of the country, without requiring him to be cited.—*In the Goods of HILL* (1892), 66 L. T. 380; 56 J. P. 297.

Annotation:—N.F. In the Goods of White (1892), 66 L. T. 861.

1813. Grant in respect of real estate—Heir-at-law abroad & address unknown.]—Notwithstanding Land Transfer Act, 1897 (c. 65), s. 2 (4), & the fact that the heir-at-law of an intestate had not been cited, the ct. granted administration under Court of Probate Act, 1857 (c. 77), s. 73, to one of the next of kin, the heir-at-law being abroad & his address being unknown.—*In the Goods of BLENKINSOP* (1901), 49 W. R. 336; 45 Sol. Jo. 240.

1814. Persons entitled alien enemies.]—*In the Estate of SCHIFF*, No. 1907, *post*.

1815. Next of kin of alien enemy resident abroad—Grant to British subject as attorney.]—*In the Estate of GRUNDT*, *In the Estate of OETL*, No. 1908, *post*.

1816. Next of kin in territory in enemy occupation.]—*In the Estate of KREJEWSKY*, No. 1670, *ante*.

1817. Necessity for citation or notice.]—*In the Goods of COOKE*, No. 1777, *ante*.

1818. — Real estate.]—*In the Goods of BLENKINSOP*, No. 1813, *ante*.

(b) Person Entitled Missing.

See the note at the head of this sub-section.

1819. Grant to creditor.]—Where the next of kin of an intestate were two nephews, who could not be traced, nor anything be ascertained as to them, the ct. granted administration to a creditor, under above sect., by reason of the "special circumstances" of the case.—*In the Goods of CURRIE* (1893), 57 J. P. 745.

1820. Whether absence abroad presumed—Disappearance of executor shortly before intestate's death—& issue of warrant for arrest.]—*In the Goods of WRIGHT*, No. 1802, *ante*.

1821. Question of survivorship doubtful.]—Where the presumption of A.'s death arose from the fact that he had not been heard of for seven years, & there was no evidence that he was ever married or had left a will, & his father died before

the expiration of the seven years, the ct., on account of the impossibility of ascertaining whether or not A. had survived his father, under above sect., granted administration to the next of kin of A., without requiring administration to be taken out to his father.—*In the Goods of ASTELL* (1860), 31 L. J. P. M. & A. 38; 24 J. P. 183.

1822. —.]—A., a bachelor, who had gone to Australia, had not been heard of for seven years. His father died intestate about two years & five months before the expiration of the seven years. No personal representation had been taken out to the father. It being uncertain whether deceased died before or after his father, the ct. granted administration of his effects to his sister as one of his next of kin, under above sect.—*In the Goods of PECK* (1860), 2 Sw. & Tr. 506; 29 L. J. P. M. & A. 95; 2 L. T. 159; 164 E. R. 1093.

Annotation:—Fold. In the Goods of Harling, [1900] P. 59.

1823. —.]—When the father of deceased had deserted his wife twelve years ago & gone to Australia, & had not been heard of for seven years, the ct. refused to presume that he had died at any given period within the seven years. But, under the circumstances, granted administration of the effects of his son, who had died within the seven years, to the mother, under above sect., without requiring her first to take out administration to the father.—*In the Goods of SMITH* (1861), 2 Sw. & Tr. 508; 31 L. J. P. M. & A. 182; 7 L. T. 193; 10 W. R. 586; 164 E. R. 1094.

Annotation:—Refd. Re Benham's Trusts (1867), L. R. 4 Eq. 416.

1824. — Presumption of death "In or since." —Where a person who left no will was presumed to have died "in or since 1863," & his father died in 1866, also intestate, the ct. made a grant under above sect. to a brother of the presumed deceased, no representative of the father's estate having been appointed.—*In the Goods of HARLING, [1900] P. 59; 69 L. J. P. 32; 81 L. T. 791.*

1825. Person entitled not heard of for fifteen years—Desertion by husband.—*In the Goods of SHOOSMITH, No. 1512, ante.*

1826. Person entitled presumed dead—Not heard of for twenty-five years.—Intestate died in 1898. His son, who, if alive, would be entitled to administration as sole next of kin, had married & left this country in 1872, & had not been heard of since. Intestate's estate amounted to about £200. The ct. allowed a grandson of intestate, the issue of a deceased daughter, to take a grant of administration under above sect., without requiring the missing next of kin to be cited by advertisements: appct. to swear that he believed himself to be the sole next of kin, & the sureties to his bond to justify.—*In the Goods of CALLICOTT, [1899] P. 189; 68 L. J. P. 67; 80 L. T. 421.*

Annotations:—Fold. In the Goods of Chapman, [1903] P. 192. Refd. In the Goods of Loveday, [1900] P. 154; In the Goods of Jackson (1902), 19 T. L. R. 74.

1827. —.]—*In the Goods of BYRNE, No. 1513, ante.*

1828. — Not heard of for eighteen years—Necessity for advertisements.—A nephew applied for administration of his deceased aunt's intestate estate. It appeared that he had an uncle, a brother of deceased. This uncle emigrated to Australia, some thirty years before, & none of his relatives had heard of or from him, for about eighteen years, when he was in poor circumstances. He would, if alive, be about seventy years of age,

but appct. & another member of the family both swore that they believed him to be dead. The ct. refused the application, & intimated that, in all such cases, the best & safest course to pursue was to advertise the citation, & if no answer were received to the advertisements, the motion might then proceed.—*In the Goods of CUTLER* (1892), 67 L. T. 355.

1829. — Not heard of for sixteen years.—*In the Goods of LOVE, No. 843, ante.*

1830. — Not heard of for sixty years.—*In the Goods of BOWDEN* (1904), 21 T. L. R. 13.

1831. —.]—*In the Goods of CHAPMAN, No. 1779, ante.*

(c) *Person Entitled Unfit or Incapable.*

See the note at the head of this sub-section.

Unfitness of executor.—See Sub-sect. 5, B., *ante.*

1832. Dissolute character.—Testator bequeathed his real & personal estate in two equal moieties to the children of his deceased sisters. The exor. renounced, & the children were resident abroad. The sole surviving next of kin was another sister, to whom testator had left a legacy of "one shilling," & who was leading a dissolute life. Under the circumstances, the ct. made a grant of administration with the will annexed to a relative not interested, for the use & benefit of the minors until they should appear & take the grant.—*In the Goods of THOMAS* (1873), 23 L. T. 677; 37 J. P. 359.

1833. — Grant in respect of real estate.—*In the Goods of ARDERN, No. 1642, ante.*

1834. Conviction for murder of intestate.—The conviction of a husband of the murder of his wife is a "special circumstance" within above sect., & the ct. passed over the legal personal representative of the husband & granted administration to the estate of the intestate wife, upon the application of one of her next of kin.—*In the Estate of CHIPPEN, [1911] P. 108; 80 L. J. P. 47; 104 L. T. 224; 27 T. L. R. 258; 55 Sol. Jo. 273.*

Annotations:—Apld. In the Estate of Hall, Hall v. Knight & Baxter, [1914] P. 1. Refd. Gayer v. Gayer (1917), 116 L. T. 322. Mentd. Mash v. Darley, [1914] 1 K. B. 1.

1835. Unfitness through age.—A. died a spinster & intestate, leaving B., her mother & next of kin, & C., her sister, together the only persons entitled in distribution to her personal estate & effects. B., the mother, being aged & infirm, & presumably incapable of administering the estate, the ct. made the grant to C. under the above sect.—*In the Goods of CLARKE* (1876), 40 L. J. P. 16; 41 J. P. 58; 25 W. R. 82.

Unfitness through infancy.—See Sub-sect. 5, E. (c).

1836. Mental incapacity—Person entitled a lunatic.—MILE END OLD TOWN GUARDIANS v. FINDLAY, *In the Goods of FINDLAY, No. 1893, post.*

1837. —.]—*In the Goods of LEWIS, No. 1786, ante.*

1838. — Not so found—Grant to creditor.]

—(1) A deceased testator left a will whereby he appointed his wife sole extrix. & universal legatee. At the time of his decease she was a lunatic, not so found by inquisition, confined in an asylum. By an order made under Lunacy Regulation Act, 1862 (c. 86), her niece was appointed her guardian to receive her income. A creditor of the deceased extracted a citation calling upon the lunatic to accept or refuse probate.

such children.—*In the Goods of GALLIGAN* (1866), 15 L. T. 146.—IR.

a. *Person entitled presumed dead—Not heard of for twenty-six years.*—

Where the father of the deceased had not been heard of for twenty-six years, & was believed to be long since dead, & deceased died recently, the ct. allowed

administration to the son's goods to issue without extracting a grant to the father.—*In the Goods of LINDLEY* (1863), 9 L. T. 243.—IR.

Sect. 11.—Letters of administration generally: Sub-sect. 5, D. (c), (d), (e), (f) i., ii. & iii., & (g).]

He served this citation on the guardian, who refused to allow him to serve it personally on the lunatic. The ct. made a grant of administration with the will annexed under Court of Probate Act, 1857 (c. 77), s. 73, without requiring the citation to be personally served on the lunatic.

(2) The ct. made a grant under above sect. to a partly secured creditor who was unable to realise his security.

(3) The ct. dispensed with personal service of the citation upon the lunatic, whose committee had been duly served.—*In the Goods of ATHERTON*, [1892] P. 104; 61 L. J. P. 134; 66 L. T. 267.

1839. — — — Grant to quasi-committee.]—The sole next of kin of a deceased intestate was a person "not lawfully detained as a lunatic, & not found a lunatic by inquisition, but through mental infirmity arising from age incapable of managing her affairs" within Lunacy Act, 1890 (c. 5), s. 116 (1). Her estate was administered by a person appointed to act with a power of committee under sub-sect. 2 of the sect. The ct. made a general grant under Probate Act, 1857 (c. 77), s. 73, to the person so appointed for the use & benefit of the next of kin.—*In the Goods of LEESE* [1894] P. 160; 63 L. J. P. 124; 70 L. T. 810.

1840. — — — & without means—Necessity for order under Lunacy Regulation Act, 1862 (c. 86), s. 12.]—An intestate, whose property was under £1,000 in value, left no known relation except a sister who was of unsound mind, but had not been found so by inquisition, & who had no property of her own. The ct. refused to grant administration under Court of Probate Act, 1857 (c. 77), s. 73, for the use & benefit of the lunatic, to a stranger in blood, until appct. should obtain an order from the Ct. of Ch. under Lunacy Regulation Act, 1862 (c. 86), s. 12, rendering the property of the lunatic available for her maintenance & benefit.—*Re SLUMBERS* (1865), 4 Sw. & Tr. 32; 34 L. J. P. M. & A. 93; 12 L. T. 582; 11 Jur. N. S. 396; 13 W. R. 696; 164 E. R. 1426.

See, generally, LUNATICS.

(d) Person Entitled Bankrupt.

See the note at the head of this sub-section.

1841. Sureties dispensed with—Grant to official receiver.]—The ct. made a grant of administration under Court of Probate Act, 1857 (c. 77), s. 73, in respect of the personal estate & effects of a married woman who had died intestate, leaving her husband surviving, upon the application & in favour of the official receiver in her husband's bkpty., & dispensed with the usual sureties.—*In the Goods of THACKER* (1890), 51 J. P. 759.

1842. — Grant to trustee in bankruptcy—Where official receiver trustee.]—The right to a grant of administration of an undischarged bkpt. vests under Bankruptcy Act, 1883 (c. 52), in his trustee in bkpty. without citing the bkpt., & if the official receiver is the trustee in bkpty., without sureties, the grant will be made under Ct. of Probate Act, 1857 (c. 77), s. 73.—*In the Goods of BOWRON* (1914), 84 L. J. P. 92; 112 L. T. 478; 59 Sol. Jo. 108; [1915] H. B. R. 78.

(e) Intestate Deserted by Husband.

See the note at the head of this sub-section.

1843. Husband not heard of for many years—& presumed dead.]—*In the Goods of SHOOSMITH*, No. 1512, *ante*.

1844. — — —.]—*In the Goods of BYRNE*, No. 1513, *ante*.

1845. — — —.]—*In the Goods of BOWDEN* (1904), 21 T. L. R. 13.

See, also, Sub-sect. 4, E. (e), ante.

(f) Consent of Parties Interested.

See the note at the head of this sub-section.

i. In General.

1846. General rule.]—The consent of all the persons interested is not a sufficient ground for departing from the general rules as to grants of administration. The ct. therefore refused to make a joint grant under Court of Probate Act, 1857 (c. 77), s. 73, to two of the persons interested in distribution, & to a nominee of the next of kin, & all the persons interested concurred in the application.—*In the Goods of RICHARDSON* (1871), L. R. 2 P. & D. 244; 40 L. J. P. & M. 36; 25 L. T. 384; 35 J. P. 792; 19 W. R. 979.

Annotations:—Apld. Teague v. Wharton (1871), L. R. 2 P. & D. 360; *In the Goods of Hale* (1874), L. R. 3 P. & D. 207.

1847. — — —.]—(1) The mere fact that the person who would be entitled to administration desires that some other person should take the grant, does not constitute such a special state of circumstances as to justify a grant under Court of Probate Act, 1857 (c. 77), s. 73. In such a case the proper course to be adopted is for the person entitled to administration to take the grant, & then appoint his nominee to act as his or her attorney.

(2) The will of deceased having been set aside by reason of an informality in the execution, the widow & children entered into an arrangement by deed to carry out the intention of deceased as contained in such will, notwithstanding its informality. The ct. refused to grant administration to the exors. named in the will under above sect., as the nominees of the parties interested in an intestacy, they themselves having no interest in the property of deceased.—*In the Goods of HALE* (1874), L. R. 3 P. & D. 207; 41 L. J. P. & M. 45; 31 L. T. 799.

Annotations:—As to (2) Distd. In the Estate of Watkin, Whitlark v. White, [1915] P. 24. Repld. In the Goods of Potter, Potter v. Potter, [1899] P. 265.

ii. Grant to Sole Nominee.

1848. Whether granted—Persons entitled aged & infirm.]—A. died intestate, leaving an aged uncle & aunt, the only persons entitled in distribution. At their desire administration was granted for their use & benefit to their son on the sureties justifying.—*In the Goods of ROBERTS* (1858), 1 Sw. & Tr. 64; 31 L. T. O. S. 41; 6 W. R. 460; 164 E. R. 631.

Annotation:—Foldd. In the Estate of Davis, [1906] P. 330.

1849. — — —.]—Under Court of Probate Act, 1857 (c. 77), s. 73, administration of the estate & effects of an intestate was granted to the nominee of the persons entitled to the grant with the consent of all the parties interested, & the administrator was not required to give justifying security.—*In the Goods of GRAVES* (1861), 25 J. P. 440.

1850. — Legatee—Estate small—Next of kin consenting.]—Deceased executed a will in which she appointed an exor. who subsequently became bkpt., & left this country for Australia. The property being small, on the consent of the next of kin the ct. granted administration with the will annexed to one of the parties interested under it, by virtue of the authority given by Court of Probate Act, 1857 (c. 77), s. 73.—*In the Goods of COOPER* (1869), L. R. 2 P. & D. 21; 39 L. J. P. & M. 8; 21 L. T. 596; 34 J. P. 23.

Annotation:—Expld. In the Goods of Massey (1899), 81 L. T. 403.

1851. — Nominee without interest.]—The ct. will grant administration, with the consent of all the parties interested in the property of deceased, to their nominee who takes no interest in the property himself.—*FARRELL v. BROWNBILL* (1864), 3 Sw. & Tr. 467; 33 L. J. P. M. & A. 185; 28 J. P. 695; 10 Jur. N. S. 593; 164 E. R. 1356.

Annotations:—Expld. In the Goods of Blake (1866), 35 L. J. P. & M. 91; *Teague v. Wharton* (1871), L. R. 2 P. & D. 360. *Refd. In the Goods of Richardson* (1871), L. R. 2 P. & D. 244; *In the Goods of Potter, Potter v. Potter*, [1899] P. 265.

1852. — — — — —.]—The ct. refused to grant an administration of the effects of deceased, under Court of Probate Act, 1857 (c. 77), s. 73, to a person not having any interest in the estate, merely because the next of kin had agreed to renounce in his favour.—*In the Goods of BLAKE* (1866), 35 L. J. P. & M. 91; 14 L. T. 769; 14 W. R. 1021.

1853. — — — — —.]—If the next of kin of deceased are unable to agree amongst themselves which of them shall take administration of his estate, & are all willing that such administration shall be granted to a nominee who has no interest therein, that will not be a special circumstance to justify the ct. in making a grant to such nominee under Court of Probate Act, 1857 (c. 77), s. 73.—*TEAGUE & ASHDOWN v. WHARTON, In the Goods of JEFFRIES* (1871), L. R. 2 P. & D. 360; 41 L. J. P. & M. 13; 25 L. T. 764; 36 J. P. 24; 20 W. R. 214.

Annotations:—Apld. In the Goods of Hale (1874), L. R. 3 P. & D. 207. *Refd. In the Goods of Potter, Potter v. Potter*, [1899] P. 265.

1854. — — — — —.]—Under an intestacy, the sole property to which deceased was entitled consisted of a one-third undivided share in certain leaseholds under the will of her grandfather, of whose estate deceased's brother, present appct., was administrator *de bonis non* & himself entitled to another one-third undivided share. The sole next of kin renounced, & the husband of a deceased next of kin also renounced, & expressly consented to the brother taking a grant, which was required in order to complete the title on sale of the leaseholds in question:—*Held*: no "special circumstances" had been shown for invoking the aid of Court of Probate Act, 1857 (c. 77), s. 73, the application by the brother for administration must be refused.—*In the Goods of BROTHERTON*, [1901] P. 139; 70 L. J. P. 33; 84 L. T. 330.

Annotation:—Distd. In the Estate of Watkin, Whitlark v. White, [1915] P. 24.

See, generally, Sub-sect. 3, D., *ante*.

1855. — — — — — Partner of deceased nominee—Grant de bonis non.]—The ct. having, with the consent of all parties interested in the estate of deceased testator, made a grant of administration with the will annexed to a stranger, as the nominee of such parties, on the ground (*inter alia*) that he had a special knowledge of the business of deceased, subsequently, on the death of such administrator, made a grant *de bonis non* to his partner.—*In the Goods of POTTER, POTTER v. POTTER* (1900), 69 L. J. P. 53; *previous proceedings*, [1899] P. 265. *Annotation:—Consd. In the Estate of Watkin, Whitlark v. White*, [1915] P. 24.

1856. — — — — — Executors under will set aside for informality—Adoption of will by persons entitled in distribution.]—*In the Goods of HALE*, No. 1847, *ante*.

1857. — — — — — With a view to avoiding litigation—Part of terms of compromise.]—A doubt having been raised as to the legitimacy of the sole next of kin, a deed was entered into by the parties interested for the distribution of deceased's property amongst themselves in certain proportions, & it was a part of the arrangement that administration of the personal estate of deceased should be

applied for by an individual who had, under no circumstances, an interest therein:—*Held*: there were special circumstances in the case which authorised the ct. to grant such administration to the person designated under Court of Probate Act, 1857 (c. 77), s. 73.—*In the Goods of HOPKINS* (1875), L. R. 3 P. & D. 235; 44 L. J. P. & M. 42; 33 L. T. 320; 39 J. P. 696.

Annotation:—Folld. In the Goods of Minshull (1889), 61 L. T. 257.

1858. — — — — —.]—Doubts having arisen as to the legitimacy of the person claiming to be next of kin, it was agreed between the persons interested in the estate of the intestate, that such claimant should apply for a grant of administration under Court of Probate Act, 1857 (c. 77), s. 73, & that the estate should afterwards be divided between them & the claimant:—*Held*: there were "special circumstances" to warrant the ct. in making a grant to the person applying in pursuance of the agreement.—*In the Goods of MINSHULL* (1889), 14 P. D. 151; 58 L. J. P. 69; 61 L. T. 257; 38 W. R. 80.

1859. — — — — —.]—Where all parties interested in the estate of deceased had entered into a compromise, with a view to putting an end to all further disputes & litigation, upon the basis that B., a stranger in blood, who had been employed by deceased in auditing his accounts, should apply for & obtain a grant of letters of administration with the will & codicils annexed, the ct., upon his application, & subject to the consents of all the persons interested in the estate, & subject to an affidavit of the fitness of the proposed administrator being filed, made the grant to him under Court of Probate Act, 1857 (c. 77), s. 73.—*In the Goods of POTTER, POTTER v. POTTER*, [1899] P. 265; 68 L. J. P. 97; 81 L. T. 234; *subsequent proceedings* (1900), 69 L. J. P. 53.

Annotation:—Consd. In the Estate of Watkin, Whitlark v. White, [1915] P. 24.

iii. Joint Grants.

1860. Widow & person without interest—Person conversant with testator's business.]—*In the Goods of BROWNING*, No. 1549, *ante*.

1861. Next of kin & person entitled in distribution.]—*In the Goods of GRUNDY*, No. 1775, *ante*.

1862. Nominee of next of kin & persons entitled in distribution.]—*In the Goods of RICHARDSON*, No. 1775, *ante*.

1863. Nominees of sole executrix & universal legatee—On ground of ill-health.]—*In the Estate of DAVIS*, No. 1788, *ante*.

1864. Brother & nephew—Consent of five of eight remaining nephews & nieces—Remainder abroad.]—A widow died intestate leaving a brother & nine nephews & nieces. Three of her nephews & nieces were in Australia, but, the other six consenting, the ct., under Court of Probate Act, 1857 (c. 77), s. 73, made a grant of administration to the brother & one of the nephews.—*In the Goods of WASH*, [1892] P. 230; *sub nom. In the Goods of WASH*, 61 L. J. P. 123; 67 L. T. 355.

(g) Other Special Circumstances.

See the note at the head of this sub-section.

1865. Intestate a fraudulent trustee—Grant to substituted trustees.]—A., who died intestate, was one of the exors. & trustees of his father's will, & applied to his own use considerable sums, part of the trust funds, which came into his hands as trustee. A renunciation & consent having been filed by the next of kin, the ct. granted, under Court of Probate Act, 1857 (c. 77), s. 73, administration of the personal estate & effects of deceased

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to B. & C., the substituted trustees under his father's will.—*In the Goods of BOND* (1875), 44 L. J. P. & M. 41; 33 L. T. 71; 39 J. P. 664; 23 W. R. 597.

1866. Intestate guilty of embezzlement.—Intestate was a clerk in the treasurer's office of the corp. of H. The borough treasurer had admitted that he had been guilty of embezzling a large sum of money belonging to the corp., & it was also suggested that money was due from deceased to the corp.:—*Held*: there were no "special circumstances" within Court of Probate Act, 1857 (c. 77), s. 73, to justify the ct. in passing over the widow & granting administration of the estate to a third person.—*WELLS v. BROOK* (1877), 25 W. R. 463.

1867. Mother renouncing.—Mother's second husband abroad.—The mother of intestate being willing to renounce her right to a grant of administration, & her husband being in Australia, the ct., without requiring the renunciation of her husband, passed her over & made the grant to intestate's sister under Court of Probate Act, 1857 (c. 77), s. 73.—*In the Goods of LLANWARNE* (1866), L. R. 1 P. & D. 306; 36 L. J. P. & M. 25; 15 L. T. 193; 31 J. P. 552.

1868. Assets remitted by foreign administrator for distribution.—Deceased having died in India, his property was administered by the Administrator-General there, who paid one moiety of the available funds to the widow, who was resident in India, & transmitted the other moiety to this country for distribution amongst the parties entitled thereto at the time of deceased's death. The ct., under Court of Probate Act, 1857 (c. 77), s. 73, granted administration of the goods of deceased to one of such parties limited to the property transmitted to this country by the Administrator-General.—*In the Goods of HUGHES* (1873), L. R. 3 P. & D. 140; 43 L. J. P. & M. 31; 29 L. T. 377; 37 J. P. 792.

1869. Deceased a sole trustee.—Will not proved.—Grant limited to trust fund to representatives of beneficiary.—The surviving trustee of a fund being dead, & no one having been appointed to administer his estate, the next of kin having failed, after citation, to have his will proved, the ct. made a grant of administration, under Court of Probate Act, 1857 (c. 77), s. 73, limited to a specific fund, over which the deceased tenant for life had power to dispose, & did dispose by her will, & by the will appointed appcts. exors.—*In the Goods of PRICE* (1892), 67 L. T. 503.

1870. Testator without known relatives except widow.—Subsequent death of widow leaving a son.—J. died on Aug. 1, 1889, without known relatives, leaving a duly executed will of July 8, 1889, revoking former wills & bequeathing five leasehold houses, which were said to constitute his whole estate. There was no residuary clause in the will B. was appointed sole exor., but there was some doubt as to the exact interest of B. or of testator's widow in the five houses. B. died intestate, without proving the will. His widow E. took out administration to his estate, but died before applying for administration with the will annexed to J.'s estate. The widow of J. enjoyed the rents of the houses until she died, on Dec. 29, 1891. She left a will, which was proved by her son C. who, with others, entered into an agreement with E. for the latter to administer & distribute J.'s property. E. having died, C. moved for administration. The Queen's Proctor had been duly

cited:—*Held*: although C. was not legally entitled to represent E. or B., the case disclosed such "special circumstances," as enabled the ct. to make a grant, under sect. 73, to C., with the will of July 8, 1889 annexed, in respect of J.'s estate, limited to the five houses, in terms of an intimation from the Queen's Proctor.—*In the Goods of JACKSON*, [1892] P. 257; 61 L. J. P. 126; 67 L. T. 827; 56 J. P. 457.

1871. Persons entitled alien enemies.—Grant to attorney appointed before outbreak of war.—*In the Estate of KOENIGS*, No. 1924, *post*.

1872.—Where a German domiciled in Germany died entitled to a debt from an English firm due before the war, which under the provisions of the Treaty of Peace Order, 1919, can only be paid through the Clearing Office, & that debt is his only asset in England, administration to his estate, confined to that debt may be granted to the Controller of the Clearing Office under Court of Probate Act, 1857 (c. 77), s. 73, without notice to any other persons.—*In the Estate of BLUHM*, [1921] P. 127; 90 L. J. P. 94; 124 L. T. 829; 37 T. L. R. 108; 65 Sol. Jo. 136.

1873. — Limited grant ad colligenda bona.—To Controller of Clearing Office.—Where a German domiciled in Germany dies entitled to a debt from an English firm due before the war, which, under the provisions of the Treaty of Peace Ord., 1919, can only be paid through the Clearing Office, administration *ad colligenda bona* limited to that debt may be granted to the Controller of the Clearing Office in the principal probate registry, without motion to the ct.—*In the Estate of MAY*, *In the Goods of BUSCHE*, [1922] P. 33, n.; 91 L. J. P. 62; 126 L. T. 385, n.; 38 T. L. R. 210.

E. To Whom Grant may be made.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 162.

(a) *In General.*

1874. Only to persons not otherwise entitled.—*In the Goods of SMITH*, No. 1774, *ante*.

1875.—*In the Goods of CORSER*, No. 1538, *ante*.

1876. — Person entitled in another character.—*In the Goods of FAIRWEATHER*, No. 1750, *ante*.

Where testator dies possessed of real estate.—*See* Nos. 1612, 1643, *ante*; Land Transfer Act, 1897 (c. 65), s. 2 (4) (repealed by Law of Property Act, 1922 (c. 16), s. 156 (11)); Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 162; Administration of Estates Act, 1925 (c. 23), s. 46.

(b) *Creditors.*

i. *In General.*

1877. When discretion exercised.—Insolvency disputed.—The ct. will not exercise the power conferred on it by Court of Probate Act, 1857 (c. 77), s. 73, by passing over a person entitled to a grant of administration in favour of a creditor, when the fact of the insolvency of the intestate is disputed.—*In the Goods of HAWKE*, *HAWKE v. WEDDERBURN* (1868), L. R. 1 P. & D. 594; 37 L. J. P. & M. 33; 18 L. T. 336; 32 J. P. 583; 16 W. R. 712.

1878. — Death of sole person entitled without administering.—Consent of representative.—Where a person, being the sole party interested in, & the sole party entitled to represent, the estate of a deceased person, died without having taken out a grant to such person, & his personal representative had filed a renunciation & a consent to the grant being made to a creditor of the party so originally interested & entitled to the grant, the ct. made the grant to such creditor under Court of Probate Act, 1857 (c. 77), s. 73.—*In the Goods of*

FRASER (1807), L. R. 1 P. & D. 327; 36 L. J. P. & M. 63; 16 L. T. 154; 31 J. P. 407.

1879. — Estate insolvent.—The estate of a deceased intestate being insolvent, the ct. granted administration to a creditor under Court of Probate Act, 1857 (c. 77), s. 73, without requiring that one of the next of kin, who was in New Zealand, should be cited.—*In the Goods of* DURHAM, MEEK v. DURHAM (1871), 24 L. T. 73; 35 J. P. 311; 19 W. R. 391.

1880. — Insolvency alleged—Next of kin unfit to administer.—Where deceased, a paper manufacturer, was alleged to be insolvent at the time of his death, & his next of kin was a woman in a low position of life, & quite unfitted to carry on or wind up the business, the ct., under Court of Probate Act, 1857 (c. 77), s. 73, granted administration to a principal creditor, who applied for the same with the sanction of other creditors.—*In the Goods of* FARRANDS (1876), 1 P. D. 439; 24 W. R. 1018.

*Annotations:—*Distd. Wells v. Brook (1877), 25 W. R. 463. *Expld.* *In the Goods of* Middleton (1888), 58 L. J. P. 25. *Consd.* *In the Goods of* Shirley (1892), 66 L. T. 590.

1881. — Person primarily entitled refusing to apply.—J. W., entitled to the property of his wife, E. W., who predeceased him, became indebted to the estate of J. P. The estate of E. W. afterwards became entitled to a share in the residuary estate of J. P. The executrix of J. W. refused to take out letters of administration to E. W.'s estate, & a grant was necessary to enable the creditors of J. W. to obtain E. W.'s share of the residuary estate in satisfaction of their debt. The ct. granted, under Court of Probate Act, 1857 (c. 77), s. 73, administration of the estate of E. W. to a creditor of J. W.—*In the Goods of* WENSLEY (1882), 7 P. D. 13; 51 L. J. P. 21; 46 J. P. 264; 30 W. R. 431.

1882. — Next of kin missing.—*In the Goods of* CURRIE, No. 1819, *ante*.

1883. — No ascertainable relatives—Urgent need for representation.—Where an intestate, who had stated, during his lifetime, that he had no relatives (& whose estate was small & next of kin had been advertised & inquired for without result), died pending proceedings instituted on his behalf for the recovery of a sum due to him, leaving assets requiring immediate attention & sundry debts owing, the ct. granted administration to a creditor, passing over the next of kin, if any, under Court of Probate Act, 1857 (c. 77), s. 73.—*In the Estate of* HEERMAN, [1910] P. 357; 80 L. J. P. 7; 103 L. T. 816; 27 T. L. R. 51; 55 Sol. Jo. 30.

1884. To whom grant made—Nominee of bulk of creditors preferred to small creditor.—The next of kin having renounced, the ct. granted administration, under Court of Probate Act, 1857 (c. 77), s. 73, of the personal estate & effects of an insolvent intestate to a stranger nominated by the bulk of the creditors in preference to a particular creditor whose debt was small, but required the nominee to give justifying security & to enter into a bond to pay the debts *pro rata*.—*In the Goods of* SMITHSON (1866), 36 L. J. P. & M. 77; 15 L. T. 296.

1885. — Nominee of mortgagee preferred to mortgagee—Foreclosure proceedings pending.—The ct., upon the application of a creditor who had obtained a grant of letters of administration with the will annexed to the personal estate & effects of his deceased mtgor., being satisfied that there were special circumstances bringing the case within Court of Probate Act, 1857 (c. 77), s. 73, & upon affidavit that the estate was insolvent,

rescinded such grant & made a fresh grant in favour of a nominee of the creditor, such nominee to be approved by the registrar.—*In the Goods of* BROWN (1888), 59 L. T. 523.

1886. — Partly-secured creditor—Unable to realise security.—*In the Goods of* ATHERTON, No. 1838, *ante*.

1887. Whether citation of next of kin necessary—Only adult abroad.—*In the Goods of* BRADLEY, No. 1748, *ante*.

1888. — One of next of kin abroad—Estate insolvent.—*In the Goods of* DURHAM, MEEK v. DURHAM, No. 1879, *ante*.

1889. — Next of kin lunatic—Committee served.—*In the Goods of* ATHERTON, No. 1838, *ante*.

1890. — Where estate small—Next of kin with notice.—In granting administration of a small estate to a creditor, the ct. dispensed with the citation of the next of kin, on proof that they had received notice of the application.—*In the Goods of* TEECE, [1896] P. 6; 65 L. J. P. 41; 73 L. T. 631; 44 W. R. 400.

1891. — Refusal to apply for grant.—On an application for a grant of administration [of a small estate] to a creditor it was stated in affidavits that several unsuccessful attempts had been made to serve the citation upon the widow, who had previously refused to apply for a grant. It was submitted that the evidence clearly showed that she had notice of the application & that service of citation should be dispensed with. The ct. made the grant without requiring the widow to be served.—*In the Estate of* BISHOP (1913), 108 L. T. 928; 57 Sol. Jo. 611.

1892. — No next of kin.—*In the Goods of* No. 1883, *ante*.

ii. Poor Law Guardians.

For grants *cum testamento annexo*, see Sect. 12, sub-sect. 1, *post*.

1893. Pauper lunatic—No committee appointed—Next of kin not appearing to citation.—A., entitled to administration of the effects of B., was a pauper lunatic, & as such was confined in a county lunatic asylum, & no committee of her person or effects had been appointed. A.'s next of kin having been cited & not having appeared, the ct., under Court of Probate Act, 1857 (c. 77), s. 73, granted administration of the effects of B. to the guardians of the poor at whose expense A. was maintained, for A.'s use & benefit, limited to the period of her lunacy.—*MILE-END OLD TOWN GUARDIANS v. FINDLAY*, *In the Goods of* FINDLAY (1863), 3 Sw. & Tr. 205; 9 L. T. 346; 9 Jur. N.S. 1253; 164 E. R. 1276; *sub nom.* SOUTHWELL v. FINDLAY, 33 L. J. P. M. & A. 21; 27 J. P. 700; 12 W. R. 59.

*Annotations:—*Consd. Lambeth Grdns. v. Bradshaw (1886), 57 L. T. 86. *Fold.* *In the Goods of* Hockley (1895), 73 L. T. 316. *Reid.* *In the Goods of* Sharland, Windcatt v. Sharland (1871), 40 L. J. P. & M. 21.

1894. — Next of kin renouncing or not appearing.—B., a pauper lunatic chargeable to the guardians of the K. Union, died, a spinster & without parents, leaving three brothers & one sister her surviving, all of whom renounced their right to administration. One other brother, who had gone to America in 1871, but who had not been heard of since 1883, was cited by advertisement, under order of this ct. The ct., upon the application of the guardians, made a grant of administration to the clerk to the board as their nominee.—*Re* BYRNE (1888), 52 J. P. 281.

Person entitled to grant a pauper lunatic.—See Sub-sect. 5, E. (g), *post*.

Sect. 11.—Letters of administration generally: Subsect. 5, E. (c), (d), (e), (f), (g) & (h).]

(c) *Guardians of Minors.*

1895. Elected guardian—Need for immediate representation—Only adult abroad—Grant limited in time.]—*In the Goods of BURGESS*, No. 1806, *ante*.

1896. — Next of kin abroad.]—The ct. granted administration under Court of Probate Act, 1857 (c. 77), s. 73, to the guardian elected by minors for their use & benefit, without requiring the citation or renunciation of their next of kin, where the property was very small & the next of kin were in Australia & their interest was infinitesimal.—*In the Goods of HAGGER* (1863), 3 Sw. & Tr. 65; 32 L. J. P. M. & A. 96; 8 L. T. 470; 9 Jur. N. S. 386; 11 W. R. 540; 104 E. R. 1196.

1897. — —.]—The nearest relatives of the minor children of deceased having been abroad for many years without having communicated with their friends in this country, the ct. permitted the children to elect another person to take administration on their behalf of the estate of their father, without citing such nearest relatives in the first instance.—*In the Goods of BURCHMORE* (1873), L. R. 3 P. & D. 139; 43 L. J. P. & M. 1; 20 L. T. 377; 37 J. P. 792; 22 W. R. 70.

1898. — — Surviving executor abroad.]—*In the Goods of BATTERBEE*, No. 1798, *ante*.

1899. — Consent of children of the half-blood not required—Though sui juris.]—The ct., upon the application of the lawfully elected & appointed curator & guardian of three minors, A., H., & E., the lawful children of deceased, who died a widow & intestate, made a grant of administration under Court of Probate Act, 1857 (c. 77), s. 73, without the consent of three children of the half-blood, all *sui juris* & resident in England, the grant to be limited to such time as one of the minors should attain full age & apply for administration on her own behalf.—*In the Goods of ROE* (1892), 66 L. T. 266.

1900. Natural guardian—Next of kin abroad—& address unknown.]—Testator appointed his wife sole executrix of his will. She predeceased him, & he left surviving him a son & three grandchildren, minors. The son was resident in America, but his precise whereabouts was not known. The ct. granted administration, with will annexed, under Court of Probate Act, 1857 (c. 77), s. 73, to the father of the grandchildren of deceased, for their use & benefit.—*In the Goods of SEE* (1879), 4 P. D. 86; 48 L. J. P. 70; 40 L. T. 658; 27 W. R. 665.

1901. Guardian ad litem.]—*In the Goods of ARDERN*, No. 1642, *ante*.

1902. Whether to one of joint guardians—Guardians appointed by Court of Chancery.]—Where joint guardians have been appointed by the Ct. of Ch. to a minor, administration for his benefit cannot properly be granted to one of them only, but under special circumstances, & by authority of Court of Probate Act, 1857 (c. 77), s. 73, the Ct. of Probate will permit this to be done.—*In the Goods of MURPHY* (1859), 5 Jur. N. S. 416.

1903. Whether citation of next of kin necessary—Next of kin abroad—Estate small—Interest infinitesimal.]—*In the Goods of HAGGER*, No. 1896, *ante*.

1904. — —.]—*In the Goods of BURCHMORE*, No. 1897, *ante*.

1905. Form of grant—Limited until one minor comes of age & applies.]—In making a limited grant, under Court of Probate Act, 1857 (c. 77), s. 73, of administration with the will annexed in favour of the guardian appointed on behalf of

minors, who, if of age, would be entitled to administer the estate of deceased:—*Held*: the best form of limitation would be "until one of the minors comes of age & applies."

A limited grant under above sect. was made without notice to the person primarily entitled.—*In the Goods of LILLEY* (1897), 76 L. T. 164.

(d) *The Public Trustee.*

1906. Jurisdiction.]—The ct. has power to make a grant of administration to the Public Trustee, passing over the heir-at-law, widow & next of kin of deceased.

By Public Trustee Act, 1906 (c. 55), s. 11 (4), the Public Trustee is not required to give a bond or security.—*In the Estate of WOOLLEY* (1911), 55 Sol. Jo. 220.

1907. When discretion exercised—Persons entitled alien enemies—Public trustees preferred to executor appointed by informal will.]—In the case of a deceased intestate, whose next of kin were alien enemies:—*Held*: the administrator proper to be appointed under the special circumstances of the case was the Public Trustee as custodian under Trading with the Enemy (Amendment) Act, 1914 (c. 87), & not a person designated as exor. by deceased in an informal testamentary paper.—*In the Estate of SCHIFF*, [1915] P. 86; 84 L. J. P. 79; 113 L. T. 189; 59 Sol. Jo. 303.

Annotations:—Consd. In the Estate of Grundt, In the Estate of Oetl, [1915] P. 126; *Re Woolf's Estate* (1918), 34 T. L. R. 477.

1908. — Estate of alien enemy—Grant to British attorney of next of kin.]—Under special circumstances the ct. permitted a limited grant of administration to the estate of alien enemies domiciled abroad to pass, under Court of Probate Act, 1857 (c. 77), s. 73, subject to restrictions as to the disposal of the residue, to a British subject domiciled in England who held a power of attorney from the next of kin. The ct. nevertheless expressed the opinion that, as a general rule, it was in the public interest advisable that in such cases the grant should go to the Public Trustee in his capacity of custodian under Trading with the Enemy (Amendment) Act, 1914 (c. 87).—*In the Estate of GRUNDT, In the Estate of OETL*, [1915] P. 126; 84 L. J. P. 175; 113 L. T. 189; 31 T. L. R. 437; 59 Sol. Jo. 510.

Annotation:—Consd. Re Woolf's Estate (1918), 34 T. L. R. 477.

1909. — Executors & next of kin resident in enemy territory.]—*In the Estate of KREJEWSKY*, No. 1670, *ante*.

(e) *Trustees.*

See, note, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 162.

1910. Trustee of settlement on wife & children—Deed testamentary in character—Probate granted by foreign court to trustee as executor according to the tenor.]—*In the Goods of COSNAHAN*, No. 2052, *post*.

1911. Trustee of marriage settlement—Of only next of kin.]—A. died intestate, leaving B., his lawful sister & only next of kin, surviving him. B. was a married woman, but she had for some years lived apart from her husband, who was abroad, & whose address was not known. Under the marriage settlement B. took the first life interest in all her after-acquired property. The ct., with her consent, granted administration to the personal estate & effects of A. to the trustees of the settlement.—*In the Goods of MAYCHEL*, (1878), 4 P. D. 74; 47 L. J. P. 31; 39 L. T. 94; 42 J. P. 281; 26 W. R. 439.

1912. — Of intestate—Guardian elected by minors renouncing.]—A. died intestate. His estate was insolvent, the only asset of any value being an interest in a mtge. of property in Ceylon, which he had conveyed to the trustees of his marriage settlement, one of whom was B., his brother-in-law. A. was a widower, & left five children, two of whom were of full age. The two adult children had renounced administration. The ct., on a renunciation by the eldest son, on behalf of the minor children, who had appointed him as their guardian for the purpose of the application, made a grant of administration to B. under Court of Probate Act, 1857 (c. 77), s. 73.—*In the Goods of TYNDALL* (1881), 51 L. J. P. 12; 46 J. P. 169; 30 W. R. 231.

1913. Trustees substituted for intestate trustee—Intestate guilty of embezzlement.]—*In the Goods of BOND*, No. 1885, *ante*.

Grants to trustees of administration with will annexed.]—See Sect. 12, sub-sect. 1, B. (c) iii., *post*.

1914. Trustees appointed by will—Until sole executor of age.]—Testatrix, by her will, appointed her daughter, who was under age, sole exor. & universal intromitter with her movable means & estate, & certain persons trustees for the daughter until she was of legal age. In a subsequent part of the will she directed the trustees, in case her daughter died before coming of age, to divide the residue of her property in a particular way. The ct. refused to grant probate of the will to the trustees as exors. according to the tenor thereof, but ordered that administration with the will annexed should issue to them under Court of Probate Act, 1857 (c. 77), s. 73, by reason that testatrix had not appointed by her will an exor. competent to take probate thereof.—*In the Goods of STEWART (or STUART)* (1875), L. R. 3 P. & M. 41; 41 L. J. P. & M. 37; 33 L. T. 72; 39 J. P. 679; 23 W. R. 683.

(f) *Nominee without Interest.*

1915. Nominee of residuary legatee—Married woman entitled to separate use—Notice to husband not required.]—Administration with the will annexed was granted under Court of Probate Act, 1857 (c. 77), s. 73, to the nominees of the residuary legatee, who was a married woman, without notice to her husband, the residue being settled to her separate use & at her absolute disposal.—*In the Goods of PINE* (1867), L. R. 1 P. & D. 388; 36 L. J. P. & M. 95; 17 L. T. 31; 31 J. P. 775.

By consent of parties interested.]—See Sub-sect. 5, D. (f), *ante*.

(g) *Poor Law Guardians.*

1916. Person entitled to grant a pauper lunatic—After citation of proper parties.]—MILE-END OLD TOWN GUARDIANS v. FINDLAY, *In the Goods of FINDLAY*, No. 1893, *ante*.

1917. — Person next entitled cited but not appearing.]—Where the next of kin of deceased intestate was a pauper lunatic confined in the county asylum at the charge of the union, the ct. under Court of Probate Act, 1857 (c. 77), s. 73, made a grant of administration to a person nominated by the guardians, but limited to such time as the pauper should remain insane.—*In the Goods*

of ECCLES (1889), 15 P. D. 1; 59 L. J. P. 5; 61 L. T. 652; 54 J. P. 55.

Annotations:—Apld. In the Goods of LACRO (1894), 70 L. T. 810. Reld. In the Goods of Everley (1891), 65 L. T. 765.

1918. — — —.]—The ct. made a grant of letters of administration in respect of the personal estate & effects of a deceased person, whose widow was a pauper lunatic, in favour of the clerk to the guardians, on the ground of "special circumstances" within Court of Probate Act, 1897 (c. 77), s. 73, the next of kin entitled to take administration after the widow having been duly cited, but not having appeared.—*In the Goods of RICHARDS* (1889), 53 J. P. 807.

1919. — — —.]—The sole executrix & residuary legatee of a testatrix, who was also one of her next of kin, did not prove the will, & some time after the death of the testatrix, became & remained chargeable to the rates as a pauper lunatic not so found by inquisition. The ct. required that the other next of kin should be cited, & upon this being done, & no appearance being entered on their behalf, made, under Court of Probate Act (c. 77), s. 73, a grant of letters of administration with the will annexed in favour of the nominee of the guardians of the union, for the use & benefit of the lunatic extrix., limited to the duration of her lunacy.—*In the Goods of HOCKIN* (1895), 73 L. T. 316; 59 J. P. 472.

1920. — Person next entitled renouncing.]—The value of the property of an intestate who died leaving a widow, but no issue, did not exceed £500. The widow was a pauper lunatic, & her father renounced his right to take the grant on her behalf.—*Held: a grant of administration might be made under Court of Probate Act, 1857 (c. 77), s. 73, to a nominee of the guardians, to whom the pauper lunatic was indebted for maintenance, without citing the next of kin of the intestate or of the lunatic.*—*In the Goods of*

1921. — — —.]—By his will, testator appointed his widow sole extrix., & left her all his property, subject to a legacy of £10. The widow did not prove, became of unsound mind, & was confined in an asylum as a pauper lunatic. The legatee & creditors, & all the next-of-kin of the widow, save two, who were abroad, renounced administration. The ct. granted administration [under Court of Probate Act, 1857 (c. 77), s. 73] with the will annexed, to the nominee of the guardians for the use & benefit of the lunatic widow, the guardians undertaking, by their counsel, to secure the legacy of £10 to any proper representative of the legatee who should appear to claim it, the legatee herself being now dead.—*In the Goods of SHAWLAND* (1892), 67 L. T. 501; 56 J. P. 682.

Deceased a pauper lunatic.]—See Sub-sect. 5, E. (b) ii., *ante*.

(h) *Other Persons.*

1922. Attorney—Person entitled abroad.]—Where the party solely entitled to the grant of administration of the estate of deceased was abroad, & it was not known where she was or when she would return to this country, & there was a sum of money payable to the estate of deceased, the ct. made a

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E. (f).

b. By consent of court.]—An injured workman received compensation regularly until the death, intestate, of his employer. The next of kin acted as exors. *de son tort*, & refused to take

administration. The ct. gave liberty to a nominee of the workman to take out a grant under Probate Act, 1857, s. 78, for the purpose only of substantiating proceedings for the recovery of compensation.—*In the Goods of BYRNE* (1910), 3 B. W. C. C. 591.—*IR.*

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E. (h).

c. Attorney—Person entitled abroad—Transfer of assets.]—The P. T. Co., as attorney of the widow of testator, domiciled in England, was appointed administrator, the New South Wales

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grant of administration under Court of Probate Act, 1857 (c. 77), s. 73, to a person whom she had duly authorised by power of attorney to manage her property in England.—*In the Goods of ESCOT* (1858), 4 Sw. & Tr. 186; 28 L. J. P. & M. 17; 164 E. R. 1488.

1923. ———.—*In the Estate of GRUNDT, In the Estate of OETL*, No. 1908, *ante*.

1924. ———. **Executors & residuary legatees alien enemies.**—Where the exors. & residuary legatees named in the will of a naturalised British subject were alien enemies, a general grant of administration, with the will annexed under Court of Probate Act, 1857 (c. 77), s. 73, was made to the attorney appointed by the exors. before the outbreak of war, with directions not to distribute the estate without the leave of a registrar.—*In the Estate of KOENIGS* (1914), 59 Sol. Jo. 130.

Annotation:—Consd. In the Estate of Grundt, In the Estate of Oetl (1915), 59 Sol. Jo. 510.

1925. Co-executor & co-trustee with deceased—Stepmother of lunatic entitled to grant.—A. died intestate, leaving her only sister solely entitled in distribution, a lunatic, & without any committee of her estate or person. Administration for the use & benefit of the sister during her lunacy granted to the stepmother, who was co-exor. & co-trustee with deceased of the father's will, & beneficially interested under it.—*In the Goods of BURRELL* (1858), 1 Sw. & Tr. 64; 31 L. T. O. S. 41; 6 W. R. 461; 164 E. R. 631.

1926. Father-in-law of person entitled.—*In the Goods of JONES*, No. 1803, *ante*.

1927. Person in possession of assets—Owner of ship on which deceased died.—(1) A foreigner, inhabiting the State of Alabama in North America, died on board a British ship on his voyage to England, possessed of property, chiefly bills of exchange drawn on merchants in Liverpool, & entitled to a sum of money alleged to be in the hands of another person in this country. On the arrival of the ship in the port of London, the owner took possession of the bills of exchange, & there being no known relation or agent of deceased in this country, & communication with his relations in the Southern States of North America being difficult & uncertain by reason of the civil war & blockade of the southern ports, the ct. granted administration to the owner of the ship, limited to realise & collect the property which deceased was possessed of or entitled to within the jurisdiction of the ct., & to invest the proceeds in Consols.

(2) The ct. intimated that for the future it would be better that the Queen's Proctor should interpose in such cases for the protection of the property.

(3) Where a foreigner domiciled abroad, dies intestate on a voyage to this country, the ct. will, in conformity with Court of Probate Act, 1857 (c. 77), s. 73, under special circumstances, make a grant *ad colligenda bona* to strangers, the Crown having declined to interpose.—*In the Goods of WYCKOFF* (1862), 3 Sw. & Tr. 20; 1 New Rep. 131, 169; 32 L. J. P. M. & A. 214; 7 L. T. 565; 9 Jur. N. S. 84; 11 W. R. 218; 164 E. R. 1178.

Annotation:—Generally, Rejd. A.-G. v. Pratt (1874), 43 L. J. Ex. 108.

1928. Chancery receiver.—Proceedings in Chancery having been taken by persons having claims upon the estate of an intestate, against his widow, who was alleged to have possessed herself

of part of the estate, but who had not taken out administration, the Ct. of Chancery appointed a receiver, with authority to collect, get in, & receive the estate, & to apply to the Ct. of Probate for administration. The widow, & all the next of kin, & persons entitled in distribution having been cited, upon their non-appearance to the citation, the ct. made a general grant of administration to the receiver.—*In the Goods of MAYER* (1873), L. R. 3 P. & D. 39; 42 L. J. P. & M. 57; 29 L. T. 247; 37 J. P. 696.

1929. Official receiver in bankruptcy.—*In the Goods of THACKER*, No. 1841, *ante*.

1930. Trustee in bankruptcy.—*In the Goods of BOWRON*, No. 1842, *ante*.

1931. Persons indicated by deceased—Legatees—Specific legatee—Limited grant.—*In the Goods of HEATON*, No. 2693, *post*.

1932. ———.—C., by his will, appointed three exors. & trustees, to whom he gave power to carry on his business for the benefit of all parties interested under the will, & he constituted his son C. C. his residuary legatee. All the exors. having renounced probate & disclaimed the trusts of the will, the ct. appointed C. C. & J. C., another son of testator, who was also a legatee under the will, as trustees in their places. The proceeds of an immediate sale of testator's business would not be sufficient to satisfy the claims of all his creditors; but the creditors were willing to accept payment by instalments if the business was carried on by the two trustees & not by C. C. alone, & it was expected that, if the business was continued, enough would be realised to discharge all the debts & to pay a dividend upon the various legacies. The ct. made a joint grant, under Court of Probate Act, 1857 (c. 77), s. 73, to C. C. & J. C., of letters of administration with the will annexed.—*In the Goods of CLAYTON* (1886), 11 P. D. 76; 55 L. J. P. 26; 50 J. P. 263; 34 W. R. 444.

1933. ———. **Legacy only disposed of by will.**—Where testatrix executed a will whereby she bequeathed certain property to an aunt, & the will disposed of no other property, appointed no exor., & contained no other bequests or directions, the ct. made a grant of administration with the will annexed to the legatee, under Court of Probate Act, 1857 (c. 77), s. 73, limited to the property described in the will, without requiring the next of kin to be first cited.—*In the Goods of BALDWIN*, [1903] P. 61; 72 L. J. P. 23; 88 L. T. 565.

— Or devisees. — *Sec. now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 162.*

1934. ———. **Addressee of letter with instructions as to property.**—A son, being entitled to the whole of the personal estate of his father, deceased intestate, wrote from Madras, where he was serving in the R.A., to a cousin in England, giving him certain directions as to securing the amount of the property, & transmitting a small sum to him. The ct. granted administration, under Court of Probate Act, 1857 (c. 77), s. 73, to the cousin for the use & benefit, etc., limited to carrying into effect the directions contained in the letter.—*In the Goods of DRINKWATER* (1862), 2 Sw. & Tr. 611; 31 L. J. P. M. & A. 93; 7 L. T. 251; 26 J. P. 456; 164 E. R. 1135.

1935. ———. **Executor entitled to probate by law of domicile—Not entitled by English law.**—Testator at the time of his death was domiciled in New South Wales, & the ct. of New South Wales granted

assets being sworn under £6,650. Subsequently administration was granted to the widow in England, the value of the English assets being under

Under the will the widow was entitled to a life estate with remainder to her children:—*Held*: the widow was entitled, as administratrix, to have the

New South Wales assets remitted to her by the P. T. Co.—*Re FORSTER* (1919), 20 S. L. N. S. W. 156.—**AUS.**

probate of his will to A. as extrix. according to the tenor. A. was not entitled to the grant as extrix., according to the tenor, by the law of England, but the ct., under Court of Probate Act, 1857 (c. 77), s. 73, decreed administration with the will annexed to A. as the person entitled to administer under the grant of the ct. of the country of domicil.—*In the Goods of EARL* (1867), L. R. 1 P. & D. 450; 36 L. J. P. & M. 127; 16 L. T. 799.

Annotations:—Apld. In the Goods of Briesemann, [1894] P. 260. *Foll. In the Goods of Meatyard*, [1903] P. 125. *Consd. Re McLaughlin*, [1922] P. 235. *Reid. Miller v. James* (1872), L. R. 3 P. & D. 4; *Hewson v. Shelley*, [1914] 2 Ch. 13.

1936. — Executors appointed by will bad for informality.]—*In the Goods of HALE*, No. 1817, *ante*.

1937. — Partner of executor requested to act in certain circumstances.]—*In the Goods of TAYLOR*, No. 1799, *ante*.

1938. — Trustee & manager of part of estate.]—*In the Goods of SHOOSMITH*, No. 1512, *ante*.

1939. — Person named in will “to carry out wishes.”—Testatrix, who died domiciled in the Republic of Hayti, left a will which was valid by the law of her domicil, but not executed with the formalities prescribed in the Wills Act, 1837 (c. 26). There was no appointment of exors., but the will contained the words: “B. of P. & W. of L. shall carry out my last wishes.” The only estate in England consisted of a sum of £1,260 in the hands of W.’s firm. The sole next of kin, who was entitled in distribution to half the fund, was in Hayti & had not been cited, but the persons entitled to the other half were in England, & assented to W. being appointed administrator with the will annexed. The ct. appointed W. administrator, with the will annexed, under Court of Probate Act, 1857 (c. 77), s. 73, without requiring the next of kin to be cited.—*In the Goods of MOFFATT*, [1900] P. 152; 69 L. J. P. 98.

1940. — Executors of revoked will—No executors appointed by later will.]—The ct., with the consent of all persons interested, made a grant of letters of administration, with the will of deceased annexed, under Court of Probate Act, 1857 (c. 77), s. 73, to persons named as exors. in another testamentary document which was pronounced against & probate of which was revoked.—*In the Estate of WATKIN, WHITLARK v. WHITE*, [1915] P. 24; 84 L. J. P. 47; 112 L. T. 736; 31 T. L. R. 100; 59 Sol. Jo. 220.

1941. Executor of widow—Husband’s estate less than five hundred pounds—No issue.]—A widow died without taking administration to her husband’s estate, which was of the net value of under £500, & as he died without issue, belonged exclusively to her, under Intestates’ Estates Act, 1890 (c. 29), s. 1. The ct. granted administration to her exor., under Court of Probate Act, 1857 (c. 77), s. 73.—*In the Goods of BRYANT*, [1896] P. 159; 65 L. J. P. 96.

1942. Person with knowledge of deceased’s affairs—Accountants of deceased’s firm.]—At the time of the death of an intestate his next of kin were in the interior of Bolivia, where it took six weeks to communicate with them by telegram, & four months by letter. The ct., being satisfied that an immediate representation was necessary for the preservation of the personal estate, made a general grant [under Court of Probate Act, 1857 (c. 77), s. 73.] to a member of a firm of accountants in London in whose hands the books of the intestate’s

firm had been placed, limited until such time as the next of kin should apply to take a full grant, & ordered the administrator to give justifying security.—*In the Goods of SUAREZ*, [1897] P. 82; 66 L. J. P. 98; 77 L. T. 137; 45 W. R. 704.

1943. —*In the Goods of POTTER, POTTER v. POTTER*, No. 1859, *ante*.

1944. — Or his partner.]—*In the Goods of POTTER, POTTER v. POTTER*, No. 1855, *ante*.

1945. Administrator to deceased father of some of next of kin.]—*In the Goods of BOWDEN* (1904), 21 T. L. R. 13.

1946. Administrator under limited grant—Foreign administrator.]—In a case where the ct. of the domicil of a deceased person, part of whose assets consisted of personal estate in England, had made a grant of administration limited in time, this ct. made, under Court of Probate Act, 1857 (c. 77), s. 73, a general grant to the foreign administrator.—*In the Estate of LEVY (OTHERWISE BENOIST)*, [1908] P. 108; 77 L. J. P. 57; 52 Sol. Jo. 193.

1947. Volunteer paying-off estate debts—Next of kin renouncing or lunatic.]—An intestate died, owing debts exceeding in value his personal estate & effects. Gifts of money had been made to him during his life by C., a relative of his deceased wife, to enable him to keep up his establishment, & after his death his debts were paid by C. There were only two next of kin & persons entitled in distribution, & of these one renounced & the other was a lunatic, & his next of kin renounced on his behalf. The ct. granted administration of the intestate’s estate & effects to C. under the Court of Probate Act, 1857 (c. 77), s. 73.—*In the Goods of BATEMAN* (1871), L. R. 2 P. & D. 242; 40 L. J. P. & M. 24; 24 L. T. 390; 35 J. P. 361; 19 W. R. 759.

1948. Representative of next of kin.]—Under Court of Probate Act, 1857 (c. 77), s. 73, a grant of administration may be made to the representative of the next of kin of an intestate without citing a person entitled in distribution.—*In the Goods of KINCHELLA*, [1894] P. 264; 63 L. J. P. 162; 71 L. T. 263; 6 R. 556.

1949. Party interested in estate—By consent of next of kin—Estate small—Executor passed over.]—*In the Goods of COOPER*, No. 1850, *ante*.

1950. Corporation sole—Successor to person named in will.]—*In the Goods of LALOR*, No. 2120, *post*.

1951. Consular officer—Of country of deceased’s domicil.]—*In the Goods of MIGAZZO*, No. 2156, *post*.

See Domicil Act, 1861 (c. 121), s. 4.

ECT. 6.—WHEN DISPENSED WITH.

1952. Small fund in court—Administration necessary.]—*Re CABEL* (1854), 24 L. T. O. S. 150; *FROGLEY v. PHILLIPS* (1901), 50 W. R. 185.

1953. — Administration not necessary.]—*CALENDAR v. TEASDALE* (1855), 3 Eq. Rep. 513; *PIPER v. BUSS* (1859), cited in 9 W. R. at p. 369; *KING v. ISAACSON* (1861), 9 W. R. 369; *HININGS v. HININGS* (1864), 2 Hem. & M. 32.

— Estate under £100.]—*See, now*, R. S. C., Ord. 22, r. 18A; Funds Rules, 1905, r. 62; C. C. R., Ord. 37, r. 6.

1954. Fund in court—Intestate insolvent—Administration granted abroad—Payment to foreign

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19531. Small fund in court—Administration not necessary.]—Where the

interest, if any, of deceased is very small, the ct. will not require a personal representative to be appointed.—*MONTGOMERY v. DOUGLAS* (1868), 14

Gr. 268.—CAN.

*d. Where person entitled dies without administering.]—*BURNES v. CANADA Co. (1859), 7 Gr. 587.—CAN.

Sect. 11.—Letters of administration generally: Sub-sects. 6 & 7, A., B., C. & D. (a) & (b).]

official assignee.]—A fund in ct., which stood to the credit of a person who had become insolvent at Bombay, & had afterwards died there intestate, was ordered to be paid out to the official assignee of the Insolvent Court at Bombay, in whom all the property of insolvent had been vested by an order of that ct., without requiring administration in England to be taken out, administration having been granted to his estate in India, & there being evidence that the debts proved in the insolvency were still unpaid, & that insolvent had not obtained his discharge.—*Re LAWSON'S TRUSTS*, [1896] 1 Ch. 175; 65 L. J. Ch. 95; 73 L. T. 571; 44 W. R. 280.

Annotations:—Mentd. Re Hayward, Hayward v. Hayward, [1897] 1 Ch. 905; *Re Anderson*, [1911] 1 K. B. 896; *Re Craig, Catling v. Esson* (1916), 86 L. J. Ch. 62.

Under statutory provisions—Property of member of trade union.]—*See Trade Union Act Amendment Act, 1876* (c. 22), s. 10; *Provident Nominations & Small Intestacies Act, 1883* (c. 47), ss. 3, 7.

1955. ——— Right of nominee to enforce payment.]—By *Trade Union Act, 1871* (c. 31), s. 4, no ct. is to entertain any legal proceeding to enforce "any agreement for the application of the funds of a trade union—(a) To provide benefits for members." By *Trade Union (Amendment) Act, 1876* (c. 22), s. 10, which is to be construed as one Act with the first-named Act, it is provided that a member of a trade union, not being under the age of 16 years, may, by writing nominate a person to whom any moneys payable on the death of such member, not exceeding £50, shall be paid; & that, on receiving proof of the death of a nominator, the trade union "shall pay to the nominee the amount due to the deceased member," not exceeding the sum aforesaid:—*Held*: there was nothing in the later Act to show that it was intended to repeal the provisions in sect. 4 of the earlier Act, & that consequently no action could be maintained against a trade union by the nominee of a deceased member to recover a sum of money to which, under the rules of the trade union, the member or his nominee had become entitled to receive from the funds of the union.—(*CROCKER v. KNIGHT*, [1892] 1 Q. B. 702; 61 L. J. Q. B. 466; 66 L. T. 596; 56 J. P. 420; 40 W. R. 353; 7 T. L. R. 412, C. A.

—*See, generally, TRADE & TRADE UNIONS.*

Property of merchant seaman.]—*See Merchant Shipping Act, 1894* (c. 60), ss. 150, 176, & *generally, SHIPPING.*

Property of officers & soldiers.]—*See Army Pensions Act, 1830* (c. 41), s. 5; 27 & 28 Vict., c. 36, s. 4; 47 & 48 Vict., c. 55, s. 3; & *generally, ROYAL FORCES.*

Property of sailors & marines.]—*See 28 & 29 Vict., c. 111, s. 6; 47 & 48 Vict., c. 44, s. 2. & generally, ROYAL FORCES.*

Property of civil servants.]—*See Superannuation Act, 1887* (c. 67), s. 8, & *generally, PUBLIC AUTHORITIES.*

Property of member of loan society.]—*See Loan Societies Act, 1840* (c. 110), s. 11; & *generally, LOAN SOCIETIES.*

Property of members of building society.]—*See, 10 Geo. 4, c. 56, s. 24; 6 & 7 Will. 4, c. 32, s. 4, & generally, BUILDING SOCIETIES, Vol. VII., pp. 465 et seq.*

Deposit in trustee or Post Office savings bank.]—*See Savings Banks Act, 1887* (c. 40),

s. 3 (2); & *generally, BANKERS, Vol. III., pp. 136, 137.*

Property of member of friendly society.]—*See Friendly Societies Act, 1896* (c. 25), s. 58, & *generally, FRIENDLY SOCIETIES.*

Property of member of industrial or provident society.]—*See Industrial & Provident Societies Act, 1893* (c. 39), s. 27 (1).

1956. ——— Power of committee discretionary.]—By *Industrial & Provident Societies Act, 1893* (c. 39), s. 27, if any member of a society entitled to property therein dies intestate without having made any nomination thereof then subsisting, the committee may without letters of administration distribute the same among such persons as appear to them on such evidence as they deem satisfactory to be entitled by law to receive the same:—*Held*: the power of the committee to distribute the property was entirely discretionary, & they could not be compelled by action to exercise their discretion.—(*ESCRITT v. TOMMORDEN CO-OPERATIVE SOCIETY*, [1896] 1 Q. B. 461; 65 L. J. Q. B. 358; 74 L. T. 350; 44 W. R. 544; 40 Sol. Jo. 298.

—*See, generally, INDUSTRIAL, ETC., SOCIETIES.*

Money due on death of assured dying abroad.]—*See Revenue Act, 1889* (c. 42), s. 19.

1957. ——— Application of exemption—Legal proceedings.]—(1) By *Revenue Act, 1889* (c. 42), "where a policy of life assurance has been effected with any insurance co. by a person who shall die domiciled elsewhere than in the U. K., the production of a grant of representation from a ct. in the U. K. shall not be necessary to establish the right to receive the money payable in respect of such policy":—*Held*: the words "establish the right to receive," were applicable to legal proceedings in which the title to the money payable upon the policy was established.

(2) Policies of life assurance were effected with an English insurance co. by a foreigner who died domiciled in Switzerland. By the policies respectively three directors of the co. whose hands were thereunto subscribed agreed that they would within three months after the decease of the assured should have been duly certified to the directors of the co. at their principal office pay out of the stock & funds of the co. to the exors. & administrators or assigns of the assured the sums of £300 & £700. Pltff., who was the testamentary exor. by Swiss law of the assured, brought an action, without taking out probate in the U. K., against the insurance co. to recover the amount due on the policies, & proved that by Swiss law he had the right to recover debts due to the estate of deceased, including the sums due under the policies:—*Held*: pltff. was within the words "exors. or administrators" in the policies; he had established the right to receive the money payable in respect of the policies within the sect.; & he was therefore entitled to judgment for the amount.—(*HAAS v. ATLAS ASSURANCE CO., LTD.*, [1913] 2 K. B. 209; 82 L. J. K. B. 506; 108 L. T. 373; 29 T. L. R. 307; 57 Sol. Jo. 446; 6 B. W. C. C. N. 87.

—*See, generally, INSURANCE.*

Where person entitled missing—Date of death uncertain—Discretionary grant.]—*See Sub-sect. 4, D. (b), ante.*

1958. Where person entitled dies without administering—Widower.]—*In the Goods of CRAUSE, No. 1486, ante.*

1959. ———.]—*In the Goods of HARDING, No. 1487, ante.*

1960. — Father.]—B. was presumed to have died in 1837, leaving a father him surviving, who died in 1849. The ct. refused to grant administration of the estate & effects of B., to his brother until he had taken out administration to his father.—*In the Goods of BAKER* (1860), 24 J. P. 630.

1961. Whether legatee survived testator uncertain—Application for payment by next of kin of legatee.]—Evidence of death of a legatee before testator uncertain. On petition for payment of the legacy to the next of kin:—*Held*: administration must be taken out to such legatee.—*Re ATKINSON'S TRUST* (1852), 1 W. R. 47.

1962. Where intestate bankrupt.]—Re TRATT, Ex p. JAMES (1853), 3 De G. M. & G. 493; 22 L. J. Bcy. 8; 20 L. T. O. S. 214; 1 W. R. 116; 43 E. R. 193, L. JJ.

See, generally, BANKRUPTCY, Vol. IV., pp. 501 et seq.

Necessity for administration ad litem.]—See Sect. 12, sub-sect. 10, D., *post*.

SUB-SECT. 7.—PRACTICE.

A. Form of Grant.

1963. Whether general—Grant to stranger without interest—General grant required by Court of Chancery.]—The ct. will not grant a general administration to a stranger, without interest, though a general grant be required by the Ct. of Ch., & though the sole next of kin refuse to accept or renounce administration.—*In the Goods of CHANTER* (1844), 1 Rob. Eccl. 273; 3 Notes of Cases, 438; 163 E. R. 1036; *subsequent proceedings, sub nom. DAVIS v. CHANTER* (1818), 2 Ph. 545.

—*J.*—*See, generally, Sect. 12, sub-sect. 1, B. (h), post.*

1964. Incorrect description of deceased—Fresh grant decreed.]—Administration had been granted to deceased as a widower when his wife was alive. The administration was revoked.

The safer course would be to revoke the administration & grant it afresh. Let that be done (SIR H. JENNER FUST).—*In the Goods of EDWARDS* (1850), 10 L. T. O. S. 317; 14 Jur. 1121.

1965. Description of deceased divorced woman.]—*In the Goods of HAY*, No. 1503, *ante*.

1966. Intestate deserted by husband—Protection order obtained under Matrimonial Causes Act, 1857 (c. 85), s. 21.]—*In the Goods of WOMAN*, No. 1509, *ante*.

1967. — Protection order obtained under Summary Jurisdiction (Married Women) Act, 1895 (c. 39).]—*In the Goods of JONES*, No. 1511, *ante*.

To creditors.]—See Sub-sect. 3, K. (d) i., *ante*.

B. Form of Oath.

See Sect. 3, sub-sect. 2, *ante*.

C. Affidavits.

1968. Whether admitted—Affidavit sworn abroad on requisition from prerogative court.]—A requisition to New South Wales, under seal of Prerogative Ct. of Canterbury, to swear an administrator:—*Held*: the Ct. of Probate could decree administration on the affidavits so sworn.—*In the Goods of BEDWELL* (1858), 1 Sw. & Tr. 15; 27 L. J. P. & M. 8; 30 L. T. O. S. 204; 164 E. R. 608.

Prescribed form substantially complied with.]—The ct. admitted an affidavit, sworn by a widow before notaries abroad to lead the grant of letters of administration to her deceased husband's effects, which, though not drawn in accordance with the prescribed form, was substantially a statement on oath, before a recognised authority, & also contained the facts to which it was necessary she should make oath.—*In the Goods of LAMBERT* (1866), L. R. 1 P. & D. 138; 35 L. J. P. & M. 64; 14 L. T. 227; 14 W. R. 617.

1970. Interlineations not initialed.]—Affidavits were sent out to New Zealand, to swear the widow of K., deceased, as administratrix. In the meantime she had moved to Tasmania, & certain interlineations in accordance were made in the affidavit, but not initialed by the judge who administered the oath, the description of Mrs. K., as widow, was also slightly irregular. The ct. made an order that such affidavit should be filed.—*In the Goods of KING* (1862), 2 Sw. & Tr. 621; 32 L. J. P. M. & A. 14; 7 L. T. 394; 27 J. P. 216; 11 W. R. 171; 164 E. R. 1139.

Evidence on affidavit generally.]—See EVIDENCE, Vol. XXII., pp. 516 *et seq.*

D. Who must be Cited.

(a) In General.

1971. Party entitled to grant—General rule.]—Where a party has the right to the administration under the statute, he must be cited or consent, before the ct. will grant administration to a third party.—*In the Goods of BARKER* (1837), 1 Curt. 592; 163 E. R. 207.

Annotation:—Reid. In the Goods of Kearney (1860), 24 J. P. 471.

1972. — Executor abroad.]—When a person entitled to an administration is resident abroad, the ct. will expect due notice to be given to him before it grants administration to another party.—*GODDARD v. GODDARD* (1821), 3 Phillim. 637; 161 E. R. 1438.

1973. — No intention to return.]—*In the Goods of CRAWSHAY*, No. 1795, *ante*.

1974. — Departure in embarrassed circumstances.]—*In the Goods of MASSEY*, No. 1796, *ante*.

1975. — Departure in fear of criminal proceedings.]—*Re WILLIAMS*, No. 1797, *ante*.

1976. — Not heard of for thirty years.]—Where upon an application by the one surviving brother of an intestate, who died in 1895, for administration of his estate, it appeared that intestate's father, who, if alive, was entitled to administration, had deserted his wife in 1866 & had not since been heard of, the ct. directed that the father should be cited.—*In the Goods of HARPER*, [1899] P. 59; 68 L. J. P. 48; 80 L. T. 294.

Annotation:—Reid. In the Goods of Chapman, [1903] P. 192.

On application for administration with will.]—*See* Sect. 12, sub-sect. 1, C., *post*.

(b) The Widower.

1977. Where widower has disappeared.]—*In the Goods of NICHOLLS*, No. 1490, *ante*.

1978. —.]—*In the Goods of SHOOSMITH*, No. 1512, *ante*.

1979. —.]—*In the Goods of BYRNE*, No. 1513, *ante*.

1980. Where widower takes no steps to administer.]—*In the Goods of RUSCH*, No. 1492, *ante*.

PART II. SECT. 11, SUB-SECT. 7.—C.

e. Construction of—Statement on presumption of death.]—It is not necessary, in a case of administration

on presumption of death, to negative in the affidavit the existence of the persons who would, if alive, have prior interests to the applt. at the time of the death of deceased, if the applt. is

unable to do so. It is enough to negative their existence at the time of swearing.—*In the Goods of SHAWNE* (1864), 11 L. T. 149. IR.

Sect. 11.—Letters of administration generally: Sub-sect. 7, D. (b), (c), (d), (e) & (f), & E., F. & G.; sub-sect. 8.]

1981. Where widower has been divorced—Or has been party to divorce proceedings.]—*In the Estate of WALLAS*, No. 1504, *ante*.

1982. Where widower has deserted intestate.]—*In the Goods of BRIGHTON*, No. 1507, *ante*.

1983. —.]—*In the Goods of STEPHENSON*, No. 1508, *ante*.

1984. —.]—*In the Goods of JONES*, No. 1510, *ante*.

1985. Effect of separation deed.]—*In the Goods of ORANMORE & BROWNE (LORD)*, No. 1518, *ante*.

1986. —.]—*In the Goods of PROBART*, No. 1441, *ante*.

1987. —.]—*In the Goods of PIGOTT*, No. 1522, *ante*.

1988. —.]—*In the Goods of HUMPHREYS, ALLEN v. HUMPHREYS*, No. 1521, *ante*.

1989. —.]—*In the Goods of MEGSON*, No. 1520, *ante*.

1990. Effect of protection order—Under Matrimonial Causes Act, 1857 (c. 85), s. 21.]—*In the Goods of BRIGHTON*, No. 1507, *ante*.

1991. —.]—*In the Goods of STEPHENSON*, No. 1508, *ante*.

1992. — Under Summary Jurisdiction (Married Women) Act, 1895 (c. 39).]—*In the Goods of JONES*, No. 1510, *ante*.

1993. Where widower bankrupt.]—*In the Goods of CONOLLY*, No. 1527, *ante*.

1994. —.]—*In the Goods of ADAMS* (1806), 74 L. T. 402, n.

1995. —.]—*In the Goods of MORGAN*, No. 1529, *ante*.

(c) *The Widow.*

1996. Where widow guilty of immorality.]—*In the Goods of NARES*, No. 1567, *ante*.

1997. —.]—*In the Goods of STEVENS*, No. 1564, *ante*.

1998. —.]—*In the Estate of FROST*, No. 1565, *ante*.

1999. Alleged immorality of widow.]—*In the Goods of MIDDLETON*, No. 1573, *ante*.

2000. —.]—*In the Estate of FROST*, No. 1565, *ante*.

2001. Where widow incapable—Lunatic.]—*In the Goods of JAMESON*, No. 1581, *ante*.

(d) *The Next of Kin.*

2002. Married woman living apart from her husband.]—*In the Goods of JAKES*, No. 1604, *ante*.

2003. On application by heir-at-law.]—*In the Goods of BARNETT*, No. 1643, *ante*.

2004. On application by creditor.]—*ANON.* (undated), cited in 4 Notes of Cases, at p. 456.

Annotation.—*Reid. Harrison v. Harrison* (1846), 4 Notes of Cases, 434.

2005. —.]—*AITKIN v. FORD* (1829), 3 Hag. Ecc. 193; 102 E. R. 1127.

Annotation.—*Reid. Huddleston v. Huddleston* (1852), 2 Rob. Ecol. 424.

2006. —.]—*BROWN v. WILDMAN*, No. 1741, *ante*.

2007. —.]—*CLAYTON v. BROWN*, *In the Goods of BROWN*, No. 1736, *ante*.

PART II. SECT. 11, SUB-SECT. 7.—D. (e).

f. Interest of Crown in estate of bastard.—*B.* was a bastard, & died intestate, unmarried, & without issue; & upon her death all her property vested in the Crown:—*Held*: the personal representative of *E.* was not

a necessary party, & supposing her personal estate should have been represented, the A.-G. should, in right of the Crown, & without any grant of administration, have sufficiently represented it.—*M'KIERNAN v. KERNAN* (1841), 4 I. Eq. R. 269; Fl. & K. 353.—*IR.*

2008. —.]—*In the Goods of GERRARD*, No. 1706, *ante*.

2009. — In respect of statute-barred debt.]—*In the Goods of DRUCE*, No. 1685, *ante*.

2010. — Poor law guardians—In respect of pauper lunatic.]—*In the Goods of EVERLEY*, No. 1920, *ante*.

2011. — Next of kin abroad.]—*MILLER v. WASHINGTON*, No. 1738, *ante*.

2012. —.]—*In the Goods of DURHAM, MEEK v. DURHAM*, No. 1879, *ante*.

2013. — Next of kin minors.]—*In the Goods of BRADLEY*, No. 1748, *ante*.

2014. — Next of kin lunatic.]—*In the Goods of ATHERTON*, No. 1838, *ante*.

2015. — Next of kin missing.]—*In the Goods of CALLICOTT*, No. 1826, *ante*.

2016. — Estate small—Next of kin with notice.]—*In the Goods of TEECE*, No. 1890, *ante*.

2017. — — — Refusal to apply for grant.]—*In the Estate of BISHOP*, No. 1891, *ante*.

2018. — — — Next of kin advertised for.]—*In the Estate of HEERMAN*, No. 1883, *ante*.

2019. Next of kin minors—On application by guardians—Next of kin abroad—Estate small.]—*In the Goods of HAGGER*, No. 1896, *ante*.

2020. — — —.]—*In the Goods of BURCHMORE*, No. 1897, *ante*.

(e) *Persons Interested in Estate.*

2021. On application by creditor.]—*CLAYTON v. BROWN*, *In the Goods of BROWN*, No. 1736, *ante*.

2022. — For grant de bonis non—Residuary legatees abroad.]—*In the Goods of FAIRWEATHER*, No. 1750, *ante*.

2023. On application by representative of next of kin.]—*In the Goods of KINCHELLA*, No. 1948, *ante*.

2024. Application by party interested in chancery suits—Used for representation to estate.]—A citation was ordered to issue against the only person interested in the estate of deceased, calling upon him to take administration on the application of a party who was interested in the due prosecution of a suit in Chancery, for which purpose a representative of deceased's estate was required.—*In the Goods of WILLIAMS*, *In the Goods of MORGAN* (1870), L. R. 2 P. & D. 81; 39 L. J. P. & M. 48; 22 L. T. 630; 34 J. P. 487; 18 W. R. 844.

(f) *Other Persons.*

2025. Husband of mother renouncing—Husband abroad.]—*In the Goods of LLANWARNE*, No. 1867, *ante*.

2026. Foreign representative of deceased widower—Widower not interested in estate.]—A married woman died at Rome in 1854, in the lifetime of her husband. By an indenture of post-nuptial settlement, it was provided that certain property which was then settled upon certain trusts, & any other property to which she might thereafter become entitled, should, in the event of her predeceasing her husband, & other events which happened, be distributable amongst her next of kin as if she had died unmarried & intestate. Her husband, an Italian, died at Rome in 1871, having executed a will, in which he appointed exors., but the will was not proved in this country. Deceased was entitled to one-third share of her

PART II. SECT. 11, SUB-SECT. 7.—D. (f).

g. Executors under joint will—Application by survivor for administration.—*A.* & *B.* made a joint will appointing exors., but not disposing of any personal property. *A.* died leaving *B.* surviving. *B.* applied for a

father's residuary personal estate which became distributable in Nov. 1874, & by an order of the Ct. of Chancery the share was carried over to her account. The ct. under these circumstances, granted administration limited to the fund in Chancery, to one of the next of kin, without requiring the representative of the husband of deceased to be cited.—*In the Goods of GAROFOLINI* (1875), 44 L. J. P. & M. 36; 33 L. T. 72; 39 J. P. 664; 23 W. R. 456.

E. Motions.

2027. For grant to nominee—Whether separate motion necessary—Grant on motion to presume death.—On a motion for presumption of death of an intestate, the ct. will also grant administration to a nominee of all parties without requiring a special motion for that purpose.—*In the Goods of CURLING* (1894), 11 R. 585.

F. Evidence.

2028. Title of applicant for grant—General rule.—The ct. being bound to satisfy itself that appt. for an administration is entitled to the grant, great delay in applying, by raising suspicion, justifies it in calling for explanation.—*In the Goods of DARLING* (1831), 3 Hag. Ecc. 561; 162 E. R. 1263.

2029. — Delay in applying.—*In the Goods of DARLING*, No. 2028, *ante*.

2030. — Proof of foreign law.—*Re STEWART*, No. 1435, *ante*.

See, generally, EVIDENCE, Vol. XXII., pp. 618 *et seq.*

2031. — Application by widow—Death of husband.—When letters of administration are applied for on behalf of a person asserting herself to be a widow, the ct. will not make the grant, unless legal evidence of the death of the husband be produced.—*In the Goods of ROBINSON* (1845), 9 Jur. 95.

2032. — Party primarily entitled not personally served with citation—Evidence that no agent within jurisdiction.—*EVANS v. BURRELL*, No. 701, *ante*.

2033. Evidence of consent to grant—Ordered to be filed.—*In the Goods of COOPER*, No. 1850, *ante*.

G. Renunciation.

2034. Retraction—Time for.—The next of kin may, with consent of the ct. retract a renunciation before letters of administration had issued to another party, but the ct. is not bound to allow such retraction.—*In the Goods of PARK* (1860), 6 Jur. N. S. 660.

2035. — Whether court must allow.—*In the Goods of PARK*, No. 2034, *ante*.

SUB-SECT. 8.—GRANT OF ADMINISTRATION AS ON INTESTACY.

2036. When granted—Testate dying insane—Will showing signs of insanity.—A party having died insane, leaving a will, which upon the face of it exhibited marks of insanity, the ct. granted administration of the effects of deceased as dead

intestate, but directed the will to be deposited in the registry.—*In the Goods of BOURGET* (1837), 1 Curt. 591; 163 E. R. 207.

Annotation:—Folld. In the Goods of Jacques, Perry v. Dyke (1858), 1 Sw. & Tr. 12.

2037. — — — — ——*In the Goods of CROASDALE* (1849), 14 L. T. O. S. 294.

2038. — — — — ——*In the Goods of RICH*, No. 848, *ante*.

2039. — — — — — Non-appearance of sole party interested.—E. made a will, whilst of unsound mind, in favour of some charitable institution. The only party interested to support it being cited to propound it, or show cause why it should not be treated as void, did not appear. On an affidavit of the medical attendant of deceased as to his testamentary incapacity, administration was granted to one of his next of kin, as in an intestacy.

—*In the Goods of JACQUES, PERRY v. DYKE* (1858), 1 Sw. & Tr. 12; 27 L. J. P. & M. 7; 30 L. T. O. S. 310; 6 W. R. 275; 164 E. R. 606.

See, also, No. 2050, post.

Evidence of testamentary capacity generally, *see WILLS*.

2040. — Refusal to propound will—Refusal by universal legatee & executor according to the tenour.—Where a party named universal legatee in a will, being extrix, according to the tenour, refused to propound it, & consented to administration being decreed as in a case of intestacy, the ct. rejected a motion for such administration.—*In the Goods of MORGAN* (1847), 5 Notes of Cases, 115.

2041. — — — — — Refusal by executors after citation.—*SPITTY v. BAYLEY & SHUTTLEWORTH* (1852), 18 L. T. O. S. 351; 16 Jur. 92.

2042. — — — — — Refusal by parties interested—Attestation apparently invalid.—O. left an autograph will with a perfect attestation clause, & the names of two witnesses subscribed. The signatures of the witnesses appeared to be in the handwriting of deceased, & no such persons could be anywhere heard of. The parties interested having declined to propound the paper, the ct. decreed administration of deceased's effects as dead intestate to the next of kin.—*WHITTING v. DEAL & ORCHARD* (1854), 2 Ecc. & Ad. 56; 24 L. T. O. S. 135; 18 Jur. 1122; 164 E. R. 304.

2043. — — — — — Refusal by parties interested after citation.—Where parties interested under a testamentary paper have been cited to appear & propound it, & have not appeared & propounded it, the ct. will grant administration as to an intestate, or probate of an earlier will, as the case may be, in common form.

Qu.: ought not the will, in respect of which the parties are cited, to be filed in the registry, if in the possession or power of the party applying.—*In the Goods of MORTON, MORTON v. THORPE* (1863), 3 Sw. & Tr. 179; 32 L. J. P. M. & A. 174; 9 L. T. 300; 27 J. P. 679; 9 Jur. N. S. 728; 104 E. R. 1242.

Annotation:—Folld. In the Goods of Bootle, Heaton v. Whalley (1901), 84 L. T. 570.

2044. — Where will disputed—Will lodged in answer to citation—No further steps taken.—Administration was granted as in case of intestacy, where a party cited to bring in a will & show cause

grant of administration of the goods as if A. had died intestate. The ct. refused administration, holding that the exors. named in the joint will must be cited.—*In the Goods of MISKELLY* (1869), 18 W. R. 215.—*IR.*

PART II. SECT. 11, SUB-SECT. 8.

b. When granted—Will condemned

by court—Party interested cited but not appearing.—The ct. has power to condemn a will upon motion. But where a party interested failed to appear on such motion, though served with a citation, & personally served with notice of the motion, & not being professionally advised, appeared to be ignorant of her rights, the ct. granted administration notwithstanding the alleged will.—*Re GILBERT*, [1911] 2 L. R. 36.—*IR.*

IR.

k. — Where widow dies without exercising power of appointment.—Testator directed the income of his residuary estate to be paid to his widow during widowhood, & after her death or remarriage the capital to be paid to such person as the widow

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why same should not be condemned, appeared & lodged it, but did not proceed further.—*GERMAIN v. O'DWYER* (1861), 4 L. T. 184.

2045. — *Alleged legatees cited but not appearing.*—In an action brought to set aside an alleged will, the ct., on proof of the citation & non-appearance of the alleged legatees, made a grant of administration to the next of kin of deceased.—*In the Goods of QUICK, QUICK v. QUICK*, [1899] P. 187; 68 L. J. P. 64; 80 L. T. 808.

2046. — *Parties interested cited but not appearing.*—When the parties who are interested under an alleged will have been cited to appear & propound it, &, after being personally served with the citation, have neither appeared nor propounded the alleged will, the ct. will grant administration as to an intestate.—*In the Goods of BOOTLE, HEATON v. WHALLEY* (1901), 84 L. T. 570; 17 T. L. R. 476; 45 Sol. Jo. 484.

2047. — *Dispute compromised—Will apparently valid.*—A deceased person by his will, apparently fully executed, left a certain person sole extrix. & universal legatee thereof. The family having disputed the validity of the alleged will, a compromise was arrived at. Subsequently a citation was issued calling on the sole extrix. & legatee to prove the will or show cause why a grant of administration should not be made to the next of kin as on an intestacy. The extrix. not having appeared to the citation, the ct. made a grant of administration to appet. on his undertaking on taking the grant to swear that he was the next of kin of deceased.—*In the Goods of DENNIS*, [1899] P. 191; 68 L. J. P. 67.

2048. — *Codicil to cancelled will not propounded—All parties renouncing.*—Deceased had executed a will, of which he retained possession, & afterwards a codicil thereto, which he gave to the custody of another, he destroyed the will, the codicil, not in his possession, remaining uncancelled at his death. Administration, as in a case of intestacy, on the renunciation of all parties, was allowed to be taken, but not decreed.—*In the Goods of ALAN* (1845), 3 Notes of Cases, 640.

2049. *How obtained—Whether on motion ex parte—Will apparently valid.*—*In the Goods of AYLING*, No. 1095, ante.

2050. — *Allegation of insanity.*—A will executed by a person in a state of utter

incapacity, was not propounded. A motion for administration as in an intestacy, was refused in the absence of full explanation by attesting witnesses.—*WILLIAMS v. WILLIAMS* (1841), 1 Notes of Cases, 129; *subsequent proceedings* (1843), 2 Notes of Cases, 390.

SUB-SECT. 9.—COSTS OF OBTAINING ADMINISTRATION.

Where property compulsorily acquired.—*See COMPULSORY PURCHASE OF LAND*, Vol. XI., p. 206, Nos. 1854, 1855.

SECT. 12.—SPECIAL AND LIMITED GRANTS OF ADMINISTRATION.

SUB-SECT. 1.—ADMINISTRATION WITH WILL ANNEXED.

A. When Granted.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 106.

(a) Where No Executor is Appointed.

i. In General.

2051. *Where no executor is appointed.*—*In the Goods of OLIPHANT*, No. 895, ante.

2052. — *Document not testamentary in form—Deed.*—(1) The English Ct. of Probate follows the grant of the ct. of testator's domicile as to the document which that ct. has admitted to probate, but not as to the person to whom the grant is made.

(2) Testator domiciled in the Isle of Man executed a deed conveying the whole of his property to a trustee upon trust after his decease to realise & invest it & pay the annual income to his widow for her life & upon her death to divide it amongst his children. This document was duly executed as a will, & the Ecclesiastical Ct. of the Isle of Man granted probate of it to the trustee as exor. according to the tenor. The Ct. of Probate followed the Isle of Man grant so far as to admit the document to probate, without inquiring whether or not it was testamentary, but not so far as to make the grant to the trustee as exor. according to the tenor. Being satisfied that testator intended to deprive the widow who was primarily entitled to the grant, of any control over the administration of the estate the ct. decreed administration with the will annexed to trustee under Probate Act, 1857 (c. 77), s. 73.—

should appoint. The widow survived testator, but died intestate, without having exercised the power of appointment.—*Held*: testator must be treated as having died intestate as to his residue, although the fact was not established until after his widow had died without exercising the power of appointment.—*Re HARRISON*, [1916] N. Z. L. R. 1098.—N.Z.

1. Right of caveator to propound will.—Where a person applied for probate, but withdrew the application before the proceedings became contentious.—*Held*: he was entitled as caveator to propound the same will in opposition to an application for grant of letters of administration to the estate of deceased.—*PAKIAM PILLAI v. INNABI FERNAND* (1896), 1 L. R. 19 Mad. 458.—IND.

PART II. SECT. 11, SUB-SECT. 9.

m. Where party without interest appears.—The A.G., served with notice of a motion for administration

to goods in which the Crown had not any interest, & as to which it made no case, is not entitled to the costs of appearing on the motion when other persons unsuccessfully impeached the legitimacy of deceased.—*REDMOND v. BARBER* (1863), 15 Ir. Jur. 312.—IR.

n. Where on sale of realty—Proceeds less than amount of valuation.—In a creditor's suit for the administration of an insolvent estate, mtgves. of realty, being required so to do, valued their security. An order was subsequently made for sale of the realty, the mtgves. not objecting, & the same was carried out, pltf. having carriage. The amount realised was less than the sum at which the mtgves. had valued their security.—*Held*: pltf. was not entitled to be paid his costs of the sale out of the amount realised.—*ROSS v. ROSS* (1892), 29 L. R. Ir. 318.—IR.

o. Where court orders administration for other parties deceased.—Money was paid into ct. by a ry. co., in respect

of leasehold premises. Persons claiming under the marriage settlement of their father, deceased, applied for payment, but the ct. decided that other children then dead, had vested interests, & declined to pay out the fund until administration had been taken out to their estates. One of the appls. then took out administration & obtained payment of the fund.—*Held*: the co. should pay the costs of obtaining administration to the deceased children.—*Re DUBLIN JUNCTION RYS., Ex p. KELLY* (1893), 31 L. R. Ir. 137.—IR.

PART II. SECT. 12, SUB-SECT. 1.—A. (a) i.

2051 i. Where no executor is appointed.—Testator left his property to appet. for probate. There was no appointment of an exor.—*Held*: appet. must apply for administration with the will annexed.—*Re SALT* (1915), 34 N. Z. L. R. 727.—N.Z.

p. Nuncupative will.—A will made

r. *Whether annexed to grant—Nuncupative will.*—Letters of adminis-

Sect. 12.—Special and limited grants of administration: Sub-sect. 1, A. (a) *ii.*, (b), (c), (d), (e) & (f), & B. (a), (b), (c), (d) & (e) *i.*]

obliterating his signature & appended to it a memorandum to this effect: "This my last will is cancelled, & as yet I have no other."

The ct. granted administration with the memorandum annexed.—*In the Goods of Hicks* (1869), L. R. 1 P. & D. 683; 38 L. J. P. & M. 65; 21 L. T. 300; 33 J. P. 711.

Annotation:—*Distd. In the Goods of Fraser* (1869), L. R. 2 P. & D. 40.

2065. —[Where testatrix duly executed, in accordance with Wills Act, 1837 (c. 20), s. 20, a paper writing declaring her intention to revoke her existing will, the ct., in pronouncing for the revocation, directed a grant of administration to issue, as upon an intestacy, with a note thereon that the grant was so made in consequence of the execution of the said paper writing but without annexing the said paper writing to the grant.—*TOOMER v. SOBINSKA*, [1907] P. 106; 76 L. J. P. 19; 96 L. T. 475.

(b) *Where Executor dies without Proving.*

2066. General rule.—Where an exor. refuses or dies before probate, administration shall be granted to the next of kin of intestate *cum testamento annexo*, unless there is a residuary legatee & then it must be granted to him.—*ANON.* (1628), 3 Salk. 21; 91 E. R. 607.

See, now, Court of Probate Act, 1858 (c. 95), s. 16; Administration of Estates Act, 1925 (c. 23), ss. 5, 7.

Whether right of probate devolves on executor's executor.—*See, generally, Part I., Sect. 8, & Part II., Sect. 5, sub-sect. 2, A., ante.*

(c) *Where Executor Renounces or Fails to Prove.*

2067. Where executor renounces before acting—General rule.—*ANON.* (1628), No. 2066, *ante.*

—[*See, now, Court of Probate Act, 1857 (c. 77), s. 79; Court of Probate Act, 1858 (c. 95), s. 16; Administration of Estates Act, 1925 (c. 23), s. 5.*

— **Discretionary grant.**—*See Sub-sect. 5, B., ante.*

Renunciation by executor after acting—Whether valid.—*See Part I., Sect. 9, sub-sect. 2, ante.*

2068. Where executor cannot be found.—The exors. & legatees named in a will could not be found. The estate was also insolvent, & the competency of testator was likewise questionable.

The ct., under these circumstances, refused to grant simple administration to a creditor, but made a grant with the will annexed.—*HANSON v. SHEPHERD, In the Goods of HOWELL* (1867), 17 L. T. 123; 32 J. P. 24; 16 W. R. 144.

2069. Sufficiency of renunciation—Consent to grant.—The ct. will not grant administration with the will annexed to the residuary legatee, with the consent of the exor. It can only do so on the exor.'s renunciation of probate, or after a citation has been served upon him, upon his non-appearance within the prescribed time.—*GARRARD v. GARRARD* (1871), L. R. 2 P. & D. 238; 25 L. T. 162; 35 J. P. 647; 19 W. R. 569.

2070. Renunciation abroad.—*In the Goods of SCARR*, No. 2192, *post.*

tration with will annexed granted of a will, made on a form prescribed by the military authorities & while testator was on active service, which purported to revoke all former wills & to be testator's last will, but made no mention of an exor.—*Re DAIGLE'S ESTATE*, [1918] 2 W. W. R. 910.—*CAN.*

—[*See, generally, Part I., Sect. 12, ante.*

2071. Failure to prove—Non-appearance to decree.—The Treasurer of the Navy refused to pay the arrears of a mariner's wages on the probate of a will granted in Jersey. A decree issued against the exor. to accept or refuse administration *cum testamento annexo* in the Prerogative Ct. No appearance being given for him, an administration *cum testamento annexo* was granted to the residuary legatee.—*LE BRITON v. LE QUESNE* (1756), 2 Lee, 261; 161 E. R. 334.

2072. Non-appearance to citation.—*GARRARD v. GARRARD*, No. 2069, *ante.*

2073. Citation by advertisement—Executor not heard of for many years.—Where a sole extrix. & legatee, being the illegitimate daughter of testatrix, had not been heard of for forty years, the ct. granted administration with the will annexed to the representative of the next of kin of testatrix, on proof that extrix. had been cited by advertisement & that the solr. to the Treasury did not intend to apply for administration to her estate & subject to administration to the next of kin being taken out.—*In the Goods of LEX*, [1892] P. 6; 61 L. J. P. 110; 65 L. T. 762.

2074. Probate accepted but not taken out.—I am not aware that the ct. has ever compelled a party to take out probate. The course for the creditor to pursue, under these circumstances, is this:—to pray the ct. to grant a monition, against the next of kin, to take out administration; & on their failing to do so, the ct. will grant administration to the creditor who has taken out the monition against the next of kin. I do not say that the ct. might not pronounce the exor. in contempt, but I think this is a preferable course (*per CUR.*).—*In the Goods of TOMKINS* (1841), 6 Jur. 156.

(d) *When Executor is incapable.*

See Sect. 11, sub-sect. 5, B., ante.

(e) *Where Executor Uncertain.*

2075. One of possible executors too ill to be sworn—Grant to other as interested in residue.—The residuary clause in a will was altered by striking out the words "to A. in trust" & substituting "to B." A. was named exor. Administration with the will as altered annexed granted to B., as interested in the residue, A. being incapable of acting, & too ill to be sworn, & proceedings being taken in Chancery to ascertain the construction of the residuary clause.—*In the Goods of BOSCHETTI* (1852), 16 Jur. 894.

(f) *Discretionary Grants.*

See Sect. 11, sub-sect. 5, B., ante.

B. To Whom granted.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 162.

(a) *In General.*

2076. Where right to grant a question of construction—Decision of court of construction followed.—A. died in 1856, leaving a will on the construction of which, in respect to a question between B. the asserted residuary legatee, & C., the next of kin, the judge of the Prerogative Ct. of Canterbury decreed letters of administration

PART II. SECT. 12, SUB-SECT. 1.—B. (a).

s. Company—Authorised by Statute.—Testatrix by her will, made on Aug. 5, 1885, appointed A. B. sole exor. & died on Jan. 16, 1886. On Dec. 8, 1885, Act No. 842 was passed,

by which an exor. instead of himself applying for probate may authorise the Trustees Exors. & Agency Co., Ltd. to apply for administration *cum testamento annexo* unless testator should by his will have expressed his desire otherwise. A. B. duly authorised the co. to apply:—*Held*: where a testator

with the will annexed to C., testator's sister & next of kin. A bill was subsequently filed in Chancery for the administration of the estate, in determining which WOOD, V.-C., held that B. was the beneficial residuary legatee. Afterwards C. died, leaving goods unadministered, & a question arising in the Ct. of Probate as to the grant *de bonis non* between B. & another next of kin:—*Held*: without going into the construction of the will, the suit before WOOD, V.-C., was substantially an appeal from the decision of the Prerogative Ct. Administration *de bonis non* was granted to B. in accordance with the decision in Chancery.—WARREN v. KELSON (1859), 1 Sw. & Tr. 290; 28 L. J. P. & M. 122; 33 L. T. O. S. 12; 5 Jur. N. S. 415; 7 W. R. 348; 161 E. R. 733.

(b) *Will disposing of Property Abroad.*

2077. Grants according to law of domicile.]—SPRATT v. HARRIS, No. 724, *ante*.

See, generally, Sect. 11, sub-sect. 4, B., *ante*; CONFLICT OF LAWS, Vol. XI., pp. 378 *et seq.*

Jurisdiction to grant—Probate of wills disposing of property abroad.]—*See* Sect. 1, sub-sect. 1, A. (b), *ante*.

(c) *Where Testator Domiciled Abroad.*

See, generally, Sect. 11, sub-sect. 4, B., *ante*; CONFLICT OF LAWS, Vol. XI., pp. 378 *et seq.*

(d) *The Widower or Widow.*

2078. General rule.]—(1) A *feme covert* having made a will of her separate property, but appointed no exor., the ct. refused to grant a limited administration, with the paper annexed, to the legatees therein named, but according to the course of office, granted a general administration, *cum testamento annexo*, to the husband.

(2) It is always the duty of the ct. to take care that there is sufficient security. Let the sureties justify (*per cur.*).—SALMON & BREEZE v. HAYS (1833), 4 Hag. Ecc. 382; 102 E. R. 1485.

Annotations:—As to (1) Consd. In the Goods of Dawson (1849), 2 Rob. Ecc. 135. *Appld.* Dempsey v. King (1851), 2 Rob. Ecc. 397. *Distd.* Brencley v. Lynn (1852), 2 Rob. Ecc. 411. *Refd.* Tugman v. Hopkins (1812), 11 L. J. C. P. 309.

2079. Whether rule absolute.]—(1) A woman, having a power to appoint certain property by will, made a will previously to her marriage in 1831, & by her marriage settlement of even date with her will covenanted not to revoke that will after her marriage. She executed many testamentary papers but did not, as alleged, thereby in any way revoke that will; subsequently she executed a "codicil" to her "last will," whereby she revoked her "said will in toto" . . . "so that I may die intestate":—*Held*: notwithstanding an averment of the necessity of probate being granted of certain former testamentary papers in addition to the last "codicil" in order

had an opportunity after the . . . of the Act of altering his will, & did not choose to do so, he must be taken to mean that his will should take effect according to the new law, & administration granted to the co.—*In the Will of BRIDGER* (1886), 12 V. L. R. 281.—**AUS.**

t. — *Not authorised by statute.]—*A corp. aggregate, not specially authorised by Act of Parliament, cannot be appointed administrator *cum testamento annexo*, nor can it lawfully authorise a trustee co. to apply for such a grant.—*In the Will of BAKER*, [1909] V. L. R. 313.—**AUS.**

PART II. SECT. 12, SUB-SECT. 1.—

B. (d).

a. *Widow—Jointly with two others—*

that a ct. of equity might construe them in reference to the covenant in the settlement the Prerogative ct. was bound by *Hughes v. Turner* (4 Hag. Ecc. 30) to decree probate of the last testamentary paper above.

(2) The grant of administration with will annexed of a married woman, when no exor. is named is, though the husband survive, in the discretion of the ct.; when such grant is refused to the husband, he may if necessary take a *caterorum* grant. The ct. has no authority whatever to alter a decree affirmed by the Judicial Committee, a superior tribunal.

(3) A ct., in merely pronouncing that a paper is entitled to probate does not thereby exclude the question whether other papers may not be joined, unless indeed that question is specifically raised (*DR. LUSHINGTON*).

(4) Intestacy can only arise when a person dies without legally bequeathing his property, that is, without a will. If a man by will declares he dies intestate, & that his property shall go as in case of intestacy, such paper does not constitute an intestacy but a bequest of the property to *personae designatae*, designated by the statute (*DR. LUSHINGTON*).—BRENCLEY v. LYNN (1852), 2 Rob. Ecc. 411; 19 L. T. O. S. 50; 16 Jur. 292; 163 E. R. 1373.

Annotations:—As to (2) Refd. In the Goods of Bailey (1861) 2 Sw. & Tr. 135. *Generally, Mntd.* Sotheran v. Denling (1881), 20 Ch. D. 99.

2080. Though husband takes no interest.]—A married woman made her will under a power; she disposed of the whole of the fund, over which she had a power, away from her husband, & appointed no exor. No other property was referred to in the will. Under the circumstances, the ct. decreed the administration to the husband.—*In the Goods of DAWSON* (1849), 2 Rob. Ecc. 135; 7 Notes of Cases, 317; 13 Jur. 1084; 163 E. R. 1208.

(e) *Universal or Residuary Legatee.*

i. *In General.*

2081. Right to grant.]—DAY v. CHATFIELD, No. 915, *ante*.

2082. —.]—Administration with a will annexed, granted to a widow in preference to a mother.

A residuary legatee is generally entitled to an administration with the will annexed, because he is bound, for his own sake, to be careful in collecting the effects & improving the estate.—REPINGTON v. HOLLAND & REPINGTON (1755), 2 Lee, 251; 161 E. R. 332.

2083. —.]—A will propounded & established; administration *cum testamento annexo*, granted to the residuary legatees, the exors. having renounced.—BIGG v. KEEN (1752), 1 Lee, 124; 161 E. R. 46.

2084. — No right to probate.]—*In the Goods of OLIPHANT*, No. 895, *ante*.

tenor, required her to renounce the executorship, if any, & take administration with the copy of the will annexed, entering into security for the benefit of the absent next of kin.—*In the Goods of QUIN* (1867), 16 W. L. R. 112.—**IR.**

PART II. SECT. 12, SUB-SECT. 1.—
B. (e) i.

2084 i. Right to grant—No right to probate.]—A universal legatee is not entitled to probate, but only to letters of administration with the will annexed.—*In the Goods of SHOHKEE BHUBAN BANNERJEE* (1892), 1 L. R. 19 Calc. 582.—**IND.**

a. — *On renunciation by executor* — *Not when distribution postponed by will.]—*Testator appointed exors. &

*Appointed trustees by will—Estate not wholly disposed of.]—*Testator appointed his widow & two of his sons his trustees, but did not purport to dispose of all his estate:—*Held*: they were entitled, under the circumstances, to a joint grant of administration with the will annexed.—*Re BROWN'S WILL* (1878), 4 V. L. R. 47.—**AUS.**

b. — *Conditional grant.]—*Testator left his property equally between his wife & one of his daughters describing the former as "manager of all"; he had another daughter & a son, both of whom had emigrated, & had not been heard of for some time. The will was lost, but a copy of it was lodged in ct. The ct., upon an application being made by the widow for probate to her as extrix, according to the

Secl. 12.—*Special and limited grants of administration: Sub-sect. 1, B. (c) i., ii. & iii.*

2085. — — — — —.]—A person constituted universal devisee & legatee by a will, but not named as exor., is entitled to administration with the will annexed, but not to probate.—*In the Goods of PRYSE*, [1904] P. 301; 73 L. J. P. 84; 90 L. T. 747.

*Annotation:—***Refd.** *Hewson v. Shelley*, [1913] 2 Ch. 384.

2086. — — — — —.]—**Preferred to next of kin.**—**ANON.** (1028), No. 2066, *ante*.

2087. — — — — —.]—Where an exor. renounces, it is the practice to grant administration *cum testamento annexo* to the residuary legatee in preference to the [next of kin]; but the ct. cannot refuse an administration of this description to a person who is both of next of kin & residuary legatee.—*LINTHWAITE v. GALLOWAY* (1757), 2 Lee, 414; 161 E. R. 388.

*Annotation:—***Refd.** *Crane v. Rebello* (1852), 19 L. T. O. S. 192.

2088. — — — — —.]—**CRANE v. REBELLO**, No. 2103, *post*.

2089. — — — — —.]—**Preferred to widower.**—Where a married woman makes a will & appoints no exor., the persons interested under the will are entitled to the grant in priority to the husband, who can only obtain the grant on their renunciation being filed in the registry.—*In the Goods of BAILEY* (1861), 2 Sw. & Tr. 135; 30 L. J. P. M. & A. 190; 4 L. T. 90; 25 J. P. 360; 9 W. R. 540.

2090. — — — — —.]—**Preferred to representative of executor dying without proving.**—A will made upon a printed form with holograph additions purported to leave all property both real & personal belonging to testator to testator's wife "for her own absolute use & benefit . . . subject only to the payment of" debts & funeral & testamentary expenses, the wife being appointed sole extrix. . . . " & after her death to come absolutely to " M. " to her & her heirs for ever " after payment of £20 to two sisters (named) of M. :—*Held*: M., as residuary legatee, was entitled to a grant of administration with the will annexed, in preference to the exor. of the widow, who had died without taking probate of the will in question.—*In the Estate of LUTTON*, [1905] P. 321; 74 L. J. P. 162; 94 L. T. 100.

*Annotation:—***Mentd.** *Re Fowler, Fowler v. Fowler*, [1917] 2 Ch. 307.

2091. — — — — —.]—**Where also next of kin.**—*LINTHWAITE v. GALLOWAY*, No. 2087, *ante*.

2092. — — — — —.]—**Universal legatee also widow.**—Administration *cum testamento annexo* decreed to the universal legatee, she having first proved herself to have been the widow of testator.—*CUNNINGHAM v. ROSS* (1757), 2 Lee, 478; 161 E. R. 411.

2093. — — — — —.]—**Where "residue" a calculable amount.**—*In the Goods of CUTLER* (1851), 15 Jur. 68.

2094. **Residuary legatee described as wife—Lawful wife surviving—Lawful wife not appearing to citation.**—A party, described by a testator in his will as his wife under his own name, & as such appointed universal legatee, whereas his real widow, from whom he had been separated, survived, was allowed to take administration, the widow being cited & not appearing.—*BARLING v. DARE* (1844), 3 Notes of Cases, 164.

2095. — — — — —.]—**Residuary legatee with life interest only—Lawful wife not cited.**—Where a

testator in his will bequeathed his whole property for life to "his wife E." his real wife H., with whom he had long ceased to cohabit, being still alive, the ct. refused, in her absence, upon the affidavit of the sister of E., to whom deceased had been married *de facto* after his separation from his wife, to decree administration with the will to E., as universal legatee for life.—*In the Goods of LAMBERT* (1846), 5 Notes of Cases, 94.

2096. **Sole executrix & joint residuary legatee—Renouncing executrixship.**—A., sole extrix. & joint residuary legatee, renounced the probate of the will of her testatrix, C., who was sole extrix. & universal legatee for life of her husband, & who had died leaving some of his effects unadministered, & administration thereof had been granted to their son; there being no representation of C., A., upon her retracting her renunciation, was allowed to take administration with will of the goods of C., as a residuary legatee.—*In the Goods of BULLOCK* (1846), 4 Notes of Cases, 645.

Residuary legatee in trust.—*See* Sub-sect. 1, B. (c) iii., *post*.

2097. **Survivor of two universal legatees—Former decree in favour of other since dead.**—The ct. will grant administration with will annexed to one of two universal legatees a decree with intimation having issued in the name of the other who was since dead.—*LAW v. CAMPBELL* (1827), 1 Hag. Ecc. 55; 162 E. R. 504.

2098. **Whether allowed to claim as creditor.**—A party entitled as substituted residuary legatee cannot claim [letters of administration with will annexed] as creditor.—*In the Goods of HUDSON* (1842), 6 Jur. 564.

2099. **Loss of right to grant—Estoppel by judgment in former proceedings.**—*Held*: a person who had been party to a prior suit touching the grant of an administration *cum testamento annexo* was barred from instituting proceedings for the purpose of claiming the administration as residuary legatee.—*THOMAS v. DAVIS* (1752), 1 Lee, 170; 161 E. R. 63.

See, generally, **ESTOPPEL**, Vol. XXI., pp. 159 *et seq.*

2100. — — — — —.]—**By renunciation—Power to retreat.**—A residuary legatee, who had renounced administration *de bonis non* of an alleged insolvent estate, was permitted to retract that renunciation, & to take the administration in preference to a nominee of creditors representing a large amount of debt.

A residuary legatee is allowed to retract his renunciation before a grant is made to another. It is only when there is no one else, according to law, to take a grant that a creditor is entitled. It cannot, even in the case of an insolvent estate, be said that a residuary legatee has no interest, for some of the debts may be questioned, some of the creditors may make unjust demands (*SIR H. JENNER FUST*).—*DIMES v. CORNWELL*, *In the Goods of WATERS* (1850), 2 Rob. Eccl. 142; 7 Notes of Cases, 380; 14 L. T. O. S. 549; 14 Jur. 252; 163 E. R. 1271.

ii. Where No Prospect of Residue.

2101. **Whether right affected.**—Letters of administration having been granted to a daughter of a testator (the only exor. to prove the will having died intestate) the widow & residuary

trustees & directed that his business should be carried on for three years after his death by his eldest son, as manager, under the supervision of the trustees. The exors. & trustees renounced, & the eldest son, who was one of the residuary legatees, applied

for administration with will annexed:—*Held*: as the estate could not be distributed for some years, the reason for the rule that, when the exors. renounce the residuary legatee is entitled to the grant of letters of administration was absent, & in the circumstances,

an impartial person should be appointed.—*Re SOLER'S WILL* (1906), 26 N. Z. L. R. 279.—N.Z.

d. — — — — —.]—**Nuncupative will.**—*Re RULE*, 35 N. Z. L. R. 254.—N.Z.

legatee applied to have them repealed. It appeared that after payment of the debts & legacies there would be no residue. The ct. strongly inclined to think that the residuary legatee was entitled to the administration, the averment that there was *residuum* being immaterial. But in view of the fact that much of the estate had already been got in, & that suits were pending for the rest, which would be abated if the administration were repealed, the ct. proposed an accommodation, which the parties accepted.—*THOMAS v. BUTLER* (1672), 1 Vent. 217; 3 Keb. 23, 27, 34, 55; 2 Lev. 55; 86 E. R. 140.

Annotations.—*Consd.* Atkinson v. Barnard (1815), 2 Phillim. 316. *Reid.* R. v. Bettsworth (1739), 2 Stra. 1111; Crane v. Rebello (1852), 19 L. T. O. S. 192. *Mentd.* Hammond v. Ouden (1700), 12 Mod. Rep. 421; Barrs v. Jackson (1842), 1 Y. & C. Ch. Cas. 585.

2102. —[Residuary legatees, even where there is no prospect of any residue, are entitled to an administration *de bonis*, in preference to legatees & annuitants.—*ATKINSON v. BARNARD (LADY)* (1815), 2 Phillim. 316; 161 E. R. 1156.

Annotation.—*Reid.* Crane v. Rebello (1852), 19 L. T. O. S. 192.

2103. — *Estate insolvent.*—Administration, with the will annexed, of an insolvent estate refused to a creditor, granted to the residuary legatee.

It is the general rule that administration should be granted according to the interest, & that in cases, whether within or without the Statute of Distributions, the ct. should entrust the management of the estate to those who have the greatest interest in it. Hence, where there is a will without the appointment of an exor., or where an exor. refuses to act, the grant of administration, with the will annexed is given to the residuary legatee not the next of kin of testator. With respect to creditors, they have but an inferior interest they cannot deny an interest, or oppose a will, & administration is only granted to them on failure of a superior interest; they are therefore postponed to residuary legatees, next of kin & legatees, & the solvency or insolvency of the estate cannot affect the question of right particularly in the case of a residuary legatee, who is testator's choice (*SIR JOHN DODSON*).—*CRANE v. REBELLO* (1852), 19 L. T. O. S. 192; 16 Jur. 482.

2104. —[*DIMES v. CORNWELL*, *In the Goods of WATERS*, No. 2100, *ante*.

2105. — *Actual interest may prevail.*—One of four residuary legatees, who was also testator's next of kin, unsuccessfully opposed the will, & was condemned in costs. The three other residuary legatees who were minors, & had, by their guardian, propounded the will, applied for a grant of administration with the will annexed to their guardian. The ct. refused to make the grant to the guardian because it was proved that in fact there was no residue, & that the next of kin had a larger interest in the specific legacies than the minors. The grant was therefore made to the next of kin, notwithstanding his unsuccessful opposition to the will; & the ct. declined to make the grant conditional on the payment of legacies to other legatees besides the next of kin & the minors.—*SAWBRIDGE v. HILL* (1871), L. R. 2 P. & D. 219; 40 L. J. P. & M. 27; 24 L. T. 320; 35 J. P. 503; 19 W. R. 705.

2106. — *Grant to specific legatee—Residuary legatee abroad.*—Upon an application for a grant of administration *de bonis non* it appeared that the residuary legatee resident abroad

had had notice by letter, & that he had no beneficial interest, there being actually no residue:—*Held*: the grant might be made to a specific legatee, without requiring the residuary legatee to be cited, or to renounce.—*In the Goods of WILDE* (1887), 13 P. D. 1; 57 L. J. P. 7; 57 L. T. 815; 51 J. P. 775; 36 W. R. 400.

iii. Trustees.

2107. *Whether entitled to grant.*—*COUSS-MAKER v. CHAMBERLAYNE*, No. 916, *ante*.

2108. — *Next of kin preferred.*—The office of trustee differs from that of exor. Administration *cum testamento annexo* was granted to one of the next of kin who was before the ct., in preference to the trustees for the property.—*BODDICOTT & HAMILTON v. DALZELL* (1756), 2 Lee, 294; 161 E. R. 346.

Annotations.—*Distd.* Hughes v. Richards (1758), 2 Lee, 543. *Apld.* *In the Goods of Jones* (1861), 2 Sw. & Tr. 155. *Consd.* *In the Goods of Fraser* (1870), 40 L. J. P. & M. 9.

2109. — *Preferred to persons with beneficial interest.*—*HUTCHINSON v. LAMBERT & CURLING*, No. 2131, *post*.

2110. — *Distinguished from executor according to the tenor.*—*In the Goods of BRAY* (1852), 16 Jur. 802.

2111. — — — — —[Where a testator bequeathed all his property to trustees, with direction to pay a specific debt, certain legacies, & to deal with the residue, but the will did not contain any general direction as to payment of debts:—*Held*: the trustees were not entitled to probate of the will as exors. according to the tenor, but they were entitled to administration with the will annexed.—*In the Goods of ARMSTRONG* (1889), 59 L. J. P. 23; 62 L. T. 184; 54 J. P. 200.

2112. — — — — —[Testatrix by her will left all she possessed to two persons, whom she named, in trust to pay the income to her husband during his lifetime, & directed that her estate should be divided equally between her four children at his death. There was no direction to pay debts & no appointment of exors. Testatrix expressed adherence to her will, which she retained in her possession, but at her death it was found torn up. All parties interested consenting:—*Held*: there was on these facts no presumption of revocation, the persons named as trustees were not, in the absence of a direction to pay debts, executors according to the tenor, & the proper form of grant was one, with the will annexed, to them as universal legatees in trust. *In the Estate of MACKENZIE*, [1909] P. 305; 79 L. J. P. 4; 26 T. L. R. 30.

See, generally, Part I., Sect. 3, sub-sect. 2, A., *ante*.

2113. — — — — — *Trustees substituted by codicil.*—Where a testator appointed "trustees & exors." of his will & by codicil cancelled "the appointment of trust" & appointed other persons in their stead the trustees & exors. appointed by will having renounced or being unable to act, the ct. refused to grant probate as exors. according to the tenor, to the persons substituted by the codicil, but made a grant to them of administration with the will annexed.—*In the Goods of HARTLEY* (1895), 11 R. 592.

2114. — *Substituted trustees—Necessity for consent.*—In no case will the ct. grant administration to substituted trustees as such without the consent of all parties interested in the property until the property is actually vested in the trustees.

Sect. 12.—Special and limited grants of administration: Sub-sect. 1, B. (e) iii. & iv., (f) & (g) i.]

—CRESSWELL v. CRESSWELL (1824), 2 Add. 342; 162 E. R. 319.

*Annotation:—*Consd. Woodfall v. Arbuthnot (1873), L. R. 3 P. & D. 108.

2115. ———.]—Administration with the will annexed was granted to a substituted trustee, the exor., who was also the trustee, having renounced.—*In the Goods of* TURNER (1860), 25 J. P. 151.

2116. ——— Substitution by court.]—Deceased executed a will in which he appointed exors. & certain persons residuary legatees in trust. In 1873 the Master of the Rolls made an order whereby he substituted certain other persons as trustees in the place of the surviving residuary legatee in trust named in the will, & vested in the new trustees the estate of deceased:—*Held*: on the citation & non-appearance or renunciation of the surviving exors., administration might be granted to the new trustees, although there had been no actual conveyance or assignment to them of the trust estate.—*In the Goods of* WOODFALL, WOODFALL v. ARBUTHNOT (1873), L. R. 3 P. & D. 108; 42 L. J. P. & M. 64; 29 L. T. 248; 37 J. P. 712; 21 W. R. 933.

2117. ——— Substitution by codicil.]—*In the Goods of* HARTLEY, No. 2113, ante.

2118. ——— Residuary charitable gift—Bequest *ad.*]—Where a devise of realty for a charitable foundation is void under Mortmain Act, a bequest to residuary legatees in trust to carry out the purposes of the devise fails too; & a bequest over, where the prior bequest is defeated by contingencies other than those provided for by testator, is also void. Administration, with will annexed, was granted to next of kin in preference to residuary legatee, for the purpose of carrying out the intended charity.—*RUDALL v. WARREN* (1857), Dea. & Sw. 306; 29 L. T. O. S. 204; 3 Jur. N. S. 822; 164 E. R. 584; *subsequent proceedings, sub nom.* WARREN v. KELSON (1859), 7 Sw. & Tr. 290.

2119. ——— Conditions precedent to grant.]—Testatrix bequeathed the residue of her property to B. "to be disposed of as she shall think fit at her discretion for the benefit of" a Roman Catholic convent. The exor. of the will & B. having died during the lifetime of testatrix, the ct. made a grant of administration with the will annexed to the Reverend Mother of the convent as residuary legatee, on proof of the permanence of the institution, & of the fitness of the Reverend Mother, having regard to her powers, to receive & apply the legacy.—*In the Goods of* M'AUILLIFFE, [1895] P. 290; 64 L. J. P. 126; 73 L. T. 193; 44 W. R. 304; 11 T. L. R. 528; 11 R. 610.

2120. ——— Whether to holder of office at date of will or successor in office.]—A testator, a Roman Catholic canon, bequeathed a legacy to the then Roman Catholic bishop of his diocese, by name, for the benefit of the library of a certain educational institution, the legal ownership & custody of which was vested in the bishop *ex officio*. He also appointed the bishop his residuary legatee, & bequeathed the residue of his estate, subject to a certain legacy, to the bishop, again by name, for the same objects as above. Testator survived the execution of his will about eleven years, during which time there had been three successors to the bishop, but the ownership etc. of the institution was still vested in the bishop for the time being *ex officio*. The ct. granted administration with

the will annexed to the bishop for the time being, under Court of Probate Act, 1857 (c. 77), s. 73, but without prejudice to any rights of the next of kin.—*In the Goods of* LALOR (1901), 71 L. J. P. 17; 85 L. T. 643; 18 T. L. R. 15.

2121. ——— Trustee without beneficial interest.]—Testator appointed no exor., but appointed his nephew his universal legatee in trust. The universal legatee was an attesting witness, but took no beneficial interest. The ct. granted him administration with the will annexed.—*In the Goods of* FORB (1870), 23 L. T. 323; 34 J. P. 679; 18 W. R. 960.

2122. Representative of residuary legatee in trust—Preferred to residuary beneficiaries for life.]—*HUTCHINSON v. LAMBERT & CURLING*, No. 2131, *post*.

iv. Other Cases.

2123. Will with two inconsistent residuary gifts—One absolute & one for life—Grant to legatee as person named.]—Testator, having in one clause of his will left all his personal property to his wife absolutely, by a subsequent clause gave her only a life interest therein. Under these circumstances a special grant was ordered to issue, which, after reciting the two clauses of the will, should authorise the widow to take administration as the party named in them.—*In the Goods of* WESTROPP (1859), 5 Jur. N. S. 1318.

2124. Residuary legatees of age—Though under age fixed by will for possession.]—Testator left his property to his children who should attain twenty-eight years of age, daughters marrying under that age to have their presumptive shares settled upon them. The sole surviving exor. renounced probate, & refused to nominate any new trustee. All the children, with the exception of the eldest son, who was in India, consenting, the ct. made a grant of letters of administration, with the will & codicil annexed, to two sons under the age of twenty-eight, this being the age fixed for possession, & not for vesting, of the shares.—*In the Goods of* THOMPSON (1892), 67 L. T. 357.

(f) Persons Claiming under Universal or Residuary Legatees.

2125. Where person entitled married woman—Grant to husband of substituted residuary legatee—Preferred to husband of executrix & residuary legatee for life.]—*Held*: the husband of a substituted residuary legatee was entitled to an administration in preference to the husband of the sole executrix & residuary legatee for life, both parties being widowers.—*WETDRILL v. WRIGHT* (1814), 2 Phillim. 243; 161 E. R. 1132.

2126. ——— Wife taking for separate use—Application to renounce in favour of next of kin—Necessity for citing husband.]—*In the Goods of* WELLS, No. 2188, *post*.

2127. ——— Grant to nominee—Refusal of husband to consent.]—A married woman was the only legatee of a will which contained no appointment of an exor. Her husband refused to consent to her taking the grant of administration with the will annexed, or to join in the bond. The property being left to her separate use, the ct. made the grant to her attorney without the husband's consent.—*In the Goods of* WARREN (1867), L. R. 1 P. & D. 538; 37 L. J. P. & M. 12; *sub nom.* *In the Goods of* WARNER, 17 L. T. 221; 31 J. P. 825.

for years in Ireland, & his real estate & chattels real in England, & Ireland, to the same trustees. The ct. granted

to the trustees in that character alone administration *cum testamento annexo* limited to the chattels real in Ireland.—

DE FOGASSIERAS v. DUPONT (1881), 11 L. R. Ir. 123.—IR.

2128. — — — — **No notice to husband.]—**
In the Goods of PINE, No. 1915, ante.

2129. — — — — **Grant to husband—On consent by wife.]—**A. died, leaving all the property over which she had a power of appointment to B., who was married & resident in America. B.'s husband came to England & applied for a grant of administration with the will annexed. The ct., before making the grant, required that B.'s consent should first be obtained.—*In the Goods of WILLIAMS (1868), 17 L. T. 518.*

2130. Representative of person entitled—Executor of residuary legatee—Preferred to executor of creditor.]—Letters of administration which had been granted to the exor. of a creditor, were rescinded before they had passed the seal, at the suit of the exor. of a residuary legatee.—*JONES v. BEYTAGH & BEYTAGH (1821), 3 Phillim. 635; 161 E. R. 1438.*

2131. — Representative of residuary legatee in trust—Preferred to residuary legatees for life—Intention of testator.]—The ordinary practice, where an exor. fails to represent a testator, is, to grant administration, with his will annexed, to the residuary legatee, in trust, if any; & failing such residuary legatee, in trust, then to grant the same, not to his, or her representative, but to such person or persons as have the beneficial interest in the residuary estate, under the will.

Administration was decreed, however, in this case, to the representative of a surviving trustee, in preference to either, or both, of two other claimants, styling themselves "residuary legatees," simply, but without any violation of the ordinary practice, as explained above, such other claimants being, in fact, residuary legatees for life only, each in a fifth of the residue, she, the representative of the surviving trustee, having also, as such, herself a beneficial interest in the residuary estate greater than that of either of the other claimants, & the will of testator plainly excluding the interference, or control, of those other claimants, or either of them, in the general management of his estate.—*HUTCHINSON v. LAMBERT & CURLING (1825), 3 Add. 27; 162 E. R. 391.*

2132. — Necessity for representation to estate of person entitled.]—A. died in 1831, an infant, leaving his father, B., the only person entitled to his estate. B. died, leaving a will, in which he named his wife, C. & D., exors., & C. universal legatee. B.'s will had never been proved. C. died, leaving a will, in which she named exors., & all her children, excepting E., residuary legatees. D. renounced probate of B.'s will, & the exors. & residuary legatees of C. renounced their right to administer to A.'s estate, & consented to the administration going to E.:—*Held*: the grant to E. could not be made unless he first represented B.—*In the Goods of ALLEN (1864), 3 Sw. & Tr. 559; 34 L. J. P. M. & A. 1; 13 W. R. 106; 164 E. R. 1302.*

2133. Attorney or agent of person entitled—Person entitled abroad—Grant to wife as agent.]—Administration with will annexed was granted to the wife of the residuary legatee as his agent under a memorandum in his handwriting, he being in India.—*In the Goods of ELDETON (1832), 4 Hag. Ecc. 210; 162 E. R. 1423.*
Annotation:—Reid. In the Goods of Morley (1864), 3 Sw. & Tr. 425.

2134. — Attorney of guardian elected by sole infant legatee abroad—Preferred to attorney of creditor.]—Administration with will annexed, the exors. & residuary legatees in trust having renounced, was granted to the attorney resident in this country of the guardian elected by a minor

sole legatee resident abroad, in preference to the attorney of a creditor.—*GRAHAM v. MACLEAN (1841), 2 Curt. 659; 163 E. R. 542.*

Annotation:—Reid. Crane v. Robello (1852), 19 L. T. O. S. 192.

Person entitled married woman.]—See
Nos. 1915, 2127, 2129, ante.

2135. Assignee of person entitled—Trustee for creditors.]—The exor. & universal legatee under a will, having assigned his interest to trustees for the benefit of his creditors, administration with will annexed was granted to two of the trustees, he having been first cited.—*MAYHEW v. NEWSTEAD, In the Goods of NEWSTEAD (1837), 1 Curt. 593; 163 E. R. 208.*

2136. — Under irrevocable deed of gift.]—An Austrian subject in Milan, by a legal will, in which no exor. was appointed, made C., spinster, universal legatee. C. was duly put in possession of the estate of deceased, by authorities at Milan, & afterwards duly executed, according to the law of Milan, an irrevocable deed of gift of all her estate in favour of R., & shortly afterwards died intestate. R. was duly put in possession of the estate in Milan. It being afterwards discovered that testator was entitled to £1,000 under some proceedings in Chancery in England, & application being made to this ct., it decreed letters of administration, with the will annexed, limited to the estate taken under the deed of gift, to R., the donee, upon an affidavit of the Austrian consul, verifying the documents produced, being left in the registry.—*In the Goods of FEDERICI (1853), 1 Ecc. & Ad. 109; 164 E. R. 63; sub nom. In the Goods of FEDERICI, 17 Jur. 1130.*

2137. — Under power of appointment.]—A. bequeathed the residue of his personal estate to W., his sole exor. & trustee, in trust for such persons as B., a married woman, should appoint, & in default of appointment to B. absolutely. W. renounced. By deed B. appointed & assigned to M. & J., who accepted the trust, all her interest under the will, & her right to letters of administration with the will annexed, in order that they might obtain such letters of administration:—*Held*: letters of administration with the will annexed would be granted to M. & J.—*In the Goods of MARTINDALE (1858), 1 Sw. & Tr. 8; 27 L. J. P. & M. 29; 30 L. T. O. S. 294; 4 Jur. N. S. 196; 6 W. R. 277; 164 E. R. 605.*

2138. Residuary legatee of residuary legatee.]—
In the Goods of BULLOCK, No. 2096, ante.

(g) *Next of Kin.*

i. *In General.*

2139. Where there is no gift of residue.]—*ISTED v. STANLEY, No. 913, ante.*

2140. —.]—*ANON. (1628), No. 2066, ante.*

2141. —.]—*KOOYSTRA v. BUYSKES, No. 2156, post.*

2142. —.]—*In the Goods of DORMOY, No. 2177, post.*

2143. — Next of kin also a legatee.]—A. by his will bequeathed the residue of his personal estate to be equally disposed of between five of his children, whom he named. One of those children died in A.'s lifetime:—*Held*: the five children took as the tenants in common, & the share of deceased child therefore lapsed to the undisposed residue, & administration would be granted with the will & codicil annexed to B., son of deceased, not as a legatee, but as entitled as one of his next of kin to part of the undisposed residue.—*In the Goods of PILE (1862), 2 Sw. & Tr. 628; 7 L. T. 194; 164 E. R. 1142.*

Sect. 12.—Special and limited grants of administration: Sub-sect. 1, B. (g) i. & ii., (h), (i) & (j),

2144. Where residuary gift imperfect.]—Although it is the practice to grant administration with the will annexed to a residuary legatee in preference to the widow, the ct. will not pass by the widow unless it is clear that the residue is left to some other person. A testator duly executed a will whereby he gave all his property to trustees upon trust to invest part of it in an annuity for his widow, & to divide the residue amongst his children, but the amount of the annuity & the names of the trustees & exors. were left in blank. The ct. granted administration with the will annexed to the widow.—*In the Goods of POOL* (1866), 1 L. R. 1 P. & D. 206; 35 L. J. P. & M. 97; 14 L. T. 859; 30 J. P. 679; 14 W. R. 976.

2145. Where residuary gift not clear—Former will confirmed as to legacies—Revoked as to appointment of executor—Former law.]—*THOMAS v. EVANS* (1752), 1 Lee, 104; 161 E. R. 39.

2146. —.]—Testator bequeathed to his father "a life interest, or until he shall marry again, of one-third of such money, stocks, funds, or other securities, not hereinafter specially devised, as I may die possessed of," & he gave the other two-thirds of his capital among such of his brothers & sisters as should attain the age of twenty-one. He also directed that, on the death or second marriage of his father, the one-third part, & the share of his mother's estate which would then belong to him, should be divided among his brothers & sisters. There was no specific gift of the residue. Both the exors. named in the will renounced probate. The ct. made a grant to the father of deceased as next of kin, of letters of administration with the will annexed, with a memorandum to the effect that the will contained no clear disposition of the residue.—*In the Goods of ASTON* (1881), 6 P. D. 203; 50 L. J. P. 77; 46 J. P. 104; 30 W. R. 92.

See, also, No. 2123, ante.

2147. Where residuary legatee cannot be found.]—The residuary legatee named in a will, not to be found, one exor. dying in the lifetime of testator, the other renouncing:—*Held*: administration, with the will annexed, would be granted to the next of kin, but the sureties were required to justify.—*CULL v. GUILLERMEY* (1848), 12 L. T. O. S. 249; 12 Jur. 966.

2148. —.]—*In the Goods of LEY*, No. 2073, *ante*.

2149. Next of kin passed over—On account of age—Grant to daughters legatees under will.]—Administration with a will, in which was no exor. nor residuary legatee, annexed, was decreed to two aunts of deceased, legatees in the will, & daughters of the grandmother, the next of kin, she being ninety years of age & incapable.—*In the Goods of HINCKLEY* (1828), 1 Hag. Ecc. 477; 102 E. R. 650.

Annotation:—Refd. Ex p. Evelyn (1833), 2 My. & K. 3.

2150. Next of kin of testator—Preferred to next of kin of former testator under whose will testator residuary legatee.]—*ANON.* (1691), Nels. 172; 21 E. R. 818.

2151. Nominee of foreign court acting on behalf of next of kin.]—The ct. refused to grant administration *cum testamento annexo* to the attorney of the Orphan Board at the Cape of Good Hope, acting on behalf of the next of kin, but subsequently granted it to a creditor, the next of kin having been cited by a decree on the Royal Exchange.—*In the Goods of REITZ* (1831), 3 Hag. Ecc. 766; 102 E. R. 1337.

ii. Next of Kin *inter se*.

2152. Larger interest preferred—Sister preferred to widow.]—In a contest for administration with the will annexed, the ct. preferred the sister of testator to the widow, as it appeared that the sister, as a legatee, had the larger interest in the property to be distributed.—*In the Goods of HOMAN* (1883), 9 P. D. 61; 52 L. J. P. 94; 31 W. R. 955.

2153. Widow—Preferred to mother.]—*REPPINGTON v. HOLLAND & REPPINGTON*, No. 2082, *ante*.

2154. Sister legatee—Preferred to brother not named in will.]—Administration with the will annexed was given to a sister, who was a legatee, in preference to a brother not named in the will.—*DOBSON v. CRACHERODE* (1756), 2 Lee, 326; 161 E. R. 357.

Compare Sect. 11, sub-sect. 4, G. (d), ante.

(h) Creditors.

2155. Where estate insolvent—Preferred to next of kin.]—*FURLONGER v. COX* (1811), cited in 3 Phillim. at p. 381; 161 E. R. 1359.

Annotations:—Consd. West & Smith v. Willby (1820), 3 Phillim. 374. *Distd. Menzies v. Pulbrook & Ker* (1841), 2 Curt. 845.

2156. Where next of kin renounce.]—If the surviving exor. decline to take administration & there is no residuary legatee, the next of kin is entitled to it. If the next of kin decline it, the administration may be granted to a legatee or a creditor; but notice must be given of the application of the legatee or creditor to the next of kin.—*KOOYSTRAS v. BUYSKES* (1821), 3 Phillim. 531; 161 E. R. 1406.

Annotation:—Mentd. Mignault v. Malo (1872), 26 L. T. 329.

2157. Preferred to joint assignee in bankruptcy with deceased.]—Administration *cum testamento annexo* contested by a creditor & by a person who had been joint assignee with the deceased in a bkpt. estate, was granted to the creditors.—*SNAPE v. WEBB* (1757), 2 Lee, 411; 161 E. R. 387.

2158. Preferred to guardian of infants—Where guardian renounces & retracts.]—An administration was granted to creditors in preference to a grandmother who had been appointed guardian to minors, & having renounced the administration, had prayed to be re-appointed before the administration passed the seal.—*WEST & SMITH v. WILLBY* (1820), 3 Phillim. 374; 161 E. R. 1357.

Annotations:—Expld. & Distd. Menzies v. Pulbrook & Ker (1841), 2 Curt. 815; *Crane v. Rebello* (1852), 19 L. T. O. S. 192; *John v. Bradbury* (1866), 36 L. J. P. & M. 33. *Mentd. Withy v. Mangles* (1843), 10 Cl. & Fin. 215; *Burles v. Burles* (1867), L. R. 1 P. & D. 472.

2159. Preferred to nominee of foreign court on behalf of next of kin.]—*In the Goods of REITZ*, No. 2151, *ante*.

2160. To what creditors—Judgment creditor preferred.]—Administration *cum testamento annexo* was granted to a judgment creditor in preference to other creditors.—*CARPENTER (LORD) v. SHEL-FORD* (1758), 2 Lee, 502; 161 E. R. 419.

Annotation:—Distd. Ernest v. Eustace (1856), Dea. & Sw. 271.

2161. — Creditor for funeral expenses—General rule.]—Administration with the will annexed, granted to a person as a creditor for funeral expenses, who had undertaken the funeral of deceased, at the request of the universal legatee named in the will, upon his giving justifying security. The ct. will not grant administration to an undertaker as a creditor for funeral expenses, unless it is informed of the circumstances under which the expenses were incurred, & by whose

authority applicant undertook the funeral.—*NEWCOMBE v. BELOE* (1867), L. R. 1 P. & D. 314; 36 L. J. P. & M. 37; 16 L. T. 33; 31 J. P. 168.
Annotation:—*Refd.* *Fairland v. Percy* (1875), L. R. 3 P. & D. 217.

2162. — *Expenses incurred at request of universal legatee.*—*NEWCOMBE v. BELOE*, No. 2161, *ante*.

2163. — *Equitable creditor.*—A. & B., who were nominated the exors. by testator, renounced probate, & his wife took out administration with the will annexed. In carrying on the business of deceased, the administratrix employed all his estate except a policy of insurance, & she also contracted a debt of £390 to C. With the consent of all parties the ct. appointed C. administrator *de bonis non* of deceased, as equitable creditor on condition that he should take out administration to the widow's estate.—*In the Goods of PERCY, FAIRLAND v. PERCY* (1875), L. R. 3 P. & D. 217; 44 L. J. P. & M. 11; 32 L. T. 405; 39 J. P. 632; 23 W. R. 597.

Annotation:—*Mentd.* *Re Johnson, Shearman v. Robinson* (1880), 15 Ch. D. 548.

2164. — *Poor law guardians.*—Testatrix left a duly executed will, but appointed no exor. She had, for some time before her death, been in receipt of outdoor relief. The ct. granted to the nominee of the guardians, as creditors, letters of administration, with the will annexed, in respect of the personal estate & effects of testatrix.—*In the Goods of BALDWIN* (1891), 55 J. P. 344.

2165. *Creditor also residuary legatee—Cannot take as creditor.*—*In the Goods of HUDSON*, No. 2098, *ante*.

2166. *Assignee of creditors.*—Where executors renounced probate, the ct. granted administration *cum testamento annexo* to the assignee of a debt due by testator to a creditor.—*In the Goods of COSH* (1909), 25 T. L. R. 785; 53 Sol. Jo. 755.

(i) Specific Legatees.

2167. *Grant limited to legacy—Legacy to hospitals—Joint nominee.*—Administration with a will annexed was granted to the joint nominees of two charitable institutions, to whom legacies, expectant on life interests, had been bequeathed, but limited to a fund appropriated for payment of the legacies, the parties entitled to a general grant having been cited, & not appearing.

In this case a limited grant is the proper form with the will annexed. The whole property has been distributed except one sum. A limited grant, with the will annexed, should go. Some grant is necessary. In ordinary cases there should be a general grant, but I do not see why the two hospitals should be incumbered by a general grant (SIR H. JENNER PUST).—*In the Goods of BLOU, INDIGENT BLIND SCHOOL & WESTMINSTER HOSPITAL v. FLACK* (1813), 3 Curt. 739; 2 Notes of Cases, 106; 163 E. R. 886.

Annotation:—*Apld.* *In the Goods of Prothero* (1874), 31 L. T. 551.

2168. — *Testator possessed of no other property.*—*In the Goods of WATSON*, No. 2181, *post*.

2169. — *Bequest of trust estates—Testator's own estate insolvent—Executor, residuary legatee & next of kin renouncing.*—Testator died insolvent, but leaving trust property of great variety & value to be administered. By his will he appointed his wife sole extrix. & residuary legatee, & by a codicil thereto he devised & bequeathed to C. "all tenements, hereditaments & premises" held by him upon trust or by way of mtge., subject to the trusts & equities affecting the same. The widow

renounced probate & administration with the will & codicil annexed, & the next of kin were also willing to renounce administration. The ct., under these circumstances, granted administration with the will & codicil annexed, to C., limited to the trust estates (so far as regarded the personality) which vested in him.—*In the Goods of PROTHERO* (1874), L. R. 3 P. & D. 209; 44 L. J. P. & M. 8; 31 L. T. 551; 39 J. P. 8; 23 W. R. 212.

2170. — *In the Goods of BALDWIN*, No. 1933, *ante*.

(j) Other Persons.

2171. *Person in whom goods of deceased vested—By Act of Parliament.*—*BRIDGES v. NEWCASTLE (DUKE)* (1712), cited 3 Phillim. at p. 381; 161 E. R. 1357.

Annotations:—*Refd.* *West & Smith v. Willby* (1820), 3 Phillim. 374; *Menzies v. Pulbrook & Ker* (1841), 2 Curt. 845; *Barrs v. Jackson* (1842), 1 Y. & C. Ch. Cas. 585; *Withy v. Mangles* (1843), 10 Cl. & Fin. 215.

2172. *Guardian appointed by Court of Probate—Preferred to guardian appointed by Court of Chancery.*—(1) The guardian of a minor is obliged to exhibit an inventory & account of an administration *pendente lite*.

(2) The guardian appointed by this ct. [of Probate] preferred to be confirmed in the administration to the guardian appointed by the Ct. of Ch.—*BROTHERTON v. HELIER* (1755), 2 Lee, 131; 161 E. R. 289.

Annotation:—*Refd.* *Hugeston v. Tucker* (1862), 2 Sw. & Tr. 596.

2173. *Attorney of permanent assignee of insolvent estate—Appointed by foreign court.*—Administration, with will, of effects in England granted to the attorney of a permanent assignee of an insolvent estate of a testator dying in Van Dieman's Land, appointed by the ct. of the island, after the exor. had taken probate.—*In the Goods of MURRAY* (1842), 2 Notes of Cases, 23.

2174. *Executor of tenant for life under will.*—*In the Goods of JACKSON*, No. 1870, *ante*.

2175. *Stranger cognisant of testator's affairs—Consent of all parties as compromise—Discretionary grant under Court of Probate Act, 1857 (c. 77), s. 73.*—*In the Goods of POTTER, POTTER v. POTTER*, No. 1859, *ante*.

2176. *Executors appointed by former invalid will—All parties interested consenting—Discretionary grant under Court of Probate Act, 1857 (c. 77), s. 73.*—*In the Estate of WATKIN, WHITLARK v. WHITE*, No. 1940, *ante*.

C. Necessity for Citation or Notice.

2177. *Executor—Not applying for grant—After thirteen years.*—A domiciled Frenchman having by his will appointed an exor. but no residuary legatee, & administration *cum testamento annexo*, granted, after citing the exor., to the son's attorney in 1828, being brought in, the ct., doubting whether it ought not to require the ambassador's certificate, ultimately on justifying security & on the French consul-general's certificate, confirmed by an affidavit, that by the French law the next of kin was entitled to the residue, granted the administration to the son without citing the nude exor., he having never applied for the grant, though deceased died upwards of thirteen years before.—*In the Goods of DORMOY* (1832), 3 Hag. Ecc. 767; 162 E. R. 1338.

Annotation:—*Refd.* *Laneuville v. Anderson & Gulchard* (1860), 2 Sw. & Tr. 24.

2178. — *Of husband of person entitled—To whom power reserved.*—One of two exors. named in the will of A. alone proved the will. Subsequently a legatee under a prior will of which the

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sole extrix., the wife of A., had died in the lifetime of testatrix, prayed for the administration with the will annexed, without a citation of the non-acting exor. of A.'s will:—*Held*: the legatee was not entitled to such grant until the non-acting exor. of A.'s will had been served with a decree & the usual intimation.—*In the Goods of LEACH, DEANE v. POULTON* (1857), Dea. & Sw. 294; 29 L. T. O. S. 24; 3 Jur. N. S. 822; 5 W. R. 679; 164 E. R. 581.

2179. — Disappearing & taking will.—Citation by advertisement.]—Where an extrix., who was also universal legatee, disappeared, taking the will with her, the ct. refused to grant administration, with the substance of the will annexed, to a creditor, until the extrix. had been first formally cited by advertisement.—*CURTIS v. MASON, In the Goods of WORMINGTON* (1867), 16 L. T. 208; 31 J. P. 408.

2180. Representatives of surviving executor—Executor dying abroad.]—B., the surviving exor. of A., died in Australia; his exors. proved his will in that country, in which alone he had any property:—*Held*: no administration with the will annexed of the unadministered property of A. could be granted before the exors. of B. had been first cited to show cause to the contrary.—*In the Goods of FLEMING* (1860), 24 J. P. 231; 6 Jur. N. S. 480.

2181. Next of kin.—Application by sole legatee—Grant limited to legacy.]—An application for grant of administration with will annexed to the sole legatee, on affidavit that testatrix died possessed of no other property than that specifically described in the will:—*Held*: no reason was shown for not citing the next of kin; they must be cited, or administration might be taken, limited to the property specified in the will.—*In the Goods of WATSON* (1858), 1 Sw. & Tr. 110; 31 L. T. O. S. 104; 164 E. R. 651.

Annotations:—Distd. In the Goods of MILES (1890), 59 L. J. P. 59. *Refd. In the Goods of Watts* (1860), 1 Sw. & Tr. 538.

2182. — — —.]—*In the Goods of BALDWIN, No. 1933, ante.*

2183. — — — Testator possessed of no other property.]—*In the Goods of WATSON, No. 2181, ante.*

2184. — One of next of kin abroad.]—A married woman executed a will under powers given to her by her marriage settlement. She survived her husband & died without republishing her will. All the next of kin, except one in New Zealand, consented to a general grant of administration with the will annexed of the goods of deceased being made to the exor. named in the will. The ct. made the grant without any notice to or consent from the next of kin in New Zealand.—*In the Goods of THORILD* (1867), 36 L. J. P. & M. 119; 10 L. T. 853.

2185. — Renouncing or whereabouts unknown—Application by stranger in blood elected as guardian of infant children.]—A. executed a will in which the name of the trustee & exor. was left blank, & he directed that no relative of his should be appointed a trustee or exor. of the will. A. died a widower, leaving three children, all of whom were infants, & who had elected R., who was not related to them, as their guardian. One of the next of kin had renounced, & another was very old, & the remainder were in poor circumstances or were absent from England. The ct. granted letters of administration with the will annexed to the guardian elected by the infants, without

citing the next of kin.—*In the Goods of WEBB* (1888), 13 P. D. 71; 57 L. J. P. 36; 58 L. T. 683; 52 J. P. 231; 36 W. R. 847.

2186. — Application by legatee of married woman—Legatee & testatrix cohabiting for many years.]—A married woman, who had lost sight of her husband for about twenty-seven years, bequeathed certain money in the Post Office Savings Bank to a man with whom she had lived in adultery during that time. The will did not appoint an exor., neither did it contain a residuary clause. The ct. refused to grant to the legatee administration with the will annexed limited to the amount of his legacy, without citing the next of kin.—*In the Goods of MILES* (1890), 59 L. J. P. 59; 62 L. T. 607.

2187. Next of kin of residuary legatee—Residuary legatee cited but not appearing—Doubt as to testator's sanity.]—Where a testator made a will appointing A. sole extrix. & residuary legatee, & next day killed his wife, & committed suicide when, as found by a coroner's jury, in a state of insanity, & the residuary legatee had been cited & had not appeared, the ct. refused to grant letters of administration with an earlier will annexed until the next of kin of the residuary legatee had been cited.—*THOMAS v. PAYNE* (1874), 23 W. R. 71.

2188. Husband of married woman entitled—Husband without interest—Wife living apart from husband—Application by wife to renounce in favour of next of kin.]—A married woman living apart from her husband was named universal legatee in a will, all the property being settled to her separate use. No exor. was appointed, & the legatee applied for leave to renounce her right to administration with the will annexed in favour of the next of kin of testator, without citing her husband to accept or refuse, & without his joining in the renunciation. The ct. refused to depart from the usual practice, & ordered her husband to be cited.—*In the Goods of WELLS* (1860), 24 J. P. 568.

2189. — — —.]—*In the Goods of PINE, No. 1915, ante.*

2190. The Crown—Executor a minor & illegitimate.]—Before administration with the will annexed will be granted to the guardian of an illegitimate minor exor., the Queen's proctor must consent or be cited.—*In the Goods of HAMILTON* (1851), 17 L. T. O. S. 172; 15 Jur. 566.

D. Other Cases.

2191. Will by married woman to exercise power—Subsequent will with general revocatory clause—Form of grant.]—A married woman having under a certain settlement & also under her mother's codicil made a will & under her mother's codicil specifically & under all & every other power, etc., generally made a second will with a general revocatory clause, the Ct. of Probate will grant administration with the latter will annexed but not pronounce against the former will; leaving it to the ct. of construction to decide whether the former will is thereby revoked.—*DRAPER v. HITCH* (1828), 1 Hag. Ecc. 674; 162 E. R. 715.

Annotation:—Refd. Thorne v. Rooke (1841), 2 Curt. 799.

2192. Grant by foreign court—Subject to further order—Whether English court put upon inquiry.]—

(1) Where administration with the will annexed has been granted abroad by a foreign ct. subject to such orders as may be made from time to time by that ct., the ct. here need not before granting such administration to an attorney of the foreign administrator inquire whether orders have been made by the foreign ct. modifying or cancelling the foreign grant.

(2) Where testator domiciled abroad has disposed by his will of all his property without qualification as to its situation & the exor. of the will has renounced probate abroad, the ct. here may grant letters of administration with the will annexed to an administrator appointed by the foreign ct. without requiring express renunciation by the exor. of probate in this country.—*In the Goods of SCARR* (1899), 80 L. T. 296.

SUB-SECT. 2.—ADMINISTRATION DE BONIS NON.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 166.

A. In General.

2193. Distinguished from cessate grant.]—*In the Goods of FOZARD*, No. 1237, *ante*.

2194. Necessity for grant—When chain of representation broken.]—The administratrix of an exor. cannot sue for the double value of lands held over after notice to quit under a demise from testator, contrary to 4 Geo. 2, c. 28, without taking out administration *de bonis non*; even though the tenant has attorned to her.—*TINGREY v. BROWN* (1798), 1 Bos. & P. 310; 126 E. R. 921.

—*See, generally*, Part I., Sect. 10, sub-sect. 1, *ante*.

2195. — Marriage of administratrix after grant—Assets not reduced into possession.]—A creditor's administration of the personal estate & effects of B. was granted to C., a *feme sole*. C. subsequently intermarried with D., & died six weeks afterwards, leaving part of the estate of B. unadministered, & the debt in respect of which she had obtained the grant still owing:—*Held*: D., the husband, had not reduced his wife's chose in action in the debt into possession by merely taking possession of that part of B.'s estate which he found in her hands, & the ct. would not make to him a grant *de bonis non* of the goods of B. until he had first taken out administration to his wife.—*In the Goods of RISDON* (1869), L. R. 1 P. & D. 637; 38 L. J. P. & M. 40; 20 L. T. 330; 33 J. P. 375; 17 W. R. 576.

See, generally, HUSBAND & WIFE.

2196. When granted—Executor dying before probate—After partial administration.]—*WANKFORD v. WANKFORD*, No. 909, *ante*.

—*After representation has ceased.]—See, generally*, Part I., Sect. 10, sub-sect. 1, *ante*.

2197. — Executor leaving executors.]—*In the Goods of FLEMING*, No. 2180, *ante*.

2198. — Where representative has disappeared.]—Where a testator died in 1827, & one of his two exors. in trust left England for America in 1832, & had not been heard of for eight years past, & the other died in 1839, leaving property unadministered, the ct., the residuary legatees renouncing, granted administration *de bonis non* to a creditor, after a decree against all persons.—*RICHARDS v. ALL PERSONS IN GENERAL*, *In the Goods of DOLBY* (1845), 4 Notes of Cases, Supp. VIII.

2199. — — Believed to be dead.]—Administration with the will annexed was in 1832 granted to K., as one of the residuary legatees, who left his home in 1834, & had never been heard of since. Administration *de bonis non* granted to another residuary legatee, on affidavit as to belief of the

death of K., with justifying security.—*In the Goods of KEMPE* (1853), 17 Jur. 240.

2200. — — —.]—The original administrator of a deceased intestate could not be found & was believed to be dead. Additional assets having been discovered due & payable to the estate of the intestate, the ct., by Court of Probate Act, 1857 (c. 77), s. 74, granted administration *de bonis non* to one of the next of kin, upon her affidavit that she believed the original administrator, her brother, to be dead or beyond the seas.—*In the Estate of SAKER*, [1909] P. 233; 78 L. J. P. 85; 101 L. T. 400; 53 Sol. Jo. 592.

Annotation:—Folld. In the Goods of French (1910), 79 L. J. P. 56.

2201. — — — Original grant revoked & fresh grant to creditor.]—The original administrator of a deceased intestate disappeared & could not be traced. Fresh assets having become payable to the legal personal representative of deceased, & the next of kin, other than the original administrator, declining either to renounce or to apply for a grant, the ct. revoked the original letters of administration which had been granted to deceased's brother, & made a fresh grant at the instance of a creditor.—*In the Estate of FRENCH*, [1910] P. 169; 79 L. J. P. 56; 26 T. L. R. 374; 54 Sol. Jo. 361.

2202. — Where representative abroad.]—*In the Goods of CAMPION*, No. 2230, *post*.

See, generally, Sub-sect. 4, *post*.

2203. — Not when person entitled lunatic.]—Where administration had been granted of intestate's effects to a creditor, for the use & benefit of the widow, a lunatic, on renunciation of the children; on the death of the creditor, leaving goods unadministered, the widow surviving & still lunatic, the ct. refused to grant administration *de bonis non* to a son of deceased, who had retracted his renunciation, but granted it to him for the use & benefit of the widow during her lunacy.

Justifying security in the second part is to be regulated by the amount of the estate left unadministered, & in addition the ordinary security is to be given to the amount of the estate.—*In the Goods of PENNY* (1846), 1 Rob. Eccl. 426; 4 Notes of Cases, 659; 163 E. R. 1090.

See, generally, Sub-sect. 5, *post*.

2204. Where inconsistent grants outstanding—Correction of one outstanding grant.]—A consistorial ct. issued a general grant of probate to C., the exor. of B., the exor. of A., & also a general grant of administration of the unadministered goods of A. to A.'s residuary legatee. The administrator died intestate, & without having fully administered. The general grant of probate to C. was amended by the insertion of an exception which included the executorship of A., & the ct. upon the production of the grant allowed administration *de bonis non* of A. to issue to the administrator of the administrator.—*SKEE v. M'COLL* (1861), 25 J. P. 104.

2205. Form of grant—Former representative a married woman.]—A., a married woman, the sole extrix. & universal legatee named in the will of B., took probate of the same & died, leaving part of his estate unadministered. C., the sole extrix. named in the will of A., took probate of the same limited to the property over which A. had a power of disposal, & also administration of the rest of her goods:—*Held*: C. should take a grant of administration with the will annexed of the

PART II. SECT. 12, SUB-SECT. 2.—A.

1. Necessity for grant.]—An administrator of an administratrix cannot represent the intestate, but an administrator *de bonis non* must be ap-

pointed to the original estate.—*INGALLS v. REID* (1866), 15 C. P. 490.—*CAN.*

de bonis non, it is sufficient if the affidavits show that the value of the property left unadministered does not exceed a certain sum; it is not necessary to state a sum which its value

Sect. 12.—Special and limited grants of administration: Sub-sect. 2, A. & B. (a), (b) & (c) i.]

unadministered estate of B., & not a supplemental grant of administration of the goods of A., limited to such personal estate as vested in A. as sole extrix. of the will of B.—*In the Goods of RICHARDS* (1866), L. R. 1 P. & D. 156; 35 L. J. P. & M. 44; 13 L. T. 757.

Annotation:—Reid. In the Goods of Bridger (1878), 4 P. D. 77.

2206. Effect of grant.—Where original deceased died testate.]—Where a man makes a will & an exor., & the exor. dies, an administrator *de bonis non* shall not make distribution, because the party did not die intestate, & so not within Statute of Distribution, 1671 (c. 10).—ANON. (1696), Freem. Ch. 212; 22 E. R. 1166.

2207. — Power to redeem estate mortgaged by previous representative.]—Semble: where the personal representative of intestate has mortgaged part of intestate's estate & died, an administrator *de bonis non* of intestate can maintain a suit for redemption of the mortgaged estate.—*SKEFFINGTON v. BUDD* (1842), 9 Cl. & Fin. 219; 6 Jur. 809; 8 E. R. 399, II. L.; *doubting but affg.* on other grounds, *S. C. sub nom. SKEFFINGTON v. WHITEHURST* (1837), 3 Y. & C. Ex. 1.

2208. — Liability of administrator.—For costs previously incurred.]—A solr. who was acted in the administration of an estate is entitled to retain the papers relating to the estate until he has been paid his costs incurred in such administration; & he cannot be compelled to deliver up the papers to an administrator *de bonis non* until he has been paid the costs incurred on behalf of preceding administrators. An administrator *de bonis non* takes the estate subject to the liability for costs previously incurred in the administration.—*Re WATSON* (1884), 53 L. J. Ch. 305; 50 L. T. 205; 32 W. R. 477.

B. To Whom granted.

(a) In General.

See, generally, Sect. 11, sub-sect. 4, ante.

2209. Where interests of two equal.—Whether grant to both necessary.]—TAYLOR v. SHORE (LADY) (1681), T. Jo. 161; 84 E. R. 1197.

2210. Where interests unequal.—Whether party with greater interest absolutely entitled.]—The ct. is not obliged to grant an administration *de bonis non* to the person having the largest interest in the personal property of the intestate.—*CARDALE v. HARVEY* (1752), 1 Lee. 177; 161 E. R. 66.

2211. Party with whole interest preferred.—Donee from original administratrix.—Preferred to next of kin becoming so after death of original deceased.]—ALMES v. ALMES, No. 1425, *ante*.

2212. Where interests uncertain.—Construction of will.]—A substituted legatee for life is entitled to letters of administration *de bonis non* with the will annexed, in preference to a substituted legatee; but where there is a doubt whether, under the terms of the will, the person claiming as legatee

for life is entitled as such, the grant will be made to the legatee whose interest is admitted.—*BROWN v. NICHOLLS* (1851), 2 Rob. Eccl. 399; 18 L. T. O. S. 67; 15 Jur. 934; 163 E. R. 1359.

2213. Direct preferred to derivative interest.—Whether rule absolute.]—On sufficient grounds shown, the ct. will depart from the general practice of the registry, by which a party originally entitled in distribution is preferred in making a grant *de bonis non* to a party having a derivative interest, e.g. the personal representative of the next of kin, & will make the grant to the latter.

Where the only assets were the probable fruits of a suit, the ct. granted administration *de bonis non* to the extrix. of the administrator in preference to intestate's niece, who was entitled in distribution, but lived with debt. in the suit.—*In the Goods of CARR* (1867), L. R. 1 P. & D. 201; 16 L. T. 181; 31 J. P. 297; 15 W. R. 718.

2214. — Next of kin of testator.—Preferred to widower of executrix.]—If the wife was an extrix. to another, then as to the goods which she had in that capacity, administration must be granted to the next of kin to the testator.—ANON. (1628), 3 Salk. 21; 91 E. R. 667.

2215. — Next of kin of married woman.—Preferred to representative of widower.]—KINASTON v. MILLS, No. 1493, *ante*.

2216. — Next of kin of testator.—Preferred to executors of administratrix.]—A devise or bequest over, in terms made dependent upon the marriage of the donee of the preceding estate, is to be extended, by implication, so as to take effect on the determination of that estate by the death of such donee.

Testator by his will gave all his property to his wife "during her widowhood," & after her death directed that the property should belong & be made over to the child or children "issue of our marriage"; should, however, the widow remarry, "then the whole of my property shall at once be made over legally to the offspring of our marriage, & if they are minors the whole to be under trusteeship"; also, should the issue of the marriage "die out," then on the remarriage of the widow testator directed that the property should be made over to "the legal next of kin & heirs descendants of my family." No appointment of exor. or trustee was made in the will. The widow, who did not marry again, took out letters of administration in 1883 with the will annexed, & having intermeddled in the estate, died in Nov. 1915, leaving a will & appointing extrices., who duly proved the same, & in Mar. 1916, as such legal personal representatives, obtained a grant of letters of administration to the estate of testator's only child, who died in 1887, aged eleven years. Upon a suit in the Probate Div. for letters of administration *de bonis non* with the will of testator annexed:—*Held:* the child of testator did not take a vested interest, but only an interest contingent upon his surviving the remarriage or death of his

at intestate's death did not exceed.—*Re HEALEY'S ESTATE* (1887), 13 V. L. R. 156.—AUS.

PART II. SECT. 12, SUB-SECT. 2.—B. (a).

h. General rule.—Where next of kin dead.]—Held: the next of kin of deceased, at the time of his death being dead, the established principle was to grant administration to the person having the largest interest.—*Re CUNNINGHAM'S ESTATE* (1898), 31 N. S. R. (19 IL & G.) 264.—CAN.

k. Whether to son who has released

his claim on estate.]—Administration de bonis non refused to eldest son who had released his claim on estate.—Re HEALEY'S ESTATE (1887), 13 V. L. R. 156.—AUS.

l. Party claiming derivatively.]—A person entitled derivatively to the estate but no relative of an intestate, not entitled to administration *de bonis non*, unless he has taken out administration of the estate of the person through whom he claims.—Re WORKMAN (1893), 19 V. L. R. 69.—AUS.

m. Matter for discretion of court.]—The ct. has a discretion as to whether it will grant administration *de bonis non* to the next of kin of deceased or the representatives of the administrator.—Re HOAREY, [1906] V. L. R. 437.—AUS.

n. —.]—The granting of administration *de bonis non* to the widow of deceased was appealed from by his daughter, on the ground that administratrix had been guilty of waste.—Held: as there was nothing to indicate such dishonesty on the part of the widow as should preclude her from all

mother, testator's widow, & the grant now sought should go to pltf., a daughter of testator's deceased brother & one of testator's next of kin, as against defts. who claimed the grant as the extrices. of the widow.—*In the Estate of GRIFFITHS, MORGAN v. STEPHENS*, [1917] P. 59; 86 L. J. P. 42; 116 L. T. 382.

2217. Estate not vested in former representative—Grant to next of kin of original deceased.]—

AMHURST v. AMHURST & BAWDES, No. 1494, *ante*.

2218. Person with prior claim passed over—Living with defendant to suit to recover assets.]—*In the Goods of CARR*, No. 2213, *ante*.

2219. — Abroad & difficult to find.]—A. died, having appointed B. exor. of his will. B. proved the will, & died leaving part of the estate unadministered. The ct. made a grant *de bonis non* with the will annexed to the administrator of B., the parties entitled in priority being abroad & difficult to be found; but required that security should be given to the amount of their share of the property.—*In the Goods of HICKS* (1870), 39 L. J. P. & M. 27; 22 L. T. 553; 34 J. P. 407; 18 W. R. 47.

(b) *Persons Claiming through Former Representative.*

2220. Where goods unadministered trust property.]—Testator appointed his wife his exor. & residuary legatee. She administered the whole of her husband's beneficial estate under a prerogative probate, & died leaving a will without appointing an exor. or residuary legatee. Her three sons took administration with her will annexed in an archdeaconry ct., & subsequently applied to the Prerogative Ct. for a *de bonis non* grant in respect of a sum in the Bank of England, of which their father was a nude trustee, still standing in his name. The judge of the Prerogative Ct. after considerable hesitation granted the motion.

I cannot understand on what principle the representatives of the wife whose will has been proved at T., can come to this ct. & make the prayer they do. I see no objection to their taking a grant limited to the sum in the bank; but I cannot understand on what principle they are to have a *de bonis non* grant, unless they admit *bona notabilia*; in which case they ought to have clothed themselves with a chain of representation in this ct. I do not see the principle of such practice; however, I will not disturb it (*SHE H. JENNER FUST*).—*In the Goods of WELLS* (1851), 2 Rob. Eccl. 356; 16 L. T. O. S. 468; 17 L. T. O. S. 20; 15 Jur. 362; 163 E. R. 1344.

2221. —.]—A. died leaving B. his sole extrix. & universal legatee. B. died intestate, & administration of her effects was granted to her three children. A representative to A. being necessary in order that certain property held by him as a trustee might be transferred, administration with the will annexed of unadministered effects was granted to one of the two surviving administrators of B., the other having been cited but not appearing.—*In the Goods of HANCOCK, HANCOCK v. LIGHTFOOT* (1864), 3 Sw. & Tr. 557; 33 L. J. P. M. & A. 174; 28 J. P. 681; 10 Jur. N. S. 758; 164 E. R. 1391.

right to the administration, the ct. could not control the discretion conferred on the judge.—*Re Koor's Estate* (1877), R. E. D. 162.—*CAN.*

PART II. SECT. 12, SUB-SECT. 2.—
B. (b).

a. *Whether to executor of executor J.*—VOL. XXIII.

(c) *Persons Claiming Independently of Former Grant.*

i. *Residuary Legatees and Persons Claiming under Them.*

2222. Legatee for life—Preferred to substituted legatee.]—*BROWN v. NICHOLLS*, No. 2212, *ante*.

2223. Residuary gift subject to a valid gift over—Gift over taking effect.]—A bequest in the words following: " & at the death of my sister M., I give & bequeath all the property I die possessed of in remainder to my niece B., subject to the annuity of £150 as before named to my sister P., but if my niece B. should be married at the time of my sister M.'s death " (which event occurred), " I, in that event, bequeath my property at the decease of my sister M. to my sister P. for her life," etc.:—*Held*: the bequest to the niece B. was not in general restraint of marriage but until marriage, & consequently B. was not entitled to a *de bonis non* grant as a residuary legatee of property left unadministered.—*GODFREY v. HUGHES* (1847), 1 Rob. Eccl. 593; 5 Notes of Cases, 499; 163 E. R. 1147.

2224. Residuary legatee in trust formerly appointed executor—Appointment revoked.]—The appointment of an exor. & residuary legatee in trust had been revoked; the other exors. were dead, & administration with the will annexed was required:—*Held*: the elected guardian of minor legatees was entitled to the grant.—*In the Goods of POYER* (1850), Dea. & Sw. 184; 27 L. T. O. S. 307; 2 Jur. N. S. 1052; 5 W. R. 9; 164 E. R. 543.

2225. Representative of residuary legatee—Preferred to legatee.]—The representative of a residuary legatee entitled, on the renunciation of a surviving exor., to a grant *de bonis non*, in preference to legatees.—*In the Goods of THIRLWALL* (1848), 6 Notes of Cases, 44.

2226. — Though limited.]—A married woman, a residuary legatee under the will of deceased, by virtue of powers enabling her to do so, executed a will by which she distributed the property of which she had a right to dispose, her residuary interest being part of such property. The chain of exors. being broken, a grant of administration, with the will annexed, of the unadministered estate of deceased, was made to the limited representative of the residuary legatee.—*In the Goods of DITCHFIELD* (1870), L. R. 2 P. & D. 152; 23 L. T. 325; 34 J. P. 664; 18 W. R. 1144.

2227. Person entitled to represent residuary legatee—Committee & next of kin.]—The chain of representation having been twice broken by the death of administrators with the will annexed, & the estate being still unadministered, administration with the will annexed of the unadministered goods was granted to the committee & next of kin of the residuary legatee named in the will, who had died a lunatic without having had a lucid interval.—*In the Goods of WOOD* (1850), 7 Notes of Cases, 442; 15 L. T. O. S. 188; 14 Jur. 558.

2228. Guardian of infant residuary legatees.]—*In the Goods of POYER*, No. 2224, *ante*.

2229. Assignee—In bankruptcy.]—*DOWNWARD v. DICKINSON, In the Goods of CHUNE*, No. 1889, *ante*.

2230. Nominee of assignee.]—A testator died in 1890, leaving a will & codicil appointing exors.,

according to the tenor.]—Exor. of an exor. according to the tenor, the representative of the original testator, refused administration *de bonis non*.—*In the Goods of GRIFFIN* (1868), 18 L. T. 420.—*IR.*

p. *Grant during incapacity of surviving executor—(Grantee preferred to*

*executor of co-executor.]—*A grant for the use & benefit of an exor. during his incapacity is equivalent to a grant of probate to him, & should such exor. survive his co-exor., the exor. of the latter will not represent the original testator.—*In the Goods of FREMLEY*, [1915] 2 L. R. 1.—*IR.*

Sect. 12.—Special and limited grants of administration: *Sub-sect. 2, B. (c) i. & ii., C., D. & E.; sub-sect. 3, A. & B.]*

who duly proved. One of the exors. died shortly afterwards, & in 1891 the other went abroad & had intimated that he had no present intention of returning to England, or of acting further as exor. The ct., without requiring citation or any formal notice to be served upon the exor., granted administration *de bonis non*, with the will & codicil annexed, in favour of the nominee of the assignees of the residuary legatee.—*In the Goods of CAMPION*, [1900] P. 13; 69 L. J. P. 19; 81 L. T. 790; 48 W. R. 288.

2231. Representative of assignee.]—Where the chain of representation was broken, administration *de bonis non* of the original deceased's effects granted to the administrator of a party entitled to such effects by deed of settlement, derived from a legatee in reversion, no next of kin appearing. Such a grant not absolutely decreed, but open to reconsideration.—*In the Goods of EDHOUSE* (1843), 2 Notes of Cases, 126.

ii. Other Persons.

2232. Representative of next of kin.]—*In the Goods of MIDDLETON*, No. 2249, *post*.

2233. Creditor—Residuary legatees renouncing.]—*RICHARDS v. ALL PERSONS IN GENERAL*, *In the Goods of DOLBY*, No. 2198, *ante*.

2234. — Equitable creditor.]—*In the Goods of PERCY, FAIRLAND v. PERCY*, No. 2163, *ante*.

2235. — Legatee of debtor to original estate—Discretionary grant under Court of Probate Act, 1857 (c. 77), s. 73—Person entitled renouncing.]—*In the Goods of WENSLEY*, No. 1881, *ante*.

2236. Nominee to Duchy of Lancaster.]—An intestate having died without known relations, his estate was administered by his widow, who, before having completed the administration, died leaving a will. The ct. made a grant *de bonis non* to the residuary legatee of the widow, the nominee of the Duchy of Lancaster.—*In the Goods of AVARD* (1886), 11 P. D. 75; 56 L. T. 673.

2237. Attorney of sole surviving next of kin—Resident out of jurisdiction.]—Where administration had been granted to the attorney of one of two next of kin, both of whom resided out of the jurisdiction, & the administrator died leaving the estate partly unadministered, the ct., upon proof of notice to the next of kin for whose benefit the administration had been granted, granted administration *de bonis non* to the attorney of the other next of kin.—*In the Goods of BARTON*, [1898] P. 11; 67 L. J. P. 10; 78 L. T. 81.

2238. Patrons of living benefiting under will—Preferred to incumbent for time being.]—*MAIDMAN v. ALL PERSONS IN GENERAL* (1809), 1 Phillim. 51; 161 E. R. 911.

C. Whether Grant General or Limited.

2239. General rule.]—An application for a grant of administration *de bonis non* with the will annexed to a substituted universal legatee, limited to £750 stock, in which she was solely interested, on an affidavit that the parties entitled to a general

grant were more than nine in number, that their residences were widely apart, & that their service with a citation would be attended with great difficulty & expense, refused:—*Held*: the ct. will not give a limited grant, except upon strong reason shown.—*In the Goods of WATTS* (1860), 1 Sw. & Tr. 538; 29 L. J. P. M. & A. 108; 24 J. P. 519; 8 W. R. 340; 164 E. R. 850.

Annotation:—*Apld. In the Goods of Somerset* (1867), L. R. 1 P. & D. 350.

2240. When grant limited—Specific legacy only unadministered—No claim by residuary legatee in lifetime.]—Administration *de bonis non*, limited to a certain legacy, granted to the representative of the substituted legatee, without citing the representative of the residuary legatee, resident abroad, but by practice entitled to the general *de bonis non* grant; no claim to this legacy having, since the death in 1797 of the residuary legatee, also exor. & legatee for life, been made by his representative.—*In the Goods of STEADMAN* (1828), 2 Hag. Ecc. 59; 162 E. R. 784.

Annotation:—*Apld. In the Goods of Prothero* (1874), 31 L. T. 551.

2241. — — —.]—The estate of a testatrix having been administered, except as to one legacy, the ct. granted administration with will annexed *de bonis non* to the legatee, without requiring the representative of the exor. or residuary legatees to be cited, but ordered that the sureties should justify.—*In the Goods of KING* (1883), 8 P. D. 162; 52 L. J. P. 93; 31 W. R. 843.

2242. — Where goods unadministered debt due to bankrupt creditor administrator—Assigned by trustee.]—A creditor having obtained administration of the estate of an intestate, died without having fully administered, & leaving the debt due to him still unsatisfied. The creditor was a bkpt. at the time of his death, & after his death his trustee in bkpy. assigned the unsatisfied debt due to his estate from the intestate's estate to one of his creditors. The ct. made a grant of administration *de bonis non* to such assignee, limited to the interest in the intestate's estate which had been assigned to him.—*In the Goods of BURDETT* (1876), 1 P. D. 427; 45 L. J. P. 71; 34 L. T. 855; 40 J. P. 519.

2243. — — —.]—*In the Goods of HAMMOND*, No. 2321, *post*.

2244. — By consent.]—*In the Goods of JACKSON*, No. 1870, *ante*.

2245. — Deceased a trustee—Beneficial owner a bankrupt—Grant to trustee in bankruptcy.]—A. being the owner of certain shares in two foreign railway cos. handed the certificates to C., who received the dividends as beneficial owner until he became bkpt., after which the trustee in C.'s bkpy. received such dividends as became payable. A. died, never having divested himself of the legal estate in the shares; & administration to his estate was granted to B., who died leaving part of the estate unadministered. Upon the application of the trustee in C.'s bkpy., the ct. granted administration to him, in respect of the unadministered estate of A., limited to the shares in the two foreign railway cos.—*In the Goods of AGNESE*, [1900] P. 60; 69 L. J. P. 27; 82 L. T. 204.

PART II. SECT. 12, SUB-SECT. 2.—C.

a. When grant limited—Goods of surviving trustee—Grant limited to appointment of new trustee & vesting of trust property.]—The ct. granted letters of administration *de bonis non* to the goods of the surviving trustee of a deed, by which a rentcharge on real estate was put in settlement. The grant was limited to the appointment

of a new trustee of the settlement, & to vesting the rentcharge in the new trustee.—*In the Goods of BERRY*, [1907] 3 I. R. 209.—*IR*.

P. — Co-executor unable to act—Alien enemy.]—Testator, formerly resident in New Zealand, made his will & died in Berlin, leaving two-thirds of his estate to his widow, a German subject in Berlin, & one-third

to his sister, a British subject resident in New Zealand. He appointed his widow & E. J. D., a resident in New Zealand, exors. Limited administration was granted to E. J. D., who died intestate. Testator's sister applied for limited administration *de bonis non*:—*Held*: she was entitled to it, but leave was reserved to recall administration.—*RE HOLDER* (1915), 34 N. Z. L. R. 602.—*N.Z.*

D. When Representative Out of Jurisdiction.
See Sub-sect. 4, post.

E. Who must be Cited.

2246. Persons abroad—Representative of residuary legatee—Grant limited to one legacy.]—*In the Goods of STEADMAN*, No. 2240, ante.

2247. — Though with prior claim—Applicant having larger interest.]—*In the Goods of HICKS*, No. 2219, ante.

2248. — Executor not formally renouncing—No intention to return.]—*In the Goods of CAMPION*, No. 2230, ante.

2249. Persons having direct interest—Grant to representatives of next of kin having larger interest.]—Administration *de bonis non* with a will annexed granted to a representative entitled to seventieths of the residuary estate without citing those having a direct interest as entitled in distribution.—*In the Goods of MIDDLETON* (1828), 2 Hag. Ecc. 60; 162 E. R. 784.

*Annotation:—*Consd. *In the Goods of Kinohella*, [1894] P. 264.

2250. Representatives of executors—One legacy only unadministered.]—*In the Goods of KING*, No. 2241, ante.

2251. Residuary legatees—One legacy only unadministered.]—*In the Goods of KING*, No. 2241, ante.

SUB-SECT. 3.—ADMINISTRATION DURANTE MINORE ETATE.

A. When granted.

See, generally, Administration of Estates Act, 1798 (c. 87), ss. 6, 7; Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 165.

2252. One executor of age to act, one under age.]—*SMITH v. SMITH* (1609), Yelv. 130; 1 Brownl. 101; 80 E. R. 88.

*Annotations:—*Reid. *Foxwith v. Tremain* (1670), 1 Mod. Rep. 296; *Wilkins v. Brown* (1745), 2 Stra. 1220.

2253. —.]—If one make two exors., one of seventeen years of age, & the other under, administration during the minority is void, because he of seventeen years old may execute the will, if administration, during the minority, in such case be granted, & the administrator brings his action, the exor. may well release the debt.—*PIGOT v. GASCOIN* (1616), 1 Brownl. 46; 123 E. R. 655.

2254. —.]—Where one of the exors. is an infant & cannot prove the will, administration *durante sua minoritate* may be granted to the other, who must sue solely, & it is not inconsistent to have administration in such case, for it is not granted in this case as it is upon a dying intestate; for here the will is proved, but only to enable him to sue solely, because the other is not capable of proving the will, not to join with him, & he cannot sue solely. But where both exors. are of full age, though the will be proved by one only, the action must be brought in both their names (*per CUR.*).—*COLBORNE v. WRIGHT* (1678), 2 Lev. 239; 83 E. R. 537.

*Annotation:—*Mentl. *Rivis v. Watson* (1839), 5 M. & W. 255.

2255. —.]—Where there are several exors., & one or more under age, & the rest of full age, all must join in an action; & administration *durante minore etate* cannot be granted, if any of them be of full age (*TWISDIN, J.*).—*FOXWIST v. TREMAIN* (1670), 1 Mod. Rep. 47; 1 Lev. 299; 1 Vent. 102; 2 Saund. 212; 1 Sid. 449; T. Raym. 198; 2 Keb. 698; 86 E. R. 721; subsequent proceedings, 1 Mod. Rep. 72, 296.

*Annotations:—*Consd. *Freecobaldi v. Kinaston* (1727), 1 Barn. K. B. 33. *Reid. Coan v. Bowles* (1690), Carth. 152; *Wilkins v. Brown* (1745), 2 Stra. 1220. *Mentl. R. v. Mitchel* (1848), 6 State Tr. N. S. 545.

2256. One of next of kin of age, three not of age—Grant to guardian of infants.]—An intestate died, leaving four grandchildren, of whom one only was of age; administration was granted to the mother & guardian of the other three *durante minore etate* in preference to the one of age.—*CARTRIGHT'S CASE* (1678), 1 Freem. K. B. 258; 89 E. R. 185.

B. To Whom granted.

2257. In discretion of court.]—Mandamus lies not for an administrator *durante minore etate*.

There is no law which says to whom these administrations during minority shall be granted (*per CUR.*).—*R. v. BETTESWORTH, SMITH'S CASE* (1731), 2 Stra. 892; 1 Barn. K. B. 370, 425; Fitz.-G. 163; 93 E. R. 921.

*Annotation:—*Reid. *R. v. Bettesworth* (1733), 2 Stra. 956.

2258. — Not within 21 Hen. 8, c. 5, s. 3.]—An administration *durante minore etate*, granted to the great-grandmother of the intestate, ought not to be repealed on the application of the grandfather, merely because he is nearer of kin; for this kind of administration is not within the above statute.—*GRANDISON (LORD) v. DOVER (COUNTESS)* (1682), 3 Mod. Rep. 23; Skin. 155; 87 E. R. 14.

2259. — Exercise of discretion—Poverty of person entitled.]—*HAWKSWORTH & SIMPSON v. WARNER* (1731), cited 3 Phillim. 380; 161 E. R. 1359.

*Annotation:—*Consd. *West & Smith v. Willby* (1820), 3 Phillim. 374.

2260. — — Age of person entitled.]—Administration *durante minoritate* of children in the East Indies decreed to the uncle resident in Ireland, he giving full justifying security: the grandfather to whom as next of kin the grant would naturally pass being upwards of 80 & also resident in Ireland.—*In the Goods of EWING* (1828), 1 Hag. Ecc. 381; 162 E. R. 619.

*Annotations:—*Consd. *In the Goods of Stephenson* (1866), L. R. 1 P. & D. 287. *Reid. In the Goods of Hagger* (1863), 3 Sw. & Tr. 65; *Allen v. Humphreys* (1882), 52 L. J. P. 24.

2261. — — Suspicion of adultery of mother of infants.]—J. died leaving a widow, from whom he had separated on suspicion of her adultery, & two infant children, whom, during his life, he had left under her charge. The grandfather, on behalf of the infants, opposed the widow, & prayed the ct. to grant the administration to him until one of the children should come of age. Under the circumstances the ct. decreed it to the widow, but gave the grandfather's costs out of the estate.—*BROWN v. BROWN* (1854), 1 Ecc. & Ad. 423; 18 Jur. 1121; 164 E. R. 243.

See, now, Administration of Estates Act, 1798 (c. 87), s. 6; Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 165.

2262. Testamentary guardian appointed by the father—Though renouncing office of executor & residuary legatee in trust.]—(1) A. & B. being appointed exors. & residuary legatees in trust, & also guardians of the children of testator on the death or second marriage of his widow, renounced their right to a grant as exors. & residuary legatees in trust, but not as testamentary guardians of the children, who were beneficial residuary legatees substituted, & a grant of administration with will annexed was made to the widow, as beneficial residuary legatee for life. The widow died, leaving part of the estate unadministered, & five children by testator, all minors. The ct. made a grant of administration with will annexed to A. & B. as testamentary guardians of the children, the beneficial residuary legatees of testator.

Sect. 12.—Special and limited grants of administration: Sub-sect. 3, B., C. & D. (a) & (b) i. & ii.]

(2) Rule 50 of the Rules for the Principal Registry in Non-Contentious Business, which directs that no person who renounces probate or letters of administration in one character, is to be allowed to take representation to deceased in another character, is for the guidance of the registry, but capable of modification by the ct.

(3) The ct. declined to depart from the practice of limiting the grant to the guardians until one of the minors should attain his majority, by the addition, "until he should apply for & obtain the grant."—*In the Goods of LOFTUS* (1864), 3 Sw. & Tr. 307; 33 L. J. P. M. & A. 59; 10 L. T. 240; 28 J. P. 264; 10 Jur. N. S. 324; 164 E. R. 1293.

See, now, Guardianship of Infants Act, 1886 (c. 27), ss. 2, 3, & generally, INFANTS; & see, also, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 105 (1); Non-Contentious Probate Rules, 1925, r. 50.

2263. Trustee appointed by will.—An administration *cum testamento annexo* decreed to a grandmother during the minority of an exor., she being also testamentary trustee.—*APPLEBY v. APPLEBY* (1752), 1 Lee, 135; 161 E. R. 50.

2264. —Administration *cum testamento annexo* decreed to testamentary trustees for the use of the infant exor., & the next of kin, till he should arrive at legal age to take probate.—*HUGHES v. RICHARDS* (1758), 2 Lee, 543; 161 E. R. 434.

Annotation:—Reid. In the Goods of Morris (1862), 31 L. J. P. M. & A. 80.

2265. —*In the Goods of STEWART*, No. 1914, *ante*.

2266. —Notwithstanding opposition of father.]—*LOVELL & BRADY v. COX* (undated), cited 3 Phillim. 379; 161 E. R. 1359.

2267. Guardian chosen by minor.—Administration decreed to a guardian elected by the free consent of a minor.—*RICH v. CHAMBERLAYNE* (1752), 1 Lee, 134; 161 E. R. 50.

2268. —With approval of court.]—*FAWKENER v. JORDAN*, No. 1765, *ante*.

2269. —Though not next of kin—Prior claimants abroad or renouncing.]—*In the Goods of WIDGER* (1842), 3 Curt. 54; 1 Notes of Cases, 300; 163 E. R. 653.

Annotations:—Reid. In the Goods of Hagger (1863), 3 Sw. & Tr. 65; *In the Goods of Burchmore* (1873), 37 J. P. 792.

2270. —Stranger—Next of kin consenting or not appearing when cited.]—Administration granted to a stranger, as guardian, on the consent of some, & non-appearance, after citation, of the remaining next of kin, the grant being to the advantage of the minors.—*In the Goods of CHAPMAN* (1846), 10 Jur. 362.

2271. —Next of kin renouncing or unfit to act.]—*In the Goods of WEBB*, No. 2185, *ante*.

Guardian assigned for infants by court.—*See Probate Rules* (non-contentious), rr. 34, 35.

2272. Guardian appointed by competent foreign court.—Administration for the use & benefit of minor children of a Frenchman, deceased, granted to their guardian, appointed by the French authorities.—*In the Goods of SARTORIS* (1838), 1 Curt. 910; 163 E. R. 315.

PART II. SECT. 12, SUB-SECT. 3.—B.

2268 i. Guardian chosen by minor—With approval of court.—Where a minor has been appointed sole exor. under a will, he may, if he has no legal guardian, nominate a guardian, whom the ct. has power to appoint administrator with the will annexed *durante*

minore ætate; but the ct. will control the choice of the minor.—*Re MATHERSON* (1906), 37 N. Z. L. R. 99.—N.Z.

PART II. SECT. 12, SUB-SECT. 3.—C.

2278 i. Powers of administrator—Power of sale—In case of necessity.—An administrator *durante minore ætate*

2273. When guardian passed over—Estate insolvent—Grant to creditors.—*HAWKSWORTH & SIMPSON v. WARNER* (1731), cited 3 Phillim. 380; 161 E. R. 1359.

Annotation:—Consd. West & Smith v. Wilby (1820), 3 Phillim. 374.

2274. —Guardian very poor.]—An administration *durante minore ætate* ought not to be committed to one that is very poor, though she is guardian, & next of kin to the infant.—*HAVERS v. HAVERS* (1740), Barn. Ch. 22; 27 E. R. 538.

2275. Creditors—Estate insolvent.—*HAWKSWORTH & SIMPSON v. WARNER* (1731), cited 3 Phillim. 380; 161 E. R. 1359.

Annotation:—Consd. West & Smith v. Wilby (1820), 3 Phillim. 374.

C. Effect of Grant.

2276. Powers of administrator—Administrator for executor of executor—Represents first testator.]

—The administrator, *durante minoritate* of the exor. of an exor., is the representative of first testator.—*ANON.* (1675), Freem. K. B. 288; 89 E. R. 208.

2277. —All powers of ordinary administrator.]

—An administrator *durante minore ætate* has, for the time, all the powers of an ordinary administrator, including a power to sell the estate of deceased for payment of debts.—*Re COPE, COPE v. COPE* (1880), 16 Ch. D. 49; 50 L. J. Ch. 13; 43 L. T. 566; 29 W. R. 98.

Annotation:—Reid. Hewson v. Shelley, [1914] 2 Ch. 13.

See, now, Administration of Estates Act, 1925 (c. 23), s. 21.

2278. —Power of sale—In case of necessity.]

—An administrator *durante minore ætate* cannot sell goods unless of necessity, for payment of debts, or *bona peritura*, nor can he assent to a legacy unless there be assets to pay debts. Such administration ceases on the infant's attaining the age of seventeen.—*PRICE v. SIMPSON, PRINCE'S CASE* (1599), 5 Co. Rep. 29 b; Cro. Eliz. 718; And. 132; 77 E. R. 96.

Annotations:—Reid. Finch's Case (1607), 6 Co. Rep. 63 a; Needham's Case (1610), 8 Co. Rep. 135 a; Roskelley v. Godolphin (1682), T. Raym. 483; Hewson v. Shelley, [1914] 2 Ch. 13. *Mentd.* Bingham v. Smeatkwick (1595), Cro. Eliz. 455; Grange v. Denny (1616), 3 Bulst. 174; Okell v. Sudlow (1697), 5 Mod. Rep. 423; Lysons v. Barrow (1836), 2 Bing. N. C. 486.

2279. —Power created by will.]—A power of sale given by a testator to his exors. or administrators may be exercised by an administrator *durante minore ætate*.—*MONSELL v. ARMSTRONG* (1872), L. R. 14 Eq. 423; 41 L. J. Ch. 715; 27 L. T. 407; 20 W. R. 921.

2280. —For payment of debts.]—*Re COPE, COPE v. COPE*, No. 2277, *ante*.

2281. —*—*]—*HEWSON v. SHELLEY*, No. 2878, *post*.

2282. —Power to lease.]—*FINCH'S (SIR MOYLE) CASE* (1606), 6 Co. Rep. 63 a; 77 E. R. 348.

Annotations:—Reid. Hewson v. Shelley, [1914] 2 Ch. 13. *Mentd.* Lynne Regis Corp'n. Case (1612), 10 Co. Rep. 120 a; Courtney v. Glanvil (1614), Cro. Jac. 343; Stukeley v. Butler (1614), Hob. 168; Duncombe v. Wingfield (1617), Hob. 254; Trenchard v. Hoskins (1628), Litt. 203; Thin v. Thin (1664), 1 Sid. 190; Dixon v. Harrison (1670), Vaugh. 36; Witherhead v. Harrison (1670), T. Jo. 2; Rice v. Langford (1690), Carth. 140; It. v. Chester (Sp.) (1697), 1 Ld. Raym. 292; Winter v. Lovedur (1697), 12 Mod. Rep. 147; Ford v. Grey (1703), 6 Mod. Rep. 44; Lloyd v. Say & Seal (1711), 1 Salk. 341; Burgess v. Wheate (1759), 1 Wm. Bl. 123; Birch v. Wright (1786), 1 Term Rep. 378; Delacherols v. Delacherols (1864), 11 H. L. Cas. 62.

has, for the time, all the powers of an ordinary administrator, including a power to sell the estate, if it is necessary in due course of administration, although not necessary for payment of debts.—*Re THOMPSON & M'WILLIAMS' CONTRACT*, [1896] 1 L. R. 356.—IR.

2283. — To retain assets to value of debts for which security given.]—**BRIERS v. GODDARD** (1617), Hob. 250; 80 E. R. 396.

2284. — Power to defend alone.]—**SMITH v. SMITH** (1608), Yelv. 130; 1 Brownl. 101; 80 E. R. 88.

Annotations.—**Reid**, Foxwist v. Tremaine (1670), 2 Saund. 212; Wilkins v. Brown (1745), 2 Stra. 1220.

2285. — Power to sue.]—An administrator *durante minore aetate* cannot sue, nor can he be called to account but by the exor., & he is not answerable to any other person for whatever he may do during his administration.—**FOTHERBY v. PATE** (1747), 3 Atk. 603; 26 E. R. 1148, L. C. *Annotation* :—**Reid**, Holland v. Prior (1834), 1 My. & K. 237.

2286. — Without joining executor.]—**COLBORNE v. WRIGHT**, No. 2254, *ante*.

—*Sec. generally*, Part V., *post*.

2287. Liability of administrator.—To actions in respect of estate.]—**BROOKING v. JENNINGS**, No. 1217, *ante*.

2288. — On devastavit.]—**BROOKING v. JENNINGS**, No. 1217, *ante*.

2289. — To account.—To executor only.]—**FOTHERBY v. PATE**, No. 2285, *ante*.

2290. — Where minor renounces in favour of creditor.]—Where an administration has been granted to a guardian *pendente minore aetate* of a widow, & the widow on coming of age renounces in favour of a creditor, the creditor has a right to call on the original administrator for an inventory & account.—**TAYLOR v. NEWTON** (1752), 1 Lec. 15; 161 E. R. 7.

2291. — Whether leave to file claim necessary.]—**DAVIS v. DAVIS** (1850), 14 Jur. 848.

Sec. now, Administration of Estates Act, 1925 (c. 23), s. 21.

2292. Liability of executor to account.—Death of administrator.]—**MUNN v. EAST INDIA CO.** (1677), *Cas. temp.* Finch, 298; 23 E. R. 163.

2293. — Action against former minor—Joinder of executor.]—A. was made an extrix; she being an infant, administration *durante minore aetate* was committed to B. A. afterwards came of age. B. died, & C. became his representative; on a bill brought against A. for an account of the personal estate of her testator, C. must be made a deft. In bills of this sort all persons who have possessed themselves of testator's estate ought to be made defts.—**GLASS v. OXENHAM** (1740), Barn. Ch. 332; 2 Atk. 121; 27 E. R. 667, L. C. *Annotation* :—**Reid**, Holland v. Prior (1831), 1 My. & K. 237.

2294. Effect of successive grants.—Account decreed against first administrator.]—Administrator *durante minoritate* obtains a decree to account; the infant marries & a new administrator during her minority is granted to the husband. *Qu.*: whether this second administrator can carry on the account.—**COKE v. HODGES** (1681), 1 Vern. 25; 23 E. R. 280.

D. Duration of Grant.

(a) In General.

2295. Whether granted until infant takes grant.]—*In the Goods of* **LOFTUS**, No. 2262, *ante*.

(b) Termination.

i. By Infant Attaining Full Age.

2296. General rule.]—**FORD v. GLANVILLE** (1601), Gouldsb. 136; 75 E. R. 1048.

2297. —.]—By the infant's coming of age, administration *durante minori aetate* ceases, & suit by such administration is thereby determined, so that the infant cannot go on therewith, but must begin anew, unless a decree to account were had;

in which case the infant, on a bill brought for that purpose, may be allowed to go on therewith.—**JONES v. BASSET** (1701), Prec. Ch. 174; 2 Eq. Cas. Abr. 426; 24 E. R. 85.

2298. Grant during minority of executor.]—**PRICE v. SIMPSON, PRINCE'S CASE**, No. 2278, *ante*.

2299. —.]—In *assumpsit* against an administrator *durante minore aetate*, deft. may plead that the exor. was above the age of seventeen at the time of the promise. *Qu.*: whether an administration *durante minore aetate* instantly determines upon the minor's attaining seventeen years of age.—**DAVENPORT v. PENSELL** (1638), Cro. Car. 516; 79 E. R. 1046.

2300. —.]—**BROOKING v. JENNINGS**, No. 1217, *ante*.

2301. —.]—Administration *durante minore aetate* of administrator ceases at the age of twenty-one. Of exor. ceases at the age of seventeen.—**FREKE v. THOMAS** (1701), 1 Salk. 30; 1 Com. 110; 1 Ld. Raym. 667; 61 E. R. 40; *sub nom.* **REEK v. THOMAS**, 12 Mod. Rep. 500.

Annotation :—**Foll.**, Edmund v. Shaler (1708), 1 Com. 159.

—*Sec. now*, Administration of Estates Acts, 1708 (c. 87), s. 6; 1925 (c. 23), s. 20.

2302. Grant during minority of person entitled to administer.]—**FREKE v. THOMAS**, No. 2301, *ante*.

2303. —.]—Administration during the minority of another shall not cease till his age of twenty-one years.—**EDMUND v. SHALER** (1708), 1 Com. 159; 92 E. R. 1013.

2304. Grant during minority of several persons—Terminates on one attaining full age—Executors.]—

Administration *durante minoritate* of several exors. determines when one of them attains the age of seventeen.—**TAYLOR v. WATT** (1676), Freem. K. B. 425; 89 E. R. 316; *sub nom.* **JOYNER v. WATTS**, 3 Keb. 607, 643; T. Jo. 48.

2305. — Persons entitled to administer.]—Administration during the minority of two, ceases when one comes of age, & administration is to be granted to him.—**WILLY v. POULTON** (1720), Mos. 99; 25 E. R. 293.

ii. By Death or Marriage of Infant.

2306. By death.—Grant during minority of one.]—Administration committed to one *durante minoritate* of an exor.—*Qu.*: whether on his dying under age it may be repealed, & committed to the residuary legatee.—**DUBOIS v. TRANT** (1700), 12 Mod. Rep. 436; 88 E. R. 1433.

2307. —.]—Administration *durante minoritate* formerly granted to the mother having ceased by the minor's death & the mother having thereby become joint residuary legatee with another minor, administration *de bonis non* decreed to her; one exor. having renounced & the other who was abroad being cited.—**AKERS v. DUPUY** (1828), 1 Hag. Ecc. 473; 162 E. R. 649.

2308. — Grant during minority of several.]—*Qu.*: whether an administration committed to one during the minority of four, is determined by the death of one, the others still being within age.—**BRUDNEL'S CASE** (1592), 5 Co. Rep. 9 a; 77 E. R. 61.

Annotations :—**Reid**, Jones v. Strafford (1730), 3 P. Wms. 79. **Mentl.**, Hughes v. Crowther (1610), 13 Co. Rep. 66; Daniel v. Waddington (1615), 3 Bulst. 130; Quick & Harris v. Ludborough (1615), 3 Bulst. 29; Geo v. Freedland (1626), Cro. Car. 47; Sacheverell v. Frogate (1671), 1 Vent. 161; Slater v. Carew (1674), 1 Mod. Rep. 187; Cowper v. Cowper (1734), 2 P. Wms. 720; Hudson v. Hudson (1735), *Cas. temp.* Talb. 127; Day v. Day (1854), Kay. 703.

2309. —.]—If an administration be granted to one during the minority of two infants, & one of them dies, the administration continues.—**ANON.** (1613), 1 Brownl. 47; 123 E. R. 650.

Sect. 12.—Special and limited grants of administration: *Sub-sect. 3, D. (b) ii. & iii., & E.; sub-sects. 4 & 5, A.]*

2310. By marriage—Of one of several—To husband of full age.]—JONES v. STRAFFORD (EARL) (1780), 3 P. Wms. 79; 2 Eq. Cas. Abr. 427; 24 E. R. 977.

*Annotations:—*Mentid. Burke v. Jones (1813), 2 Ves. & B. 275; Jones v. Scott (1831), 1 Russ. & M. 255; Kay v. Marshall (1838), Donnelly, 22.

See, now, Married Women's Property Act, 1882 (c. 75), ss. 1 (2), 24.

iii. By Grant of Probate.

2311. General rule.]—HEWSON v. SHELLEY, No. 2878, *post*.

See Administration of Estates Act, 1925 (c. 23), s. 20 (2).

E. Amount of Security.

2312. Where infant takes administration at full age.]—Where there has been an administration *pendente minore ætate*, & the minor coming of age takes upon herself the administration, she is obliged to give security to the same amount that the administrator did in the first instance.—ABBOTT v. ABBOTT (1818), 2 Phillim. 578; 101 E. R. 1237.

SUB-SECT. 4.—ADMINISTRATION DURANTE ABSENTIA.

See Administration of Estates Act, 1798 (c. 87), s. 6; Court of Probate Act, 1857 (c. 77), s. 74; Court of Probate Act, 1858 (c. 95), s. 18; Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 104.

2313. When court has jurisdiction—Representative out of jurisdiction—In Scotland.]—HANNAY v. TAYNTON (1800), 2 Add. 505, n.; 162 E. R. 379; *subsequent proceedings, sub nom.* TAYNTON v. HANNAY (1802), 3 Bos. & P. 26; *sub nom.* RAINSFORD v. TAYNTON, TAYNTON v. HANNAY (1802), 7 Ves. 460.

2314. ———.]—Administration granted under Administration of Estates Act, 1898 (c. 87), where the exor. went to Scotland. It cannot be disputed in this ct., though it may at law. Though not for a limited time, it is for a limited purpose, viz. being made debts. to suits in equity. The effect of the return of the exor., in this instance the exor.'s exor., is, that he must be made a party in the usual course; & then the temporary administrator may account, have his costs, & be discharged, but the proceedings had are not put an end to.—RAINSFORD v. TAYNTON, TAYNTON v. HANNAY (1802), 7 Ves. 460; 32 E. R. 186; *previous proceedings, sub nom.* TAYNTON v. HANNAY, 3 Bos. & P. 26.

2315. ——— Where representative has disappeared—Believed to be dead.]—In the Estate of SAKER, No. 2200, *ante*.

2316. ——— Executor of executor out of jurisdiction.]—An exor.'s exor. is affected by the provisions of Administration of Estates Act, 1798 (c. 87), s. 1, & Court of Probate Act, 1858 (c. 95), s. 18, so that if he reside out of the jurisdiction of the Ct. of Probate at the expiration of twelve calendar months from the death of his testator, the ct. may grant administration with the will annexed of the estate of the original deceased to a creditor, next of kin, or legatee, limited to institute

a suit in the Ct. of Ch., or to receive a specific fund.—In the Goods of GRANT (1876), 1 P. D. 435; 45 L. J. P. 88; 40 J. P. 825; 24 W. R. 929.

2317. Time for grant—"At the expiration of twelve months"—At or after.]—The words "at the expiration of twelve months from the death of testator," in Administration of Estates Act, 1798 (c. 87), s. 1, when compared with the words given in the form of affidavit in sect. 2, & of the grant of administration in the third, must be held to mean at or after the expiration of that period. When applicant is residuary legatee, whose interest is undetermined, the grant will be made under that Act, but where a particular sum is set aside for & actually payable to applicant, the grant can be made under Court of Probate Act, 1858 (c. 95), s. 18.—In the Goods of RUNDY (1872), L. R. 2 P. & D. 330; 41 L. J. P. & M. 63; 25 L. T. 950; 36 J. P. 184; 20 W. R. 819.

2318. To whom grant may be made—"Legatee"—Representative of legatee.]—The ct. will make a limited grant to the personal representative of a legatee, the exor. being out of the jurisdiction, though the legatee only is mentioned in Administration of Estates Act, 1798 (c. 87).—In the Goods of COLLIER (1862), 2 Sw. & Tr. 444; 31 L. J. P. M. & A. 63; 5 L. T. 849; 164 E. R. 1069.

2319. ——— Father & guardian of infant legatees.]—The exor. being out of the jurisdiction, the ct. made a grant of administration, with the will annexed, to the father & guardian of infant legatees, limited to the interest of those legatees in the unadministered estate, under Administration of Estates Act, 1798 (c. 87), & Court of Probate Acts, 1857 (c. 77), s. 74, & 1858 (c. 95), s. 18.—In the Goods of HAMPSON (1865), L. R. 1 P. & D. 1; 35 L. J. P. & M. 1; 13 L. T. 304; 11 Jur. N. S. 911.

2320. ——— Legatee & next of kin.]—One of the exors. named in the will proved the paper & then left the country. The second exor. named in the will was also out of the jurisdiction. The ct. made a grant *durante absentia* to a legatee & also one of the next of kin, to enable her to become a party to a suit in the Ch. Div. for the administration of the estate.—In the Goods of JENKINS (1880), 49 L. J. P. 30; 41 L. T. 736; 44 J. P. 801; 28 W. R. 431.

2321. ——— "Creditor"—Assignee in bankruptcy.]—An assignee in bkpy. of an administrator who is out of the jurisdiction is a creditor within Administration of Estates Act, 1798 (c. 87), s. 1, & Court of Probate Act, 1858 (c. 95), s. 18, & as such may obtain administration *de bonis non* of the intestate limited to the fund to which the assignee is entitled.—In the Goods of HAMMOND (1881), 6 P. D. 104; 50 L. J. P. 70; 44 L. T. 649; 45 J. P. 619; 29 W. R. 807.

2322. Power of administrator to sell.]—HEWSON v. SHELLEY, No. 2878, *post*.

2323. Duration of grant—Executor returning within jurisdiction.]—HODGE v. CLARE (1691), 4 Mod. Rep. 14; 87 E. R. 235; *sub nom.* CLARE v. HEDGES, 1 Lut. 342.

*Annotations:—*Consid. Slater v. May (1704), 6 Mod. Rep. 304. *Etd.* Major v. Peck (1691), 1 Lut. 338.

2324. ———.]—If an administrator *durante absentia* of an exor. brings an action, he must show in his declaration that the exor. is in *partibus transmarinis*.—SLATER v. MAY (1701), 2 Ld. Raym. 1071; 6 Mod. Rep. 304; 3 Salk.

PART II. SECT. 12, SUB-SECT. 4.

s. To whom grant may be made—Guardian of minor next of kin.]—Under

Probate Act, 1857, s. 79, the guardian of a minor next of kin is entitled to apply for administration during the absence out of the jurisdiction of the

administrator of deceased, who had left Ireland without administering the assets.—In the Goods of LEE, [1898] 21 R. 81.—IR.

28; 92 E. R. 210; *sub nom.* SLAUGHTER v. MAY,
1 Salk. 42.

Annotations:—*Reid v. Rainsford v. Taynton, Taynton v. Hannay* (1802), 7 Ves. 460; *Hewson v. Shelley*, [1914] 2 Ch. 13.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 164 (3).

2325. — Until former administrator returns.]

—Administration of the personal estate of deceased had been granted in the year 1818 to two of his sons, one of whom had since died & the other had for many years resided in the West Indies. A sum of money being now divisible, in which the surviving administrator had no interest, an administration was granted to a third son limited to the particular sum to be divided & to continue so long only as the former surviving administrator remained out of the jurisdiction of her Majesty's cts. of law & equity.—*In the Goods of BAYNES* (1861). 7 Jur. N. S. 832.

2326. — **Death of executor.**—The authority of an administrator appointed according to Administration of Estates Act, 1798 (c. 87), during the absence of an exor. from this country does not become actually void upon the death of such exor., but only voidable.—**TAYNTON v. HANNAY** (1802), 3 Bos. & P. 26; 127 E. R. 16; *subsequent proceedings, sub nom. RAINSFORD v. TAYNTON*, **TAYNTON v. HANNAY**, 7 Ves. 460.

2327. — [In the particulars of sale of certain leaseholds, the premises were stated to be sold "by order of the exors.," they were in fact sold by the administrator *de bonis non* of testator *durante absentia* of his next of kin. The sale was by auction, & the purchaser paid the usual deposit, but refused to complete on discovering the nature of the vendor's title:—*Held*: although the effect of the grant during the lifetime of the absent principal would have been perfectly valid, yet inasmuch as the principal might at the time of the sale have been dead, the title was not such as a purchaser was bound to accept, & the deposit, with interest, was ordered to be refunded.

Although pltf. as administrator *durante absentia*, could make a title, because, if the party for whom he is attorney is alive, he clearly could, yet it is not such a title as a purchaser would be obliged to accept, for *non constat* that the letters of administration are now in force, as they clearly would not be. if the party had died (LORD CRANWORTH, C.).—WEBB v. KIRBY (1856), 7 De G. M. & G. 376; 26 L. J. Ch. 145; 28 L. T. O. S. 314; 33 Jur. N. S. 73; 5 W. R. 189; 44 E. R. 147, L. C. Annotation :—*Consd.* Hewson v. Shelley, [1914] 2 Ch. 13.

2328. — Executor applying for probate.]—Administration, with a will annexed, granted to an attorney of the exor. who was abroad, not revoked, but pronounced to have ceased & expired on application of the exor. for probate, & on affidavit that no suits were pending. Future grants, *durante absentia*, to be further limited, until the exor., or party entitled to administration, duly apply for & obtain a grant.—*In the Goods of CASSIDY* (1832), 4 Hag. Ecc. 360; 102 E. R. 1477.

Annotations:—*Expi'd.* Suwerkrop v. Day (1838), 8 Ad. & El. 624. *Re'd.* Webb v. Kirby (1856), 7 De G. M. & G. 376.

2329. Limited grant until return of executor.]—
In the Goods of CHOLWILL, No. 1810, ante.

2330. — — — —.]—In the Goods of SUAREZ, No.
1942. *ante*.

See, generally, Sect. 11, sub-sect. 4, ante.

SUB-SECT. 5.—ADMINISTRATION DURANTE DEMENTIÂ.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 166.

A. Person Entitled to Grant Insane.

2331. Lunacy of executor—Grant to residuary legatee.]—Administration, with the will annexed, may be committed to a residuary legatee, during the lunacy of a surviving exor. & residuary legatee, in trust; at least by & with the consent given, or implied, of the committee of the lunatic.—*In the Goods of MILNES* (1826), 3 Add. 55; 182 E. R. 401.

2332. — Pauper lunatic—Grant to poor law guardians—Persons entitled in priority renouncing or abroad—Discretionary grant under Court of Probate Act, 1857 (c. 77), s. 73.—*In the Goods of SHARLAND*. No. 1921, *ante*.

See, generally, Sect. 11, sub-sect. 5, E. (g), ante.

2333. Lunacy of person entitled to administer—Grant to quasi-committee.]—Where the next of kin of deceased lunatic was of unsound mind, though not so found by inquisition, a transfer of the lunatic's personal estate was directed to be made to the person to whom administration *durante animi vitio* of such next of kin had been granted, agreeably to the practice of the Ecclesiastical Ct.—*Ex p. EVELYN* (1833), 2 My. & K. 3; 39 E. R. 846.

Annotation:—**Reld.** Evans v. Tyler (1849), 7 Notes of Cases, 396.

2334. — Grant to executors of deceased administratrix.]—Administration with will annexed de bonis non granted to the exors. of a sister, the administratrix, deceased, for the use & benefit of the surviving sister, the sole next of kin, during her imbecility, without citing her next of kin.—*In the Goods of SOUTHWOLD* (1842), 3 Curt. 28; 1 Notes of Cases, 274; 103 E. R. 643.

2335. — Grant to stepmother of lunatic—
Co-executor with deceased of husband's will—
Discretionary grant under Court of Probate Act,
1857 (c. 77), s. 73.]—*In the Goods of BURRELL*, No.
1925. *ante*.

2336. — Pauper lunatic—Grant to poor law guardians—Discretionary grant under Court of Probate Act, 1857 (c. 77), s. 73.]—MILE END OLD TOWN GUARDIANS v. FINDLAY, *In the Goods of FINDLAY*, No. 1893, *ante*.

2337. — — — — —.]—*In the Goods of*
Eccles. No. 1917, ante.

See, generally, Sect. 11, sub-sect. 5, E. (g), ante

2338. — Grant to stranger—Committee renouncing—Consent of Masters in Lunacy & next of kin.]—The sole next of kin of an intestate was lunatic. Her committee renounced, & L., a stranger in blood, applied for grant of letters of administration. The Masters in Lunacy, & next of kin of the lunatic, approved of the application. The ct., upon the consents of the next of kin being filed, ordered the grant to be made to L.—*In the Goods of HASTINGS* (1877), 4 P. D. 73; 47 L. J. P. 30; 39 L. T. 45; 42 J. P. 185.

2339. — Grant to creditor—Persons with prior rights renouncing.]—*In the Goods of PENNY, No. 2203, ante.*

2340. — Death of administrator leaving assets unadministered—Further grant to person with prior claim retracting renunciation.]—*In the Goods of PENNY, No. 2203, ante.*

2325 1. *Duration of grant.—Until former administrator returns.*—Upon the application of A. administrator of an estate, who was desirous of leaving the colony for a time, an order was

made purporting to appoint the U. T. Co. administrators. On his return an application was made to rescind the previous order, A. wishing to resume administration:—*Held*: the ct. had

power to give leave to A. to rescind the appointment, but A. must pay the co.'s costs.—*Re* ARCHER (1893), 6 Q. L. J. 27.—**AUS.**

Sect. 12.—Special and limited grants of administration: Sub-sect. 5, B. & C.; sub-sects. 6 & 7, A.]

B. Lunacy Supervening after Grant.

2341. Lunacy of sole representative—Grant to aunt of infant entitled in distribution.]—Intestate left a widow & an infant; the widow took out administration, but became lunatic; administration granted also to the aunt of the infant, for the use & benefit of the widow & infant, during the incapacity of the widow, & the minority of the infant.—*Re BINFIELD* (1754), 1 Lec. 625; 161 E. R. 228.

2342. — Having no beneficial interest—Grant to residuary legatee.]—Administration with the will annexed is prayed on the part of the residuary legatee, & not opposed by the next of kin, to enable him to receive the dividends, during the life & incapacity of W., the only surviving exor. No inconvenience can result from the grant. In this case the exor. has no beneficial interest; & it is not to be expected that a committee will be appointed by his family merely to benefit this party. Upon the whole, I think, I may grant administration with the will annexed as prayed: this is not revoking a former grant supplemental to it, & to carry into effect the real object of testator's will (*per CUR.*).—*In the Goods of CRUMP* (1810), 3 Phillim. 497; 161 E. R. 1396.

Annotation:—Reid. Ex p. Evelyn (1833), 2 My. & K. 3.

2343. — Grant to trustee appointed by Court of Chancery.]—Two exors. proved under £25,000, & died, leaving £10,300 unadministered; the surviving exor. was a lunatic. Administration decreed to S. for the use & benefit of the lunatic exor., on his giving the usual security in double the original sum, & justifying security to the amount of £10,300. S. was also a trustee appointed by the Ct. of Ch.—*In the Goods of CHILTON* (1853), 17 Jur. 720.

2344. — Grant to administrateur provisoire appointed by foreign court.]—Where the wife of a domiciled foreigner obtained letters of administration with the will annexed to his assets in England & became insane abroad the ct. granted letters of administration to an *administrateur provisoire* appointed by a foreign ct. for the use & benefit of the lunatic so long as appctd. remained *administrateur provisoire*.—*In the Goods of GOLDSCHMIDT* (1898), 78 L. T. 763.

2345. — Original grant impounded.]—An administratrix becoming a lunatic, administration granted, limited during her lunacy. The letters of administration being first impounded.—*In the Goods of BINCKES* (1830), 1 Cur. 286; 163 E. R. 97.
Annotation:—Folld. In the Goods of Cooke, [1895] P. 68.

2346. — Appointment under Lunacy Act, 1890 (c. 5), s. 116.]—Where a single administrator becomes insane, & a person is appointed under above sect., with only specified powers, the ct. will make a grant to another of the next of kin for the use of such administrator during his lunacy, impounding the original grant.—*In the Goods of COOKE*, [1895] P. 68; 64 L. J. P. 35; 72 L. T. 121; 43 W. R. 428; 11 T. L. R. 166; 11 R. 594.

See, generally, LUNATICS.

2347. Lunacy of one of several administrators—Original grant revoked—Fresh grant de bonis non made to the others—Consent of committee.]—*In the Goods of PHILLIPS* (1824), 2 Add. 335; 162 E. R. 316.

Annotation:—Folld. In the Goods of Newton (1843), 3 Curt. 428.

2348. — Special grant to save administrator.]—One of two joint administrators having become imbecile & incapable of acting, ordered,

that the joint letters of administration, brought into the registry, be revoked, & special letters of administration granted to the sane administrator.—*In the Goods of NEWTON* (1843), 3 Curt. 428; 7 Jur. 219; 163 E. R. 780.

2349. Lunacy of one of several executors—Original grant revoked—Fresh grant made to the others—Limited to period of lunacy.]—The exors. of a will obtained probate in the ordinary way. One of them subsequently became of unsound mind, & no early recovery was to be anticipated. The co-exor. moved the ct. for directions:—*Held*: the most convenient course for the ct. to adopt would be to revoke the original grant of probate, & to make a fresh grant to appct., limited to such time as the other exor. should continue of unsound mind. The ct. made an order accordingly.—*In the Goods of SOWERBY* (1891), 65 L. T. 764.
Annotation:—Consd. In the Estate of Shaw, [1905] P. 92.

2350. — Power reserved to the lunatic on recovery.]—Where one of three exors. who had proved a will, subsequently became of unsound mind, the ct., on the application of the others, revoked the grant, & made a fresh grant of probate to appcts., reserving power to the lunatic, in case he should become of sound mind & apply, to join in the probate.—*In the Estate of SHAW*, [1905] P. 92; 74 L. J. P. 39; 92 L. T. 428.

C. Powers of Administrator.

2351. Power of administrator to sell.]—HEWSON v. SHELLEY, No. 2878, *post*.

SUB-SECT. 6.—ADMINISTRATION DURING ILLNESS OF EXECUTOR.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 166.

2352. Grant with will annexed to residuary legatee—Limited until recovery of executor.]—Where an exor. was incapacitated through illness, the ct. made a grant of administration with the will annexed to a residuary legatee for life for the use & benefit of the exor. till his recovery.—*In the Goods of PONSONBY*, [1895] P. 287; 64 L. J. P. 119; 44 W. R. 240; 11 R. 613.

2353. Power of administrator to sell.]—HEWSON v. SHELLEY, No. 2878, *post*.

SUB-SECT. 7.—ADMINISTRATION PENDENTE LITE.

A. In General.

See Court of Probate Act, 1857 (c. 77), ss. 70, 71; Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 163.

2354. Power to grant—Dispute as to executor appointed.]—ROBINS CASE (1601), Moore, K. B. 636; 72 E. R. 807.

Annotations:—Folld. Smyth v. Smyth (1672), 3 Keb. 54. *Reid. Walker v. Woollaston* (1731), 2 P. Wms. 576.

2355. —]—SMYTH v. SMYTH (1672), 3 Keb. 54; 84 E. R. 591.

2356. — Dispute concerning will.]—Administration granted *pendente lite*, where it is good, where not.

An administration *pendente lite* concerning a will was utterly void, & the difference is thus, viz. Where there is a controversy in the Spiritual Ct. concerning the right of administration, & where it is concerning a will, as in this case; for in the first case an administration granted *pendente lite* is good; but it is otherwise where the controversy is concerning a will; for he who comes in under a will, shall avoid all that which an administrator

can do (*per cur.*).—**FREDERICK v. HOOK** (1690), Carth. 153; 90 E. R. 694.

Annotations:—**Consol.** Walker v. Woollaston (1731), 2 P. Wms. 576. **Reid.** Hewson v. Shelley, [1914] 2 Ch. 13.

2357. ———.]—The Spiritual Ct. may order the effects to be brought into ct., whilst a will is in contest, & grant an administration *pendente lite*.—**VILLERS v. OSBORN (LADY)** (1730), Mos. 308; 25 E. R. 410.

2358. ———.]—**Where executor named.**—The Cts. of Common Law have ceased to object to the grant of administrations *pendente lite* where there is an exor. named in a will propounded. Such administrations ought not to be granted without good reason.—**MASKELINE & BROHIER v. HARRISON** (1756), 2 Lec. 258; 161 E. R. 333. **Annotations**:—**Reid.** Godrich v. Jones (1840), 2 Curt. 453; Hewson v. Shelley, [1914] 2 Ch. 13.

2359. ———.]—**Dispute as to the right to administration.**—**FREDERICK v. HOOK**, No. 2356, *ante*.

2360. **What constitutes lis pendens—Pending appeal to House of Lords as to validity of will.**—A suit having been instituted to try the validity of the will of deceased, & judgment having been given to establish it, one of the parties appealed from such judgment to the House of Lords. Notwithstanding the appeal, the judge of the Ct. of Probate ordered probate to be delivered out to the exors. named in the will. A difficulty having arisen in the Ct. of Ch. as to the power of the exors. to give a good title to certain leasehold property belonging to deceased's estate, under the probate & pending the appeal, the Ct. ordered the probate to be brought into the registry, & thereupon that letters of administration pending suit should be granted to such exors.—**WRIGHT v. ROGERS** (1870), L. R. 2 P. & D. 179; 40 L. J. P. & M. 8; 23 L. T. 509; 35 J. P. 104; 19 W. R. 192.

2361. ———.]—**Suit touching executor's will—Whether grant to be general or limited.**—A married woman, under a power given to her to that effect, duly executed a will. Her husband, by his will, made her universal legatee & sole extrix. She survived him, but did not take probate of his will, nor re-execute her own. Litigation having arisen on the question whether the wife's exors. are entitled to a limited or general grant of probate, the ct. appointed an administrator *pendente lite* to the estate of the husband, as well as one to the estate of deceased.—**In the Goods of DAVES** (1870), L. R. 2 P. & D. 147; 23 L. T. 397; 34 J. P. 694.

Annotation:—**Dbtd.** *In the Goods of Fawcett* (1889), 14 P. D. 152. I am not altogether satisfied that when *In the Goods of Daves* was decided the attention of the ct. was sufficiently drawn to the words of [Court of Probate Act, 1857 (c. 77)] s. 70, but I shall follow the precedent though with doubt (**BRETT, J.**).

2362. ———.]—**Validity disputed.**—**In the Goods of SHEPPARD, SHEPPARD v. CARTER** (circa 1886), 61 L. T. 304, n.

Annotation:—**Dbtd.** *In the Goods of Fawcett* (1889), 61 L. T. 302. I shall follow that decision. At the same time I wish to say that I have very much doubt about the power. I am not satisfied that the point was brought to the notice of the learned judge who decided the case of *In the Goods of Sheppard*, & while following that decision, I do so with the expression of my opinion that it is not in accordance with the powers conferred by the Act (**BRETT, J.**).

2363. ———.]—A husband died leaving a will of which his wife was sole extrix. at the time of his death. The extrix. took out probate & died leaving a will the validity of which was disputed in a suit which was pending in the ct. A

representative of the husband being required to receive money due to his estate, the ct. appointed an administrator *pendente lite* to the estate of the husband.—**In the Goods of FAWCETT** (1889), 14 P. D. 152; 58 L. J. P. 87; 61 L. T. 303.

Annotation:—**Fold.** Shorter v. Shorter, [1911] P. 184.

2364. ———.]—**Validity of codicil disputed—Codicil not affecting appointment of executors.**—Deceased executed a will & two codicils, & by the will he appointed exors. A suit was instituted to try the validity of the second codicil only; such codicil in no way affecting the appointment of exors. The ct. refused to appoint an administrator *pendente lite*.—**MORTIMER v. PAULL** (1870), L. R. 2 P. & D. 85; 39 L. J. P. & M. 47; 22 L. T. 631; 34 J. P. 487; 18 W. R. 901.

2365. ———.]—**Legitimacy of persons entitled in distribution disputed—Guardian ad litem appointed in Chancery.**—Where a naturalised Englishman died leaving three infant children, the two younger of whom were admittedly illegitimate, but the elder had been registered as the legitimate child of deceased & his wife, & had been so brought up, & proceedings had been commenced in the Ch. Div., in which the legitimacy of the elder child was in dispute, & the Ch. Div. had appointed W. guardian *ad interim* of the elder child, for the purpose of applying to the Probate Div. for a grant of administration to the personal estate of deceased, the ct., under Court of Probate Act, 1857 (c. 77), s. 73, made the grant asked for to W. but limited until the persons entitled by law to letters of administration to the estate should have obtained such letters.—**In the Goods of MUSTAPHA** (1890), 59 L. J. P. 61; 62 L. T. 606.

2366. ———.]—**Entry of caveat.**—A. entered a caveat against probate of a will. B., the exor. named in the will, warned it, & A. appeared. Before anything further had been done A. moved for an order for a receiver & administrator *pendente lite*.—**Held**: there was no jurisdiction to make the order, for the caveat proceedings did not constitute a *lis pendens*, & as no writ had been issued, there was no application to the ct. on which the ct. could act.—**SALTER v. SALTER**, [1896] P. 291; 65 L. J. P. 117; 75 L. T. 7; 45 W. R. 7; 12 T. L. R. 512; 40 Sol. Jo. 635, C. A.

2367. **Grounds for granting—Special cause must be shown.**—An application for an administration *pendente lite*, rejected because no special cause for granting it, was set forth.—**SUTTON v. SMITH** (1753), 1 Lec. 207; 161 E. R. 77.

Annotations:—**Fold.** Maskeline & Brohier v. Harrison (1756), 2 Lec. 258. **Reid.** Godrich v. Jones (1840), 2 Curt. 453.

2368. ———.]—**MASKELINE & BROHIER v. HARRISON**, No. 2358, *ante*.

2369. ———.]—The ct. will not grant an administration *pendente lite* unless a necessity be shown for the grant. **Qu.**: whether the ct. will grant such an administration, limited to the purpose of investigating the title to property assigned in the lifetime of deceased.—**GODRICHI v. JONES** (1840), 2 Curt. 453; 163 E. R. 471.

Annotations:—**Reid.** Shadforth v. Burton & Maul (1860), 24 J. P. 664; Bellew v. Bellew (1865), 4 Sw. & Tr. 58.

2370. ———.]—**Property in hands of litigant.**—This ct. has been constantly in the habit of refusing to grant administrations, pending suit, merely to take property out of the hands of a litigant party in the actual possession of it. It has always

PART II. SECT. 12, SUB-SECT. 7.—A.

2367 i. Grounds for granting—Special cause must be shown.—To entitle a suitor to have an administrator *pendente lite* appointed, a case of necessity must be made out. If such

case is shown as to a portion of the estate only, an appointment limited to such portion should be made.—**TILLIER v. SCHLEMMANS** (1907), 5 W. L. R. 467; 17 Man. L. R. 303.—**CAN.**

i. Grounds for refusing to grant—Proceedings not authorised by statute.—The appointment of an administrator *ad litem* should be refused in an action brought for malicious prosecution, against one who had died pending

Sect. 12.—Special and limited grants of administration: Sub-sect. 7, A., B., C. & D.]

required it to be shown that the property was in jeopardy, that the party sought to be dispossessed was irresponsible & refused or neglected to furnish adequate & reasonable security. On the other hand it has as constantly declined putting a litigant party in possession of the property by granting administration pending suit to him, always granting it where required to a nominee presumed to be indifferent between the contracting parties (SIR JOHN NICOLL).—NORTHEY v. COCK (1822), 1 Add. 326; 162 E. R. 114.

*Annotations:—*Reid. Godrich v. Jones (1840), 2 Curt. 453; Shadforth v. Burton & Saul (1860), 24 J. P. 664.

2371. — Estate in jeopardy.]—NORTHEY v. COCK, No. 2370, ante.

2372. ——]—The practice of the Prerogative Ct., & of the Probate Ct. hitherto, has been not to grant administration pending suit, unless by consent, or on proof that such a grant was necessary for the preservation of the property; but in future cases the ct. will follow the practice of the Ct. of Ch. in appointing receivers, & will appoint an administrator pending suit where a *bond fide* suit is pending, irrespective of the property being in particular danger.—BELLEW v. BELLEW (1865), 4 Sw. & Tr. 58; 34 L. J. P. M. & A. 125; 13 L. T. 247; 11 Jur. N. S. 588; 164 E. R. 1437.

*Annotations:—*Distd. Horrell v. Witts (1866), L. R. 1 P. & D. 103. Follid. Smith v. Tebbitt (1867), 16 L. T. 96. Reid. Smith v. Smith (1867), 31 J. P. 248.

2373. ——]—Although the practice of the ecclesiastical cts. was not to appoint an administrator *pendente lite*, except the estate was shown to be in peril, this ct. will for the future appoint an administrator wherever there is a *bond fide* suit.—SMITH v. SMITH (1867), 31 J. P. 248.

See, also, No. 2382, post.

2374. — Conduct of party.]—An administrator, *pendente lite*, will be appointed, such appointment being necessary from the nature of deceased's property, & from the conduct of one of the parties in the suit; & the nominee of the other party, on whose conduct there is no imputation, may be selected if shown to be impartial, competent & responsible.—YOUNG (OTHERWISE MEARING) v. BROWN (1827), 1 Hag. Ecc. 53; 162 E. R. 504.

See, also, No. 2382, post.

2375. — Special nature of property.]—YOUNG (OTHERWISE MEARING) v. BROWN, No. 2374, ante.

2376. — Investigation of title of property assigned by deceased.]—GODRICH v. JONES, No. 2369, ante.

2377. — Litigation pending in foreign court— & property in private hands.]—When a question respecting the validity of a will is pending in a foreign ct., the Prerogative Ct. will not grant administration of the goods of deceased to a person, though duly appointed by the foreign ct., limited to the pendency of those proceedings, unless the property be in private hands. The ct. will grant an administration limited to receive & invest the dividends only, when the property is in a public place of safety.—*In the Goods of MORGAN* (1851), 2 Rob. Eccl. 415; 18 L. T. O. S. 280; 16 Jur. 20; 163 E. R. 1364.

the action, & whose widow & children refused to administer to the estate. Such action not being authorised by R. S. O., 1897, c. 129, s. 11.—HUNTER v. BORD (1901), 33 C. L. T. 50; 3 O. L. R. 183; 1 O. W. R. 79; 3 O. W. R. 734, 1055.—CAN.

a. — To party seeking to legalise

unwarranted act.]—The rules authorising a ct. to appoint an administrator (*pendente lite*) do not apply where the estate to be represented is the very estate to be administered, in the case of a pltf. who, without right or title, has commenced an action & then seeks to legalise his unwarranted act by an

2378. — Bond fide suit.]—BELLEW v. BELLEW, No. 2372, ante.

2379. ——]—SMITH v. SMITH, No. 2373, ante.

2380. — Grounds justifying appointment of receiver in Chancery.]—BELLEW v. BELLEW, No. 2372, ante.

2381. ——]—The ct. ordered, in granting administration *pendente lite* in a testamentary suit, that the administrator should not remove certain diamonds which were deposited in the Bank of England by the exors. after the death of testatrix.

In *Bellew v. Bellew*, No. 2372, ante, I gave notice that I should in future assimilate the practice of this ct. to that of the Ct. of Ch., & grant administration *pendente lite* wherever the Ct. of Ch. would appoint a receiver (SIR J. P. WILDE).—SMITH v. TEBBITT (1867), 16 L. T. 96.

See, generally, RECEIVERS.

See, also, No. 2383, post.

2382. — Partnership assets in hands of surviving partner—Partner opposed to grant.]—Where the estate of deceased consists of his share of a business which he was carrying on in partnership at the time of his death, & which is continued to be carried on by the surviving partner, the ct. will not appoint an administrator *pendente lite* against the wish of the surviving partner, unless a strong case is made that he is dealing improperly with the business.—HORRELL v. WITTS & PLUMLEY (1866), L. R. 1 P. & D. 103; 35 L. J. P. & M. 55; 14 W. R. 515; *sub nom.* HARRELL v. WILTS & HUMBLEY, 14 L. T. 137; 12 Jur. N. S. 673.

See, also, Nos. 2370–2374, ante.

2383. — Delay in bringing suit to trial—Receiver appointed in Chancery.]—Where the parties to a testamentary suit took no steps to bring it to trial, & an action had been commenced in the Ch. Div. in which a receiver had been appointed, this ct., on the application of a creditor not a party to the testamentary suit, appointed an administrator, *pendente lite*.—*In the Goods of EVANS, EVANS v. EVANS* (1890), 15 P. D. 215; 60 L. J. P. 18; 63 L. T. 254.

See, also, Nos. 2365, 2372, ante.

Appointment of receivers, *see, generally, RECEIVERS.*

2384. Costs of appointment—Part of costs of action.]—The costs of appointing an administrator *pendente lite* are part of the costs for which the unsuccessful party condemned in costs will be liable.—FISHER v. FRY (1879), 44 J. P. 24.

See, generally, PRACTICE.

B. To Whom granted.

2385. Party to suit.]—NORTHEY v. COCK, No. 2370, ante.

2386. ——]—YOUNG (OTHERWISE MEARING) v. BROWN, No. 2374, ante.

2387. — By consent.]—Administration *pendente lite*, under Court of Probate Act, 1857 (c. 77), s. 70, granted to doft. in the suit, pltf. not opposing.

In that case, the administration may go as prayed *pendente lite*; otherwise I should have thought some person unconnected with the suit would have been a more proper person to have

order of the ct.—HUNTER v. FOW. (1917) 3 W. W. R. 132.—CAN.

PART II. SECT. 12, SUB-SECT. 7.—B.
b. *Whether to widow or children of former marriage—Action pending to establish will.]—*In an action pending to establish a will the widow of tes-

been appointed (SIR C. CRESSWELL).—*DE CHATELAIN v. PONTIGNY* (1858), 1 Sw. & Tr. 34; 27 L. J. P. & M. 18; 30 L. T. O. S. 353; 6 W. R. 409; 164 E. R. 616.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 162.

2388. — Executor—Defendant in suit for revocation of probate.]—A. died making B. his exor. & residuary legatee. Eight days later B. died without having proved A.'s will. On the day B. died she was alleged to have executed a will naming C. as her exor. C. proved this will & then obtained letters of administration to the estate of A. with his will annexed. D. brought a suit against C. & others for revocation of the probate of B.'s will. An application by C. to appoint him administrator & receiver *pendente lite* in the estate of B. was opposed by D., & the ct. ordered the appointment of an independent person with power to act as to both estates.—*In the Goods of SHORTER, SHORTER v. SHORTER*, [1911] P. 184; 80 L. J. P. 120; 105 L. T. 382; 27 T. L. R. 522.

2389. —]—There is no absolute rule that a party to an action propounding a will cannot be appointed administrator *pendente lite* without the consent of all parties. The ct. will make such an appointment when circumstances make it clearly desirable.—*Re GRIFFIN, GRIFFIN v. ACKROYD*, [1925] P. 38; 94 L. J. P. 32; 132 L. T. 494; 41 T. L. R. 191.

2390. Nominee of party.]—YOUNG (OTHERWISE MEARING) v. BROWN, No. 2374, *ante*.

2391. — Party disputing validity of will—No evidence that executor unfit.]—The ct. refused to grant administration *pendente lite* to the nominee of the heir-at-law, & next of kin, who had instituted a suit disputing the validity of a will, in the absence of satisfactory evidence that the exor. named in the will was an unfit person to be entrusted with the management of the property.—*SHADFORTH v. BURTON & SAUL* (1800), 24 J. P. 664.

2392. Nominee of person whose claim is not contested preferred.]—Administration contested between a son & an asserted wife. Administration *pendente lite*, given to the nominee of the son in preference to the nominee of the wife, because his interest was certain, & that of the wife uncertain.—*BOND v. BOND* (1753), 1 Lee, 333; 161 E. R. 123.

2393. Joint grant to nominees of both parties.]—An administration *pendente lite* granted jointly to the nominees of the parties litigant.—*HELLIER v. HELLIER* (1753), 1 Lee, 281; 161 E. R. 104.

Joint grants generally, *see* Sect. 11, sub-sect. 5, D. (f), iii., *ante*.

2394. Attorney of foreign judicial administrator—Will in suit in foreign court—Grant limited to assets in jurisdiction.]—Deceased, a Spaniard, died domiciled in Spain, leaving £10,000 in this country; pending a suit in the ct. at Cadiz, as to the validity of one of two wills of deceased, a judicial administrator was appointed, with a power to pay to the heirs of the sister of deceased a moiety of his property, to which they would be entitled in any event. The ct., carrying out the decree of the ct. at Cadiz, granted administration to the attorney of the judicial administrator limited to receiving the £10,000 in this country.—*VIESCA v. D'ARAMBURU* (1839), 2 Curt. 277; 163 E. R.

411; *subsequent proceedings, sub nom. DE VIESCA v. LUBBOCK* (1840), 10 Sim. 629.

Annotations:—Distd. In the Goods of Morgan (1861), 2 Rob. Ecol. 415. *Reid. In the Goods of Earl* (1867), L. R. 1 P. & D. 450.

2395. Receiver appointed by Chancery Division—In same matter.]—In an interest suit between the Queen's Proctor & a deft., asserting himself to be the lawful nephew of deceased intestate, the ct. appointed A., who had been made receiver in respect of the same estates in proceedings in Chancery, to be administrator *pendente lite*, on his affidavit that the estates in certain particulars would be benefited by being dealt with by a person clothed with such authority, & on consent of the parties to the suit.—*PROCURATOR-GENERAL v. WILLIAMS, In the Goods of EMSLEY* (1862), 2 Sw. & Tr. 353; 5 L. T. 765; 164 E. R. 1032.

2396. —]—In a creditor's action in the Ch. Div. for the administration of the estate of deceased person, defts. in that action being respectively plffs. & defts. in a probate suit relating to the testamentary documents of deceased, the Probate Div., on the application of plffs. in the Chancery action, who were, however, not parties to the probate suit appointed as administrators *pendente lite* the same persons who had been appointed receivers by the Ch. Div., & with the same surety.—*In the Estate of CLEAVER*, [1905] P. 319; 74 L. J. P. 164; 94 L. T. 99.

2397. Guardian ad litem appointed by Chancery Division.]—*In the Goods of MUSTAPHA*, No. 2365, *ante*.

2398. Person appointed by foreign court.]—*In the Goods of MORGAN*, No. 2377, *ante*.

C. Necessity for Citation or Notice.

2399. The heir-at-law.]—Where deceased has died possessed of real & personal estate, an administrator & receiver *pendente lite* will not be appointed without notice to the heir-at-law.—*WIGGINS v. HUDSON* (1800), 80 L. T. 296.

2400. — Urgency of representation—Heir-at-law abroad.]—Plff., as exor. of a will, propounded the will for probate, & deft. contested its due execution & claimed to be the heir-at-law & one of the next of kin. Plff. did not admit deft.'s claim to be the heir-at-law, & alleged that the heir-at-law was a person residing in the United States. Plff. moved for the appointment of a receiver & administrator *pendente lite* without citing the person in America stated to be the heir-at-law, upon the ground that rents had to be collected & payments made immediately the ct. made the order.—*In the Goods of MESSITER-TERRY, MATHEW v. TOOZE* (1908), 24 T. L. R. 465; 52 Sol. Jo. 379.

D. Whether Grant General or Limited.

2401. Funds in public place of safety—Grant limited to dividends.]—*In the Goods of MORGAN*, No. 2377, *ante*.

2402. Legitimacy of persons claiming administration disputed—Grant limited until person entitled should take out administration.]—*In the Goods of MUSTAPHA*, No. 2365, *ante*.

2403. Difficulty in obtaining sureties to full amount of estate—Grant limited to half-year's income & mortgages shortly to be paid off.]—An administrator *pendente lite*, who was also the exor.

tator moved to be sworn as administratrix *pendente lite*, being extrin. under the will & mother of an infant child. The children of a previous marriage of testator contested the will

& opposed on the ground that where an intestate left issue the administration was always granted to the children & not to the widow:—*Held: the latter contention overruled in the cir-*

cumstances & the widow sworn as administratrix *pendente lite*, ample security being required from her.—*SKILLICORN v. SKILLICORN & CUBBON* (1839), Bluet. 139.—L. of M.

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of the will in dispute, had taken out a general grant of administration, but found a difficulty in obtaining sureties to the administration bond to the full amount of testator's estate:—*Held*: the grant might be limited to the amount to be received in respect of two mtges. which were about to be paid off, together with the amount of one half-year's dividends on certain shares, such mtge. debts & shares forming part of the estate of deceased.—*ASKEW v. ASKEW*, [1891] P. 174; 60 L. J. P. 52; 64 L. T. 145.

2404. Jewellery deposited in bank—Removal prohibited.]—SMITH v. TEBBITT, No. 2381, *ante*.

E. Effect of Grant.

(a) In General.

2405. Order for sale by Chancery Division—Whether Probate Division will interfere.]—An administrator *pendente lite* having been appointed by the Ct. of Probate, a suit was instituted in the Ct. of Ch. to administer the estate of deceased, & an order made in such suit upon the administrator to sell certain property for the purpose of raising a fund to pay the debts due from deceased's estate. The Ct. of Probate refused to interfere & stop the sale so ordered by the Ct. of Ch.—*TICHBORNE v. TICHBORNE* (1870), L. R. 2 P. & D. 41; 39 L. J. P. & M. 22; 22 L. T. 42; 34 J. P. 183.

*Annotation:—*Consd. *Re Toleman, Westwood v. Booker*, [1897] 1 Ch. 866.

Whether Chancery Division will appoint receiver.]

—*See, generally, RECEIVERS.*

(b) Powers, Rights and Liabilities of Administrator.

See, generally, Parts V., VI., post.

2406. Power of sale.]—HEWSON v. SHELLEY, No. 2878, *post*.

2407. Rights—To sue for debts of deceased.]—An administrator *pendente lite* touching a will, may maintain actions for recovering debts due to deceased.—*WALKER v. WOOLLASTON* (1731), 2 P. Wms. 570; 24 E. R. 808; *sub nom.* *WOOLLASTON v. WALKER*, 2 Stra. 917; 2 Burn. K. B. 62; *sub nom.* *WOOLLASTON v. WALKER*, Fitz-G. 257.

*Annotations:—**Apld.* *Wills v. Wills* (1742), 2 Atk. 285. *Consd.* *Ez p. Du Faure* (1837), 3 Hodg. 135. *Refd.* *Maskell v. Harrison* (1756), 2 Loe. 258; *Atkinson v. Henshaw* (1812), 2 Ves. & B. 85; *Bull v. Oliver* (1813), 2 Ves. & B. 95; *Jones v. Goodrich* (1839), 10 Sim. 327; *Scott v. Wodlake* (1845), 7 Q. B. 706; *Hewson v. Shelley*, [1914] 2 Ch. 13.

Actions by representatives generally, *see* Part VII., Sect. 1, *post*.

2408. —To papers of deceased—In possession of late attorney.]—An administrator appointed *pendente lite*, is entitled to call upon the late attorney of deceased to deliver up deeds & papers belonging to deceased which are in his possession.—*Ez p. Du Faure* (1837), 3 Hodg. 135.

2409. Liability—To account—Administration to the use of a minor.]—BROTHERTON v. HELLIER, No. 2172, *ante*.

2410. —To be sued—Whether leave of court necessary.]—An administrator *pendente lite* of the personal estate of deceased person, appointed by the Probate Div., under Court of Probate Act of 1857 (c. 77), s. 70, pending an action touching the validity of the will of deceased, may, without

any leave of the Ct., be sued in the Ch. Div. by a creditor of deceased in the same way as a general administrator.—*Re TOLEMAN, WESTWOOD v. BOOKER*, [1897] 1 Ch. 866; 66 L. J. Ch. 452; 70 L. T. 381; 45 W. R. 548.

Actions against representatives generally, *see* Part VII., Sect. 2, *post*.

2411. Special powers—What court may authorise—Annuity for maintenance of a residuary legatee—Only by consent of all parties.]—In appointing an administrator *pendente lite* the ct. cannot, except with the consent of all interested parties, give him special powers to pay an annuity, by way of maintenance, to one of the residuary legatees, although one of the next of kin.—*WHITTLE v. KEATS* (1866), 35 L. J. P. & M. 54.

2412. —Payment out of estate of premium to guarantee society—On special terms as to refunding.]—In a Probate action where an administrator *pendente lite* had been appointed & had been ordered to give security in a penal sum of £10,488 for due administration of the estate, the ct., on the application of an intervener, allowed him to pay £50 out of the estate to a guarantee society which was willing to enter into a bond on his behalf, on condition that the intervener should undertake to recoup the estate in the event of his failing in the suit & being condemned in costs.—*In the Goods of HARVER, HARVER v. HARVER* (1889), 14 P. D. 81; 58 L. J. P. 72; 61 L. T. 338; 37 W. R. 768.

2413. Restriction of powers by court—Approval of claims by registrar before payment.]—An administrator *pendente lite* of personal estate was appointed, on his giving security to the amount of one year's income of the property; his administration to be under the direction of the ct. The ct. directed that he should not discharge claims on deceased's estate, until they had passed before the registrar.—*CHARLTON v. HINDMARSH* (1860), 1 Sw. & Tr. 519; 2 L. T. 24; 8 W. R. 259; 104 E. R. 840.

F. Duration of Office and Discharge.

2414. Commencement—At date of order of appointment.]—(1) The duties of an administrator & receiver pending suit commence from the date of the order of appointment, & if the decree in the action is appealed from do not cease until the appeal has been disposed of. (2) Costs of the administrator & receiver pending suit & of his solr. allowed from the date of the appointment until the dismissal of the appeal.—*TAYLOR v. TAYLOR* (1881), 6 P. D. 29; 50 L. J. P. 45; 45 J. P. 457.

*Annotation:—*As to (1) *Distd.* *Wieland v. Bird*, [1894] P. 262.

2415. Termination—By termination of suit—& handing over assets to person entitled.]—A monition against an administrator *pendente lite*, will be granted at the end of a suit, to compel him to transfer, to the person entitled, everything in his possession acquired in that character.—*In the Goods of GRAVES* (1828), 1 Hag. Ecc. 313; 162 E. R. 597.

2416. —Will established.]—The functions of an administrator *pendente lite* terminate with a decree pronouncing in favour of a will with exors. *Semble*: the case is the same if there be no exors.—*In the Goods of WIELAND, WIELAND v. BIRD*,

PART II. SECT. 12, SUB-SECT. 7.—E. (b).

c. Rights—To pay legacies.]—An administrator *pendente lite*, has no authority to pay legacies, yet if paid

bond fide, he shall have credit for them.—*ADAIR v. SHAW* (1803), 1 Sch. & Lef. 243.—*IR.*

d. Special powers—What court may authorise—Investment of funds in

*authorised securities.]—Administrators *pendente lite* were empowered to invest moneys in their hands in securities authorised by Trustee Investment Act. *Re MACKAY* (1903), 23 C. L. T. 115; 6 O. L. R. 292; 2 O. W. R. 669.—*CAN.**

[1894] P. 262; 63 L. J. P. 162; 71 L. T. 267; 6 R. 574.

2417. ——— **Where decree appealed from.]—**TAYLOR v. TAYLOR, No. 2414, *ante*.

2418. Discharge—Creditor-administrator—Debts & costs exceeding assets received.]—A creditor, who had obtained a grant of administration pending suit, & who had incurred costs in respect of such administration & of proceedings in the Ch. Div., the amount of which costs, together with his original debt, would more than swallow up the amount which had come to his hands as administrator, was allowed by the ct. to pay himself the amount, *pro tanto*, of his debt & costs, & thereupon to take his discharge as administrator; but the ct. refused, upon his application, to dismiss the original probate suit for want of prosecution.—*In the Goods of EVANS, SHUTE v. GEORGE* (1891), 65 L. T. 793.

2419. ——— **Practice—Whether formal motion necessary.]—**Where all the issues in a suit have been found for the exor. propounding a will, if an administrator *pendente lite* has been appointed, the regular course is not to move to discharge him, but to take out probate & call on the administrator to show cause why his grant should not cease.—*DUPREZ v. VERET* (1809), 20 L. T. 331.

SUB-SECT. 8.—GRANT TO ATTORNEY OF PERSON ENTITLED.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 166.

A. When granted.

See Non-Contentious Business Rules, r. 32.

2420. Person entitled abroad.]—Administration granted to a wife, under a special power from her husband, who was beyond seas.—*LUCAS v. LUCAS* (1729), 2 Lee, 576; 161 E. R. 445.

2421. Administrator with will annexed abroad—One executor within jurisdiction not renouncing—Colonial law.]—Testator domiciled in British Guiana by his will appointed two exors., one resident in the colony, the other in England, with power of substitution in the event of either or both being unable or unwilling to act. The exor. resident in the colony administered the estate on his own behalf & on behalf of the other exor. until he returned to this country to reside here permanently. By the law of the colony an exor. under such circumstances had the right to substitute as exor. the Administrator-General of the colony, who thereupon became possessed of all the powers necessary for the administration of the estate. This substitution had been effected by the exor. before leaving the colony, & there being estate in this country which required a personal representative here, the ct. made a grant of administration with the will annexed to persons nominated as his attorneys by the Administrator-General until such time as the Administrator-General or the exor. resident in this country who

had not renounced should apply, & without requiring justifying security.—*In the Goods of BLACK* (1887), 13 P. D. 5; 57 L. J. P. 20; 36 W. R. 400.

2422. Where person entitled to grant resident in jurisdiction—& able to take grant.]—Where the person solely entitled to a grant of administration was resident in this country, & able to take it himself, the ct. declined to decree it to his attorney for his use & benefit.—*In the Goods of BURCH* (1861), 2 Sw. & Tr. 139; 30 L. J. P. M. & A. 170; 5 L. T. 119; 25 J. P. 392; 9 W. R. 639; 164 E. R. 946.

2423. ——— **Estate other than trust estate.]—***In the Goods of BULLAR*, No. 1458, *ante*.

2424. Whether wish of parties alone sufficient.]—*In the Goods of BULLAR*, No. 1458, *ante*.

B. To Whom granted.

2425. Attorney of person beneficially entitled—Under law of deceased's domicile.]—Administration of the goods of a public functionary of the Emperor of Morocco, decreed to a party specifically empowered to take it on behalf of the Emperor of Morocco, on proof exhibited to the ct. of the Emperor's title, not questioned by the Crown, or otherwise, to deceased's effects, in behalf of the national treasury, by the Mahomedan law.—*In the Goods of BEGGIA* (1822), 1 Add. 340; 163 E. R. 119.

Annotations:—Dist. Asplwall v. Queen's Proctor (1839), 2 Curt. 241. *Refd. In the Goods of Dost Aly Khan* (1880), 49 L. J. P. 78.

2426. Attorney out of the jurisdiction—Sureties within jurisdiction.]—Administration will be granted to the attorney of the next of kin, such attorney being resident without the jurisdiction of the ct., if the sureties to the bond are resident within the jurisdiction.—*In the Goods of LEESON* (1859), Sea. & Sm. 31; 1 Sw. & Tr. 403; 29 L. J. P. & M. 19; 1 L. T. 74; 23 J. P. 809; 5 Jur. N. S. 1270; 164 E. R. 814.

2427. ——— **Sureties out of jurisdiction—When allowed.]—***In the Goods of BALLENGALL*, No. 2669, *post*.

2428. Whether attorney of attorney—Express authority to delegate in original power of attorney—Allowed by law of deceased's domicile.]—Where a power is given by an heir-at-law to an attorney to appoint another attorney for the purpose of administration of the estate of deceased foreigner, & such power is allowable by the law of deceased's domicile, letters of administration will be granted to the attorney duly appointed by the first attorney. *Semble:* where a power of attorney expressly authorised the appointment of an attorney by an attorney, the maxim, *delegatus non potest delegare*, does not apply.—*In the Goods of ABDUL HAMID BEY* (1898), 67 L. J. P. 59; 78 L. T. 202.

See, generally, AGENCY, Vol. I., pp. 387 et seq.

2429. Sufficiency of attorney's authority—Whether formal power necessary.]—The ct. will grant administration with papers annexed, to a person, as attorney of an exor. according to the

PART II. SECT. 12, SUB-SECT. 8.—A.
e. Grant made abroad—Executor within jurisdiction renouncing.]—A British subject, possessed of property in India & England, died in England, having appointed four persons to be his exors. in England, & D. his exor. in India. Probate was granted to the four English exors., but D. renounced probate. On an application for administration to be granted to L., the attorney in India of the English exors.—*Held:* the English exors. were intended by testator to have

power of administering his assets in India as well as in England, & L. as their attorney was entitled to letters of administration.—*In the Goods of LROKIE* (1875), 15 B. L. R. App. 8.—**IND.**

1. — Administration with will annexed without security.]—Testatrix made her will & died in Scotland, leaving property in New Zealand, & appointing exors. who resided in Scotland, where the will was proved. The exors. appointed an attorney in New Zealand, who applied for letters of

administration with the will annexed, & produced a certified copy of the will according to Scotch form. Letters of administration granted without security.—*In the Will of FULTON*, 4 J. R. N. S. 15.—**N.Z.**

PART II. SECT. 12, SUB-SECT. 8.—B.
g. Attorney beneficially entitled to whole if will valid—To what extent if will invalid—Security required for moiety only.]—Where a party applying for administration, would be beneficially entitled to the whole of deceased's

Sect. 12.—Special and limited grants of administration: Sub-sect. 8, B., C., D. & E.; sub-sect. 9, A.]

tenor, without requiring a regular power of attorney; such person being clearly authorised to act, by letter, from that exor., the exor. of the residuary legatee, who was also exor., but did not take probate, having consented.—*In the Goods of ORMOND* (1828), 1 Hag. Ecc. 145; 162 E. R. 537.

Annotation:—Held. In the Goods of Morley (1864), 3 Sw. & Tr. 425.

2430. ———.]—If the ct., on the documents before it, is satisfied that the party entitled to a grant of administration desires the person applying to act as his attorney, it will not require a regularly executed power of attorney.—*In the Goods of MORLEY* (1864), 3 Sw. & Tr. 425; 3 New Rep. 691; 33 L. J. P. M. & A. 108; 10 L. T. 540; 28 J. P. 376; 12 W. R. 1064; 164 E. R. 1339.

2431. ———.]—An exor. who was absent from the country, & who was expected to be absent for two years, had before his departure executed a power of attorney, in general terms, enabling the persons named in it to act for him about all his concerns or business of every kind whatsoever as fully & effectually as he himself could do, & also to appear for him in any ct. of justice in any action or proceeding to which he might be a party:—*Held*: the power was sufficiently wide to justify the ct. in making a grant with the will annexed to the parties named in it for the use & benefit of the exor.—*In the Goods of BARKER*, [1891] P. 251; 60 L. J. P. 87; 39 W. R. 500.

See, generally, AGENCY, Vol. 1., pp. 295 et seq.

C. Necessity for Citation or Notice.

2432. Next of kin—Application on behalf of Administrator-General of colony—Deceased dying intestate & without relation in colony.]—By an ordinance of British Guiana, the Administrator-General is empowered to administer to the estate & effects of every person who shall die intestate, & whose heir *ab intestato* shall be unknown, or if known, shall be absent without having an attorney or agent in the colony to represent him. A. died in the colony a bachelor & intestate, & having there no known relation. By virtue of the ordinance the Administrator-General took possession of the estate of deceased in the colony, & appointed A. his attorney to take out administration to the estate in England. Upon motion for a grant of administration to A. the ct. directed that the next of kin should be cited, & that the usual notice to the Queen's Proctor should be

given; & afterwards, upon one of the next of kin appearing to the citation & consenting, the grant was made as prayed.—*In the Goods of O'BRIEN* (1861), 2 Sw. & Tr. 604; 31 L. J. P. M. & A. 194; 7 L. T. 249; 25 J. P. 360; 164 E. R. 1132.

2433. The Crown—Application on behalf of Administrator-General of colony—Deceased dying intestate & without relation in colony.]—*In the Goods of O'BRIEN*, No. 2432, *ante*.

2434. Executor to whom power reserved—Will proved abroad.]—Testator in his will named five exors., four of whom took probate in Victoria, in which colony testator died, & power so to do was reserved to the fifth:—*Held*: administration with the will annexed could not be granted in this country to the attorney lawfully, constituted of the four exors. who proved the will, unless the fifth exor. had been first duly cited.—*In the Goods of FLETCHER* (1862), 8 Jur. N. S. 572.

D. Effect of Grant.

2435. Attorney represents deceased—Until principles or takes out grant.]—K. being left exor., as his attorney, obtained letters of administration to testator's effects, with the will annexed, for the benefit of K., who never took out probate. K. died, having appointed an exor., & S. took out administration with the will of first testator annexed, & also administration with the will of K. annexed, for the benefit of K.'s exor., till that exor. should himself obtain probate. M. was still living, & the goods of first testator were not duly administered:—*Held*: during the life-time of K. the goods of first testator vested, not in him, but in M., as the personal representative of first testator: but after K.'s death M. ceased to be such representative.—*SUWERKROP v. DAY* (1838), 8 Ad. & El. 624; 112 E. R. 975; *sub nom.* *SEWERKROP v. DAY*, 3 Nev. & P. K. B. 670; 1 Will. Woll. & H. 463; 7 L. J. Q. B. 261.

2436. Liability to be sued—As though administrator in own right.]—A party to whom letters of administration have been granted, as the attorney of the person entitled to the grant, & for the use & benefit of such person, is liable to be sued in respect of the estate by the parties beneficially interested in it, in the same way as if he had obtained letters of administration in his own right.—*CHAMBERS v. BICKNELL* (1843), 2 Hare, 536; 7 Jur. 167; 67 E. R. 222.

Annotations:—Ald. Re Dewell, Edgar v. Reynolds (1858), 4 Drew. 269. *Cond. Eames v. Hason* (1880), 16 Ch. D. 407. *Held. A.-G. v. Köhler* (1861), 9 H. L. Cas. 655; *Re Rendell, Wood v. Rendell*, [1901] 1 Ch. 230.

assets under a will, if valid, made in America, & proved there by the exors., who gave appt. a power of attorney to take the grant, & would, if the will were not valid, be entitled to a moiety the ct. required security for only one moiety.—*In the Goods of SULLIVAN* (1864), 11 L. T. 148.—*IR.*

2431 i. Sufficiency of attorney's authority.]—The attorney under power of an English extrix. applied to have the seal of the ct. affixed to the exemplification of the English probate. The terms of the power were that the attorneys were appointed to apply for & obtain from the proper ct. in Australia or in any division thereof probate of H. or to procure themselves to be constituted as attorneys or legal representatives of H. in Australia:—*Held*: the power was sufficient, & the application granted.—*Re Hewitt's Will* (1898), 33 V. L. R. 499.—*AUS.*

2431 ii. ———.]—An exor. absent from the colony & expected to be absent for a long time, had before his departure executed a power of attorney:—*Held*: the power was sufficiently wide to

justify the ct. in making a grant to the parties named in it on behalf of the exor.—*Re Jones' Estate* (1900), 21 N. S. W. B. 35.—*AUS.*

2431 iii. ———.]—Attorneys under power of an English exor. applied to have the seal of the ct. affixed to an exemplification of the English probate. The power authorised the attorneys to apply for & obtain from the proper ct. in Australia letters of administration limited to the real & personal estate & effects of testator there situate, & procure themselves to be constituted the administrators of the personal estate or the legal personal representatives of testator in Australia:—*Held*: the power was sufficient.—*Re Shannon*, [1915] V. L. R. 64.—*AUS.*

h. — Proof of declaration made before a mayor in England.]—Upon an application for the sealing in Victoria of an exemplification of probate under an English grant, a statutory declaration made before the Lord Mayor of London was tendered in proof of due execution by the English extrixes. of their power of

attorney:—*Held*: the declaration was not admissible, & was not made before a person empowered to take declarations.—*Re Baker*, [1915] V. L. R. 530.—*AUS.*

k. — ———.]—The registrar of probates refused to act upon a power of attorney, on the ground that it was not properly verified by a certificate signed & sealed, in that the mayor of B., England, was not a person or officer before whom such declaration could properly be made for the purposes of the application:—*Held*: the registrar was at liberty to act upon the power of attorney so verified, although he was not necessarily bound to do so.—*In the Will of Halfrey*, [1918] V. L. R. 354.—*AUS.*

PART II. SECT. 12, SUB-SECT. 8.—D.

1. Right to distribute assets as an original administrator.]—An attorney who has been authorised to apply to have the seal of the ct. in Victoria affixed to an exemplified copy of the letters of administration, holds the position of an original administrator

2437. — — —.]—*Re* DEWELL, EDGAR v. REYNOLDS, No. 1652, *ante*.

2438. Right to hand over assets to principal.]—The exor. of testator, who was domiciled & died in the United States of America, appointed an agent to collect assets in England. The agent took out letters of administration to testator, & the ct. directed him to pay over the assets he had collected to the exor. in America.—PUTNAM v. POPE (1844), 4 L. T. O. S. 192.

2439. — Though grant limited until principal takes out grant.]—Pending a litigation in a Spanish ct., as to which of two testamentary papers of a deceased Spaniard ought to be established, pltf., who was resident in Spain, was appointed, by the Spanish ct., the judicial administrator of deceased's goods; & pltf., under the authority of that ct., afterwards appointed deft. to be his attorney to recover & receive £10,000 due to deceased's estate from C. & Co., of London. Deft., after litigation, in the Prerogative Ct. of Canterbury, with one of the parties to the Spanish suit, obtained letters of administration to deceased, to be granted to him as pltf.'s attorney, limited to receive the £10,000, until pltf. should obtain administration to deceased. Deft. afterwards received the £10,000:—*Held*: he might safely pay it over to the pltf., although he had not obtained administration to deceased.—*DE VIESCA v. LUBBOCK* (1840), 10 Sim. 629; 59 E. R. 760; *previous proceedings, sub nom.* VIESCA v. D'ARAMBURU (1839), 2 Curt. 277.

Annotations:—*Apld.* Putnam v. Pope (1844), 4 L. T. O. S. 192. *Foll.* Eames v. Hacon (1881), 18 Ch. D. 347. *Refd.* Chambers v. Bicknell (1843), 2 Harc. 536; Edgar v. Reynolds (1858), 27 L. J. Ch. 562.

2440. — Where beneficiaries have not intervened.]—E. having died in Ireland intestate, letters of administration were granted in Ireland to pltf. Part of his assets being in India, pltf. sent out a power of attorney to F. & Co. in India, who procured letters of administration to be granted to them in India for the use & benefit of pltf., received the Indian assets, paid the Indian debts, & remitted the surplus to their agents in England. The Irish letters of administration were sealed in England:—*Held*: the agents in England were bound to hand over the fund to pltf., & could not require the concurrence of the next of kin, they not having taken any legal proceedings to prevent pltf. from receiving the assets.—*EAMES v. HACON* (1881), 18 Ch. D. 347; 50 L. J. Ch. 740; 45 L. T. 196; 29 W. R. 877, C. A.

Annotation:—*Consd.* *Re* Kloebe, Kannreuther v. Gieselbrecht (1884), 28 Ch. D. 175.

2441. — Only where principal legal representative of deceased.]—Letters of administration of the estate of a person who died in England were granted to the attorney of the widow, a resident in America, who was not legal personal representative of deceased in any country:—*Held*: the principal could not give a discharge to the attorney, & the attorney was responsible for the due distribution of the assets.—*Re* RENDELL, WOOD v. RENDELL, [1901] 1 Ch. 230; 70 L. J. Ch. 265; 83 L. T. 625; 49 W. R. 131; 45 Sol. Jo. 78.

2442. Duty to hand over assets.—On principal taking grant.]—Testator died in the East Indies, leaving property in England. His son & exor., L., being in Calcutta, his attorney, J. took out the usual letters of administration & afterwards brought into the registry an inventory, & an

account which showed a large balance. L. having afterwards himself applied for & obtained probate, & J.'s authority being thereby terminated, a proctor appeared for L., & exhibited a special proxy; & the ct., on his petition, granted a monition to J. to pay the balance of the account which had been allowed, to him, the proctor, for the use of his party.—*LUCAS (OTHERWISE JOHN) v. JOHNSON, In the Goods of* LUCAS (1853), 1 Ecc. & Ad. 107; 17 Jur. 1186; 164 E. R. 62.

E. Duration of Grant.

2443. Grant to attorney of several executors—Limited until principal or other executor proves.]—*In the Goods of* BLACK, No. 2421, *ante*.

2444. Termination of grant.—On application by principal.]—*In the Goods of* CASSIDY, No. 2328, *ante*.

2445. — By death of principal.]—*WERB v. KIRBY*, No. 2327, *ante*.

SUB-SECT. 9.—ADMINISTRATION AD COLLEGENDA BONA.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 166.

A. When granted.

2446. To avoid loss by delay—Will abroad—Parties interested consenting.]—Administration granted [all persons apparently interested consenting] limited to certain purposes, of the goods of a party deceased, until his last will, stated by himself a few days before his death to be in India, or an authentic copy thereof, should be transmitted from India to this country.—*In the Goods of* METCALFE (1822), 1 Add. 343; 162 E. R. 121.

Annotations:—*Dist.* *In the Goods of* Wright, [1893] p. 21. *Refd.* Hewson v. Shelley, [1914] 2 Ch. 13.

2447. — Will not forthcoming—Next of kin abroad.]—*In the Goods of* TEPPEL, No. 2480, *post*.

2448. — In custody of foreign court—Pending production of original or exemplification.]—*In the Goods of* BROWN, No. 2605, *post*.

2449. — Will destroyed—Difficulty in ascertaining contents—Parties interested consenting.]—*In the Goods of* WRIGHT, No. 2604, *post*.

2450. — Person entitled abroad.]—*In the Goods of* GUDOLIE (1835), cited in 3 Sw. & Tr. at p. 22; 164 E. R. 1179.

Annotation:—*Consd.* *In the Goods of* Wyckoff (1862), 3 Sw. & Tr. 20.

2451. — Majority of parties interested consenting.]—Upon the death of testator A., the surviving exor., being resident in Sydney, B., who held a general power of attorney to act for A. in this country, sent out to him for execution a special power of attorney to authorise B. to take out administration with the will annexed for A.'s use & benefit, & also a proxy of renunciation, in case he should wish to renounce. The residuary legatee for life was incompetent from senility to take administration; & subject to her interest, B. & others were entitled to the residue. The majority of the persons interested under the will, being desirous that a grant should be made without waiting for the return of the power of attorney or renunciation, the ct. granted administration with the will annexed to B., limited, until such time as A. should apply for probate, or his attorney for administration with the will annexed.—*In the Goods of* LEWIS (1860), 29 L. J. P. M. & A. 94,

so far as the Victorian assets are concerned, & is not the mere agent of the English administrator & is entitled to distribute the Victorian assets to those entitled thereto.—*PARAGGEL v.*

HOLLINGWORTH, [1905] V. L. R. 321.—*AUS.*

m. —.]—An attorney, who has sealed an exemplification of an English

probate, is in the same position in all respects as if an original grant of probate had been made to him.—*Re* WATMOUGH, [1913] V. L. R. 435.—*AUS.*

Sect. 12.—Special and limited grants of administration: Sub-sect. 9, A., B., C. & D.; sub-sect. 10, A.]

2452. — Communication difficult owing to blockade.]—In the Goods of WYCKOFF, No. 1927, ante.

2453: — Persons primarily entitled & within jurisdiction renouncing.]—The widow & next of kin in this country renounced administration, & the estate, which was insolvent, was liable to depreciation if the property, timber, were not at once sold. The ct., under the circumstances, made a grant *ad colligenda bona* to a creditor, the money realised by the sale of the timber, after deduction for wages & charges, & collection of debts, to be paid into the registry, & the next of kin abroad to be at once cited with a view to appt. taking a creditor's grant.—*In the Goods of STEWART* (1869), L. R. 1 P. & D. 727; 38 L. J. P. & M. 39; 20 L. T. 279; 33 J. P. 360.

2454. — .]—In the Goods of SUAREZ, No. 1942, ante.

2455. — .]—Where the keeper of a small shop in London died apparently a bachelor & intestate, & his next of kin who lived in South America had been communicated with but had not yet answered, & it was necessary to sell the goodwill at once, the ct. made a grant *ad colligendum* to a friend, whom deceased had shortly before his death asked to manage his affairs.—*In the Goods of BOLTON*, [1899] P. 186; 68 L. J. P. 63; 80 L. T. 631.

See, also, No. 2480, *post*.

2456. — Persons entitled infants or abroad.]—A domiciled Italian died intestate, leaving in London a child whom he had formally declared, in accordance with the law of Italy, to be his lawful child. Deceased, who left two brothers & a sister resident abroad, was possessed of certain property in this country, some of it being of a perishable character. Upon the application of the Italian Vice-Consul the ct. made a grant to him *ad colligenda bona*.—*In the Goods of MIGAZZO* (1894), 70 L. T. 246; 6 R. 571.

2457. When next of kin refuses to take grant.]—In the Goods of RADNALL, No. 2473, *post*.

2458. Uncertainty as to person entitled.]—A woman having died intestate without any known relatives, & it being impossible to ascertain whether she had ever been married, or, if married, whether her husband survived her, the ct. made a grant *ad colligendum* to an unsecured creditor, & accepted the affidavit of his solr. that "he was informed & verily believed that she died a widow without any known relations, & intestate."—*In the Goods of ASHLEY* (1890), 15 P. D. 120; 59 L. J. P. 72.

2459. Heir-at-law unknown—Assets chiefly real estate.]—A married woman who owned certain farms made a will, by which she left her real estate to her husband for life, with remainder to her natural daughter absolutely, & all her personal estate to her husband, whom she appointed exor. Her natural daughter died in her lifetime. Her husband died without proving the will, & administration of his personal estate was granted to his sister as next of kin. It was not known who was the heir-at-law of testatrix. The value of the real estate was £7,088, that of the personal estate £45:—*Held*: on an application by the administratrix of the husband, for a grant of administration of the real & personal estate of testatrix, having regard to Land Transfer Act, 1897 (c. 65), s. 2 (4), the heir-at-law not having been cited, a general grant ought not to be made, but the appt.

might take a grant *ad colligendum*, which would enable her to let & manage the farms, till the heir-at-law could be cited.—*In the Goods of ROBERTS*, [1898] P. 149; 67 L. J. P. 71; 78 L. T. 390.

Grants limited until production of will.]—See Sub-sect. 12, *post*.

B. To Whom granted.

2460. The Crown.]—Administration of the effects of a citizen of the United States of America, dying intestate in this country, *in itinere*, limited for the purpose of paying his debts, etc., & transmitting the balance to the Treasury of the United States, refused to the American Consul, upon the non-appearance of any next of kin of deceased, the Crown opposing the grant.—*ASPINWALL v. QUEEN'S PROCTOR* (1839), 2 Curt. 241; 163 E. R. 398.

Annotation:—Refd. In the Goods of Wyckoff (1862), 3 Sw. & Tr. 20.

2461. —.]—In the Goods of WYCKOFF, No. 1927, ante.

See, also, No. 2481, *post*.

2462. Creditor—Paying funeral expenses—Indorsee of bills & correspondent of deceased.]—In the Goods of GUDOLLE (1835), cited in 3 Sw. & Tr. at p. 22; 164 E. R. 1179.

Annotation:—Expld. & Distd. In the Goods of Wyckoff (1862), 3 Sw. & Tr. 20.

2463. —.]—In the Goods of CLARKINGTON, No. 2475, *post*.

2464. —.]—In the Goods of STEWART, No. 2453, ante.

2465. —.]—In the Goods of ASHLEY, No. 2458, ante.

2466. Consul of deceased's national state.]—*ASPINWALL v. QUEEN'S PROCTOR*, No. 2460, ante.

2467. —.]—In the Goods of MIGAZZO, No. 2456, ante.

2468. Attorney under general power of surviving executor.]—In the Goods of LEWIS, No. 2451, ante.

2469. Shipowner—On whose ship deceased died.]—In the Goods of WYCKOFF, No. 1927, ante.

2470. Presumed executor—Will not forthcoming.]—In the Goods of TEPPER, No. 2480, *post*.

2471. Accountant—In possession of books of deceased's firm.]—In the Goods of SUAREZ, No. 1942, ante.

2472. Friend of deceased—Requested by deceased to manage affairs.]—In the Goods of BOLTON, No. 2455, ante.

C. Form of Grant.

2473. Powers limited according to circumstances of case.]—When a sole next of kin refuses to take administration the ct. on cause shown will decree letters *ad colligendum bona defuncti* limited according to the special circumstances of the case.—*In the Goods of RADNALL* (1824), 2 Add. 232; 162 E. R. 278.

Annotation:—Expld. In the Goods of Cookson (1841), 5 Jur. 1041.

2474. Special limitations—Sale of ship & protection of cargo.]—*Re WHITE* (1832), cited in *Tristram & Coote's Probate Practice*, 15th ed., at p. 173.

2475. — Renewal of lease—Sale of business & power to carry on refused.]—The ct., under special circumstances, made a grant to a creditor *ad colligenda bona*, limited to collect the personal estate of deceased, to give receipts for his debts on the payment of the same, & to renew the lease of his business premises which would expire before a general grant could be made. The ct. refused to include in the grant a power to dispose of the lease & goodwill of the business, or a power to

carry on the business.—*In the Goods of CLARK-INGTON* (1861), 2 Sw. & Tr. 380; 7 L. T. 218; 8 Jur. N. S. 84; 10 W. R. 124; 164 E. R. 1043.
Annotation:—Expld. In the Goods of Wyckoff (1862), 32 L. J. P. M. & A. 214.

2476. — Realisation of assets—& investment.]—*In the Goods of WYCKOFF*, No. 1927, *ante*.

2477. — Balance to be brought into registry.]—Deceased, who was a Prussian subject resident in this country, died a bachelor & intestate, without any known relations. He carried on the business of a schoolmaster, & an offer was made for the purchase of the goodwill of the school if possession were given forthwith. The ct., in these circumstances, made a grant *ad colligenda bona* to a creditor, with power to dispose of the goodwill of the school, but directed that the administrator should bring into the registry the proceeds of the sale after deduction of expenses & his taxed costs of obtaining the administration.—*In the Goods of SCHWERDTFEGER* (1876), 1 P. D. 424; 45 L. J. P. 46; 34 L. T. 72; 40 J. P. 136; 24 W. R. 298.

Annotation:—Folld. In the Goods of Bolton, [1899] P. 186.

2478. — — — — —.]—*In the Goods of BOLTON*, No. 2155, *ante*.

2479. — Payment of charges—Balance to be brought into registry.]—*In the Goods of STEWART*, No. 2453, *ante*.

2480. — Directions as to certain payments.]—Deceased was supposed to have made a will, appointing his cousin his exor., but at his death it could not be found. His brother, the sole next of kin, had been absent in Australia for forty years, & a representative was urgently needed to carry on the business, to collect the debts, & to represent deceased in a Chancery suit. The ct. made a grant *ad colligenda* to deceased's cousin for the use & benefit of the next of kin, with special directions to make certain payments.—*In the Goods of TEPPER* (1872), 25 L. T. 853; 36 J. P. 169.

2481. — Payment of pressing claims—Taking accounts—Sale of business.]—Under a grant *ad colligenda bona* made to the Solr. to the Treasury, the ct. gave leave to the administrator to pay all pressing claims for rent, rates, & taxes, to take the accounts of the manager of intestate's business, & to dispose of the business. *Qu.*: whether such a grant does not, of itself, confer an implied authority upon the administrator to perform such acts without special leave.—*In the Goods of ODDY* (1890), 62 L. T. 643.

D. Effect of Grant.

2482. Powers of administrator—Apart from official directions in grant—Settlement of claims—& disposal of business.]—*In the Goods of ODDY*, No. 2481, *ante*.

2483. Vesting of property—Property authorised to be sold.]—Upon the death of the tenant of certain premises deft. was appointed administrator *ad colligenda bona*, & was empowered by the ct. to sell the lease. Deft. entered upon the premises & endeavoured to sell the lease, but without success. Rent subsequently became due & deft. having failed to pay the amount, the landlord brought an action against him to recover possession of the premises under a forfeiture clause in the lease, & for the rent in arrear & mesne profits. Judgment for possession was given under R. S. C.,

Ord. 14, but deft. retained possession for some time after the date of the judgment:—*Held*: the grant to deft., coupled with the power of sale, vested the lease in him in the same way as if he had been an exor. under a will, subject to being divested if a permanent administrator should be appointed, & he was therefore liable for rent & mesne profits from the date of the order up to the date when he gave up possession.—*WHITEHEAD v. PALMER*, [1908] 1 K. B. 151; 77 L. J. K. B. 60; 97 L. T. 909; 24 T. L. R. 41; 52 Sol. Jo. 45.

SUB-SECT. 10.—ADMINISTRATION AD LITEM AND REPRESENTATION OF DECEASED PARTIES.

See, now, R. S. C., Ord. 10, r. 46; Administration of Estates Act, 1925 (c. 23), s. 17; Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), ss. 103, 106.

A. Jurisdiction to grant.

2484. Under Chancery Amendment Act, 1852 (c. 86), s. 44—Estate of deceased being administered in suit.]—The above sect. does not apply to the case where the estate to which it is desired to appoint a representative is the estate being administered by the ct.—*SILVER v. STEIN* (1852), 1 Drew. 295; 21 L. J. Ch. 312; 61 E. R. 465.

Annotations:—Distd. Ashmall v. Wood (1855), 4 W. R. 60. *Reid. James v. Aster* (1856), 27 L. T. O. S. 33; *Macleod v. Dawson* (1859), 27 Beav. 21; *Curtius v. Caledonian Fire & Life Insce.* (1881), 30 W. R. 125.

2485. — — — — —.]—Where one of two trustees of an estate which was being administered in ct. died intestate, & as was alleged, insolvent, after a decree for an account against himself & his co-trustee, & after the certificate made in pursuance thereof had been settled by the chief clerk, except in some formal particulars:—*Held*: the proceedings ought to be carried on in the absence of a representative of his estate, although considerable balances were proved to be due from the trustees, & although one of the parties having the conduct of the cause was entitled to take out representation to deceased trustee.

I have frequently to consider that section in chambers, & have always held that that section does not apply in the three following cases: first, where the estate of deceased person is that which is being administered in the suit; secondly, where the interest of deceased person is adverse to that of plff.; thirdly, where the representative of deceased person has active duties to perform (*LORD ROMILLY, M.R.*):—*MOORE v. MORRIS* (1871), L. R. 13 Eq. 139; 41 L. J. Ch. 161.

2486. — Where representation entails liability.]—The person who would be appointed administrator *ad litem* is the most proper person to be nominated under above sect. to represent deceased party who has no personal representative. This enactment extends even to those cases where the party interested is sought to be made liable.—*ELY (DEAN & CHAPTER) v. GAYFORD* (1853), 10 Beav. 561; 51 E. R. 806.

Annotations:—Reid. Edwards v. Batley (1854), 19 Beav. 457; *Joint Stock Discount Co. v. Brown* (1869), L. R. 8 Eq. 376; *Johnston v. Hodgson* (1873), 21 W. R. 779.

2487. — — — — —.]—In Feb. 1866, F., a registered holder of shares, transferred them to S., & the transfer was lodged at the office for registration, but was not registered. On Mar. 3, 1866, the

PART II. SECT. 12, SUB-SECT. 10.—A.

n. Where estate small.]—It is competent to the ct., to appoint or displace with an administrator *ad litem*, & direct an account; but to

justify such order it should appear that the estate was small, & a statement showing the nature & amount of the personal estate ought to be produced & verified.—*Re COLTON, FISHER v. COLTON* (1880), 8 P. R. 542.—*CAN.*

o. — — — — —.]—If it appears that there is no personality, or personality of such trifling amount as will not suffice to answer the claim made in respect of deceased's real estate in respect of which litigation has been brought or is

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winding-up order was made. In June, 1866, F. attended at chambers & opposed the proposal that his name should be settled on the list of contributories, but did not procure his name to be removed from the register. At that time he was entitled to have his name removed & S.'s name substituted, as if the transfer had been registered in due time. In June, 1867, S. died intestate, & no administration to his estate was taken out. In May, 1869, F. received notice that his name would be included in the final list of contributories.

I cannot appoint a person to represent the estate of S., as has been suggested. To do so would be to make the person so appointed personally liable for calls to the extent of such assets as he might get in. The ct. appoints a legal personal representative under above sect. to bind the estate where the duties are nominal, but never, so far as I am aware, when there is personal responsibility attached to the position (LORD ROMILLY, M.R.).—*Re JOINT-STOCK DISCOUNT CO., FYFE'S CASE* (1869), as reported in 17 W. R. 870; *reversd.* on other grounds, 4 Ch. App. 708, L. J.

Annotations:—*Mentd. Re Hercules Insco., Lowe's Case* (1870), L. R. 9 Eq. 589; *Union Debenture Co. v. Fletcher* (1896), 11 T. L. R. 193; *Re National Bank of Wales, Taylor, Phillips & Rickards' Cases*, [1897] 1 Ch. 298.

2488. ——A sole pltf. died insolvent, & so far as could be ascertained, intestate. On the application of sole deft. for an order appointing a person to represent the estate of pltf., that he, deft., might have an opportunity to move for dismissal of the action in default of due prosecution thereof. The ct. made the order appointing a person to represent deceased pltf.'s estate.

Though the legal personal representative when appointed may be liable for the costs of the action, it does not follow that he can be made to carry on the action; but I think the section enables me to make the order (TRY, J.).—*WINGROVE v. THOMPSON* (1870), 11 Ch. D. 419; 27 W. R. 910.

2489. — Death of party to suit—Not where suit relates to estate to which administration sought.]—This was a claim by the personal representative of a legal mtgee., suing on behalf of himself & all other creditors of the mtgor., to realise the security, & if necessary, to sell the mtgor.'s estate. Defts. were the widow & heirs in gavelkind. There was no personal representative of the mtgor., but a deft. in the interest of pltf. had taken out administration *ad litem*. At the original hearing, the claim was ordered to be amended, by inserting an allegation of a debt being due to pltf., & also by taking out full administration. Meanwhile above Act passed, & pltf., now asked the ct., under above sect., to dispense with a personal representative, alleging the expense & hardship of obtaining one. The Act did not apply, & full administration was absolutely necessary. The Act only applied where a party, already a deft. in a suit, had died, & it was sought to bind his rights, & at any rate it did not apply where the very object of the suit was to administer the estate of deceased person. Here the administrator would have to get in outstanding debts, &

to do other acts which no one but the person having full administration could do. Pltfs. could not proceed without full administration (*per CUR.*).—*GROVES v. LANE* (1852), 16 Jur. 1061; 1 W. R. 31.

Annotation:—*Consd. Dowdeswell v. Dowdeswell* (1878), 9 Ch. D. 294.

2490. — Admitting liability.]—Bill to recover a sum of money in respect of which one deft. was treated as primarily liable, & the other two defts. as secondarily liable only. Deft. alleged to be primarily liable after having, by his answer, admitted his liability to answer pltf.'s demand, died, leaving assets altogether inadequate to meet such demand, & having, by his will, appointed two persons to act as his exors., both of whom declined to prove the will. Pltf. then moved, under above Act, that the ct. would direct the suit to be proceeded with in the absence of any person representing the estate of deceased deft., or appoint some person to represent such estate for all the purposes of the suit. The ct. held, deceased deft. was "a deceased person interested in the matters in question" within the meaning of the Act, & under the circumstances, appointed the persons named in his suit to represent his estate for the purposes of the suit.—*ASHMALL v. WOOD* (1855), 25 L. J. Ch. 23; 26 L. T. O. S. 86; 1 Jur. N. S. 1130; 4 W. R. 110.

2491. — Where deed of deceased settlor disputed.]—Where a party deceased, to whom a personal representative is required, is the settlor of a deed which is disputed, & upon which the suit was founded, the ct. will not, under above sect. appoint a person to represent the estate of such deceased party.—*VACY v. VACY* (1860), 1 L. T. 267.

2492. — Will of deceased in litigation in Probate Court.]—Pending the taking of partnership accounts under a decree, one of the partners died. His will by which he gave his estate to his widow & appointed her sole extrix, was in litigation in the Probate Ct. This ct. declined, under above sect. to appoint the widow to represent the estate in the suit, pending the litigation.—*ROWLANDS v. EVANS* (No. 2) (1863), 33 Beav. 202; 55 E. R. 344; *sub nom.* *ROWLANDS v. EVANS, WILLIAMS v. ROWLANDS*, 3 New Rep. 233.

Annotation:—*Consd. Curtius v. Caledonian Fire & Life Insce.* (1881), 19 Ch. D. 534.

2493. — Interest of deceased adverse to plaintiff.]—*MOORE v. MORRIS*, No. 2485, *ante*.

2494. — Where representation entails active duties.]—*MOORE v. MORRIS*, No. 2485, *ante*.

2495. — Where deceased solely liable as defendant.]—*Re CURTIS & BETTS*, [1887] W. N. 126, C. A.

B. When granted.

Sec. now, R. S. C., Ord. 16, r. 46.

2496. Institution of proceedings—In Chancery.]—An application to continue a certificate of service before a process served on the Royal Exchange had become returnable into ct., rejected. An administration with the will annexed, granted to a creditor, limited to filing a bill in equity.—

impending, administration *ad litem* may be granted, limited to the real estate in question.—*Re WILLIAMS & McKINNON* (1891), 14 P. R. 338.—CAN.

p. Only where expressly conferred by statute—To defend action not yet begun.]—The ct. has no jurisdiction unless expressly conferred by statute to appoint an administrator *ad litem* to defend an action not yet begun.—

Re HOOVER & NUNN (1911), 19 O. W. R. 418; 2 O. W. N. 1215; 5 D. L. R. 731.—CAN.

PART II. SECT. 12, SUB-SECT. 10.—B.

a. Institution of proceedings—Death by negligence—Statutory limitation.]—The facts that, unless administration is granted immediately, the

twelve months allowed by Wrogs Act, 1890, s. 16, will have expired, & that appt., widow of intestate, has been prevented by poverty from applying earlier, are sufficient reasons for granting administration *ad litem*.—*GREENWAY v. MCKAY* (1911), 13 C. L. R. 310.—AUS.

r. — Grounds for refusing grant.]

WOOLLEY & GORDON v. GREEN (1820), 3 Phillim. 314; 161 E. R. 1836.

*Annotations:—***Reid.** *Faulkner v. Daniel* (1843), 3 Hare, 199; *Davis v. Chanter* (1848), 2 Ph. 545; *Maclean & Maclean v. Dawson* (1859), 1 Sw. & Tr. 425.

2497. ———. *J.—A.*, under the impression that he was entitled in his own right to a share in the residue of deceased's estate, assigned it for a sufficient consideration to B. At the time he executed the deed of assignment the share formed part of the estate of his father, to whom he was administrator. On the death of A. the ct. refused to grant administration to the exor. of B. of the estate of the father, limited to A.'s interest in such share, the value of which had been ascertained in the Ct. of Ch., but made such grant as would enable him to institute proceedings in that Ct., & to receive whatever he might be held entitled to by it.—*In the Goods of LONGHURST, BURDON v. MORGAN* (1872), L. R. 2 P. & D. 371; 41 L. J. P. & M. 26; 26 L. T. 405; 36 J. P. 720; 20 W. R. 613.

2498. ———. *Under Fatal Accidents Act, 1846 (c. 93)—Person primarily entitled out of jurisdiction.*—A married woman was killed by an accident, leaving a mother, a husband, & an infant child her surviving. The husband was a mariner, absent from England at the time of the death, & not expected to return for two years. The ct. granted limited administration to the mother for the purpose of enabling her to bring an action against the persons by whose negligence the death was alleged to have been caused, within the twelve months limited by above Act, for the commencement of such actions.—*In the Goods of WILLIAMS* (1859), 23 J. P. 519.

2499. *Substantiation of proceedings.—In Chancery.*—The ct. will grant, to the agent of a foreign prince, an administration limited to substantiate proceedings in Chancery; but will not extend it to the receipt of a debt, without a power of attorney from the proper authorities.—*In the Goods of HESSE (ELECTOR)* (1827), 1 Hag. Ecc. 93; 162 E. R. 518.

*Annotations:—***Reid.** *Faulkner v. Daniel* (1843), 3 Hare, 199; *Davis v. Chanter* (1847), 10 L. T. O. S. 477.

2500. ———. *Mere averment of interest sufficient.*—B. filed a bill in Chancery against C., D., & E., the trustees & exors. under a Scottish probate & confirmation of the will of F., deceased, to set aside as fraudulent a purchase of certain shares in a Scottish co. made by F. from B.'s wife, then a spinster, in 1839. When the bill was filed no part of the estate of F. was in England. To this bill a demurrer, on the ground that a legal personal representative of F. constituted by an English ct. must necessarily be a party to the suit, was allowed & leave given to amend. B. then cited C., D., & E., to take probate or administration, etc., or to show cause why letters of administration limited as the ct. might direct should not be granted to his nominee. C., D., & E., refused to take probate or administration, & contested B.'s right to letters of administration under any

limitation whatever:—*Held*: the ct. in accordance with the practice of the Ecclesiastical Cts., will make such grants limited to substantiate proceedings in Chancery on a mere averment of interest, without in any way considering the merits of the case, & 15 & 16 Vict. c. 86, s. 44, does not apply to cases where the estate to be represented is the very estate to be administered in the suit.—*In the Goods of DAWSON, MACLEAN & MACLEAN v. DAWSON* (1859), 1 Sw. & Tr. 425; 43 L. T. O. S. 53; 164 E. R. 796.

2501. ———. *Preferred to general grant pendente lite.*—D. propounded the will of E., which was opposed by H., one of the next of kin of E., & certain issues in the suit came on for hearing before the ct. & a special jury. Before the jury were sworn, certain terms of compromise were signed by counsel on behalf of both parties; one of which terms was that a Scottish confirmation of the will brought into this ct. by D., should receive the seal of the ct. Subsequently, the parties being unable to agree as to the meaning & effect to be given to the terms of compromise, D. moved to have the confirmation sealed & delivered out to him; the ct. refused to give effect to one of the terms of the compromise, the parties being unable to agree as to the rest, but held that D. was entitled to take out the confirmation unsealed. H. then filed a bill in Chancery for administration of E.'s estate, etc.; a demurrer to this bill for want of parties was allowed. The estate of E. was also alleged to be vested in trustees by a certain sequestration under Scotch Bankruptcy Acts. H. now moved for administration with the will annexed, *pendente lite*, or for administration limited to substantiate the proceedings in Chancery:—*Held*: the nominee of H. would be entitled to a grant of the latter description.—*HAWARDEN (VISCOUNTS) v. DUNLOP* (1862), 2 Sw. & Tr. 614; 31 L. J. P. M. & A. 180; 7 L. T. 251; 26 J. P. 695; 164 E. R. 1130.

2502. ———. *Date of death of deceased uncertain.*—A. was not heard of from Dec. 1846. More than seven years afterwards, namely, in Sept. 1854, he would, if alive, have become entitled, by the death of a relative, to a share in her residuary personal estate. This share had, in his absence, been paid into the account of the Accountant-General of the Ct. of Ch., who, it was stated, was prepared to pay it to A.'s administrator. A. had no other property in this country. The ct. declined to make a general grant of administration to A.'s brother, on the ground that A. must be presumed to have died before the death of his relative, but made a grant limited to substantiate proceedings in the Ct. of Ch.—*In the Goods of TURNER* (1864), 3 Sw. & Tr. 476; 33 L. J. P. M. & A. 180; 10 Jur. N. S. 708; 164 E. R. 1300.

*Annotation:—***Expld.** *In the Goods of Tucker* (1861), 3 Sw. & Tr. 585.

2503. *Carrying on particular suit—& receipt of fund in court.*—General letters of administration cannot be granted to a person having an interest

—*MEIR v. WILSON* (1889), 13 P. R. 33.—**CAN.**

s. ———.—*Ptff.* claimed from deft. a sum of money, part of which had been deposited by P. & part by ptff., but all in the name of B., a non-existent person. P. died intestate before this action was brought, & no administration to his estate having issued, ptff. applied for the appointment of administrator *ad litem*. The ct. refused to make an appointment.—*FORD v. LAMOND BANKING & LOAN CO.* (1889), 13 P. R. 210.—**CAN.**

t. ———.—*The only living*

issue & heir-at-law of an intestate brought an action to set aside, on the ground of undue influence, a transfer of property made by intestate to deft.; & now applied for an order appointing him administrator ad litem of deceased:—Held: the order could not be made in the case of a ptff. who without right or title has commenced an action & then seeks to legalise his illegal act by an order of the ct.—FAIRFIELD v. ROSS (1902), 23 C. L. T. 413; 4 O. L. R. 534; 1 O. W. R. 631.—**CAN.**

a. Carrying on particular suit—Where deceased had substantial interest.—

The ct. will not appoint an administrator *ad litem* of a deceased party to a suit where deceased had a substantial interest in the suit. The suit must be revived.—*HANK v. MONTREAL v. WALLACE* (1860), 1 Ch. Ch. 261.—**CAN.**

b. ———. Death of party before judgment.—Recovery of costs from deceased's estate.—*Ptff.* died after argument of an appeal. The ct. was not informed of the death, & gave judgment dismissing the appeal with costs:—*Held*: defts. were entitled to have an administrator *ad litem* appointed to represent ptff.'s estate in order that the costs

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only in part of the effects of deceased; but the grant must be limited to that part.

A., whose interest in the effects of deceased intestate was confined to a particular fund, presented a petition to the Ct. of Ch. for the purpose of obtaining a transfer thereof to him. The person entitled to general letters of administration refusing to apply for them, letters of administration in the usual form, limited to the purpose of appearing upon & supporting the petition, were granted to A.'s nominee. The Lords Justices declining to order the transfer of the fund to A.'s nominee, on the ground that the limited administration did not entitle him to receive the fund, the ct. amended the grant by extending it also to the fund, the subject matter of the petition; but refused to grant general letters of administration.—*In the Goods of DODGSON* (1859), 1 Sw. & Tr. 259; 28 L. J. P. & M. 116; 5 Jur. N. S. 252; 164 E. R. 719.

2504. Revival of proceedings—Defendant dying abroad—Executors proving will abroad only.]—If deft., having an interest in the estate of a testator, which is being administered in this ct., dies abroad, & his exors. prove the will at the place of his death, but refuse to prove it in England, this ct., under the 15 & 16 Vict. c. 86, will order a representative to be appointed, that the suit may be revived.—*BLISS v. PUTNAM* (No. 2) (1860), 29 Beav. 20; 30 L. J. Ch. 38; 7 Jur. N. S. 12; 54 E. R. 532.

Annotation:—Distd. Rowlands v. Evans, Williams v. Rowlands (1863), 3 New Rep. 233.

2505. Revival & substantiation of proceedings.]—F. died in 1836, leaving a will & one codicil, & therein appointed three exors. & residuary legatees in trust. Two renounced, & the third took probate, but died in 1853, intestate. All the residuary legatees named in the will & codicil then renounced except T., & on his being cited & not appearing a grant *de bonis non*, will annexed, was made to K., as a creditor. He died in 1858, leaving personalty of F. unadministered. F. was indebted to his co-trustees of the marriage settlement of D. in respect of certain trust moneys misappropriated by him, which had been the subject of certain proceedings in Chancery. By indenture of Dec. 28, 1860, the exors. of the surviving trustee agreed with the persons beneficially entitled to the trust fund to transfer all their right & title to sue, etc., on receiving discharges from such persons; & the ct., on T. being cited & not appearing, granted to the nominee of the assignees of the exors. of the surviving trustee administration *de bonis non*, will annexed, of F., limited to revive & substantiate the proceedings in Chancery.—*DAY v. THOMPSON, In the Goods of FRAMPTON* (1863), 3 Sw. & Tr. 169; 32 L. J. P. M. & A. 183; 8 L. T. 701; 27 J. P. 712; 9 Jur. N. S. 755; 164 E. R. 1238.

2506. In foreclosure proceedings—Deceased second mortgagee.]—*NEAL v. BARRETT*, [1887] W. N. 88.

2507. — Deceased member of class of defendants.]—*SCOTT v. STREATHAM & GENERAL ESTATES CO., LTD.*, [1891] W. N. 153.

2508. — Deceased mortgagor.]—Deft. to a foreclosure action died insolvent before foreclosure absolute; there was no legal representative of his estate; an order was made in chambers appointing one of his next of kin to represent his estate for the purposes of the action. The ct. refused to make the foreclosure absolute in the absence of a properly constituted representative of the mtgor.—*AYLWARD v. LEWIS*, [1891] 2 Ch. 81; 64 L. T. 250; 39 W. R. 552.

2509. On originating summons—Construction of will.]—Where on a summons to construe a will a question was raised as to who was entitled to the residue, & it was sought to appoint some one to represent the estate of deceased alien enemy claimant, who might have been entitled, & the Public Trustee had refused to be so appointed, on the ground that he had no power to act in such capacity, the ct. applying R. S. C., Ord. 16, r. 46, appointed the first deft. on the summons to represent the estate of deceased alien enemy, who had died in 1915, leaving a will, of which no probate had been granted in England.—*Re RAPHAEL, WARBURG v. RAPHAEL* (1916), 61 Sol. Jo. 99.

C. To Whom granted.

2510. Under Chancery Amendment Act, 1852 (c. 86), s. 44—Person who would have been appointed administrator ad litem.]—*ELY* (DEAN & CHAPMAN) v. GAYFORD, No. 2486, *ante*.

2511. — Must be a person willing to act.]—The ct. cannot, under above sect. appoint a person to represent the estate of a deceased person who is not willing to act.—*HILL v. BONNER* (1858), 20 Beav. 372; 7 W. R. 81; 53 E. R. 941.

2512. — Person without interest in suit.]—A party went to Australia several years ago; but he had not been heard of since. Assuming that he were dead, but had survived testator in the suit, there would be arrears of a fund in ct. to be paid to his personal representative, if appointed:—*Held*: a person who was not interested in the subject matter of the suit might be appointed administrator *ad litem* of the party.—*MORTIMER v. MORTIMER* (1863), 8 L. T. 487; 11 W. R. 740.

Annotation:—Reid. Curtius v. Caledonian Fire & Life Insce. (1881), 30 W. R. 125.

2513. — Sole executrix & universal legatee under disputed will.]—*ROWLANDS v. EVANS* (No. 2), No. 2492, *ante*.

2514. — Counsel appearing on behalf of executor proving will abroad.]—On the hearing of a petition relating to the disposition of a trust fund, it appeared that A. had an interest in it which might be asserted. A. died in the United States, having by his will appointed B. his exor., who proved the will there, but not in this country. Counsel appeared for B. at the hearing. The ct., at the hearing, under above Act appointed B.'s counsel, to represent B.'s estate.—*HEWITSON v.*

of the action & appeal might be recovered.—*GUNN v. HANPKR* (1902), 22 C. L. T. 208; 3 O. L. R. 693; 1 O. W. R. 366.—CAN.

c. — Appointment of unconsenting party.]—It is not a proper practice for a judge when giving judgment after trial to appoint an unconsenting party as administratrix *ad litem* of deceased's estate so as to bind the estate by the judgment, though such appointee is administratrix of deceased's estate in a foreign jurisdiction & has been sued as administratrix.—*ABBOTT v. BROWNS*, [1921]

1 W. W. R. 1188; 16 Alta. L. R. 232; 58 D. L. R. 288.—CAN.

2508 i. In foreclosure proceedings—Deceased mortgagor.]—C. joined his wife in executing a mtge. on her land to a co. & died intestate. The co., about to begin an action on the mtge., desired to have C.'s estate represented for the purpose of claiming against it for any deficiency. No letters of administration had been taken out:—*Held*: it was proper to appoint an administrator *ad litem*.—*Re CHAMBLISS & CANADA LIFE ASSURANCE CO.* (1888), 12 P. R. 649.—CAN.

2508 ii. —.]—In a mtge. action the mtgor. being dead & having left no estate except the equity of redemption sought to be foreclosed, the exor. named in the will of mtgor., which had not been offered for probate, was appointed administrator *ad litem* without security.—*CAMERON v. PHILLIPS* (1889), 13 P. R. 78.—CAN.

PART II. SECT. 12, SUB-SECT. 10.—C. d. (Guardian of infant heirs.)—An order had been made for administration, but before it was filed, administratrix died. No one could be found

TODHUNTER (1852), 22 L. J. Ch. 76; *sub nom.* HEWETSON v. TODHUNTER, 20 L. T. O. S. 153; 1 W. R. 78.

Annotation :—*Reid*. Bliss v. Putnam (1860), 30 L. J. Ch. 38.

2515. — Defendant—On death of plaintiff—Only by consent of parties interested.]—On an application in the Probate Div. by deft. in a Chancery suit for a grant of letters of administration to the estate of pltf. in that suit with a view to wind-up the Chancery suit :—*Held* : (1) an affidavit by the parties interested in the estate & assenting to such a course was necessary; (2) even with an affidavit before the ct. no order could be made without first a certificate under the hand of the judge in the Ch. Div. before whom the suit is pending, which should state that the course proposed was a proper one under the circumstances.—*In the Goods of RICHARDSON* (1876), 35 L. T. 767.

2516. Under R. S. C., Ord. 16, r. 46—Must be person willing to act.]—*Re* CURTIS & BETTS, [1887] W. N. 126, C. A.

2517. — Widow of deceased—Party to action in own right.]—SCOTT v. STREATHAM & GENERAL ESTATES CO., LTD., [1891] W. N. 153.

2518. — First defendant on summons—Summons for construction of will.]—*Re* RAPHAEL, WARBURG v. RAPHAEL, No. 2509, *ante*.

D. When Representation dispensed with.

See, now, R. S. C., Ord. 16, r. 46.

2519. Jurisdiction of court—Deceased illegitimate—Attorney-General already a party.]—The A.-G. does not, as a party in the cause, sufficiently represent the estate of an illegitimate person who died intestate, so as to enable the ct. to dispense with a legal personal representative of such person, duly constituted in the Ecclesiastical Ct., as a party.—*BELL v. ALEXANDER* (1847), 6 Hare, 543; 67 E. R. 1279.

2520. — Interests of deceased defendant & plaintiff identical.]—The Chancery Amendment Act, 1852 (c. 86), s. 44, gives the ct. a discretionary power of proceeding with a suit in the absence of the personal representative of deceased deft., whose interests were identical with those of pltf.—*COX v. TAYLOR* (1853), 1 Eq. Rep. 122; 22 L. J. Ch. 910; 21 L. T. O. S. 123.

Annotation :—*Reid*. Edwards v. Batley (1854), 23 L. J. Ch. 872.

2521. — Foreclosure action by sub-mortgagee—Death of mortgagee.]—A bill of foreclosure was filed by a sub-mtgee.; the mtgee. had died & his representative was not known :—*Held* : the ct. could not, under Chancery Amendment Act, 1852 (c. 86), s. 44, direct the suit to proceed in the absence of a representative of the mtgee. against whose estate a decree was asked.—*BRUITON v. BIRCH* (1853), 1 Eq. Rep. 136; 22 L. J. Ch. 911; *sub nom.* BRUITON v. HUGHES, 21 L. T. O. S. 123.

Annotations :—*Consol.* Band v. Randle (1854), 23 L. T. O. S. 21. *Reid*. Curtius v. Caledonian Fire & Life Insce. (1881), 30 W. R. 125.

2522. — Action by equitable mortgage on life policy—Death of assured.]—*Qu.* : whether, in an action by an equitable mtgee. of a life policy against the assurance co. claiming payment of the policy moneys, the ct. has jurisdiction, under Chancery Amendment Act, 1852 (c. 86), s. 44, to dispense with the legal personal representative of the assured.—*WEBSTER v. BRITISH EMPIRE MUTUAL LIFE ASSURANCE CO.* (1880), 15 Ch. D.

109; 49 L. J. Ch. 769; 43 L. T. 229; 28 W. R. 818, C. A.

Annotations :—*Consol.* Curtius v. Caledonian Fire & Life Insce. (1881), 19 Ch. D. 534. *Mentl.* L. C. & D. Ry. v. S. E. Ry., [1892] 1 Ch. 120; *Re* Drax, Savile & Drax, [1903] 1 Ch. 781.

2523. — —.]—In an action by an equitable mtgee. of a policy of insurance against the insurance co., for payment of the policy money the ct. has jurisdiction under Court of Chancery Amendment Act, 1852 (c. 86), s. 44, to dispense with a legal personal representative of the assured where none exists. In a case where the mtgee. debt was larger than the policy money, & the estate of the assured was insolvent :—*Held* : the jurisdiction to dispense with the personal representative was rightly exercised.—*CURTIS v. CALEDONIAN FIRE & LIFE INSURANCE CO.* (1881), 19 Ch. D. 534; 51 L. J. Ch. 80; 45 L. T. 602; 30 W. R. 125, C. A.

2524. Exercise of jurisdiction—Deceased a trustee—Active duties requiring to be performed.]—The ct. will not, under 15 & 16 Vict. c. 86, s. 44 dispense with the personal representative of a trustee, where such personal representative has necessarily active duties to perform in the execution of the trust.—*FOWLER v. BAYLDON* (1853), 9 Hare, App. II., lxxxviii.; 68 E. R. 802.

Annotation :—*Reid*. Curtius v. Caledonian Fire & Life Insce. (1881), 51 L. J. Ch. 80.

2525. — Sole property of deceased interest under trust funds.]—A claim for the appointment of new trustees allowed to proceed in the absence of a personal representative of a deceased person, where such person had an interest in the trust funds in the event of the death of his child, infant pltf., under twenty-one, but had died indebted, & without any other property.—*MAGNAY v. DAVIDSON* (1853), 9 Hare, App. II., lxxxii.; 1 W. R. 212; 68 E. R. 804.

2526. — Solicitors of deceased authorised to receive debt.]—A personal representative of a deceased party, entitled to a small sum of money, not dispensed with, under 15 & 16 Vict. c. 86, s. 44 by enabling the solicitors of the deceased party to receive such sum.—*RAWLINS v. MCMAHON* (1852), 1 Drew. 225; 9 Hare, App. II., lxxxii., n.; 61 E. R. 437.

2527. — Death of plaintiff after judgment—Administration suit.]—A tenant for life, the sole pltf. in an administration suit, died after decree, an arrear of income remaining due to him. He left a will, appointing an exor.; but the exor. died without proving the will. The ct., on the application of one of defts., made an order to revive the suit against the other defts., without any representative of original pltf., but without prejudice to any application by a personal representative of original pltf. to intervene.—*HAYWARD v. PILE* (1872), 7 Ch. App. 634; 41 L. J. Ch. 778; 26 L. T. 900; 20 W. R. 736, L. J.

Annotation :—*Mentl.* Maddy v. Hale (1876), 3 Ch. D. 327.

2528. — — Before taxation of costs.]—ASPDEN v. SEDDON, [1877] W. N. 207.

2529. — Death of defendant—Joined for purpose of being present at account.]—In a suit for account against a trustee the ct. on death, before replication or notice of motion for decree, of a deft., who was tenant for life of one share of the trust property, made an order, *ex p.*, to continue the suit without any personal representative of deceased.—*TWYNAM v. PORTER* (1869), 21 L. T. 351.

2530. — — One co-defendant—After

willing to administer the estate, which was insolvent. The ct. therefore appointed an administrator *ad litem* the person who had been guardian of the infant heirs of intestate, he having also been solr. for the administratrix

in her lifetime.—*Re* TOBIN, COOK v. TOBIN (1873), 6 J. R. 40; 9 C. L. J. N. S. 191.—*CAN.*

Sect. 12.—Special and limited grants of administration: Sub-sect. 10, D., E., F. & G.; sub-sect.

hearing & before decree.—Where, after the hearing of a cause, but before the decree was entered, it was discovered that deft. had died abroad intestate before the hearing, & had no personal representative, a statement was inserted in the decree under Chancery Amendment Act, 1852 (c. 86), s. 44, that the ct. proceeded in the absence of any personal representative of deft.—*RÜCKER v. SCHOLEFIELD* (1862), 1 New Rep. 180; 7 L. T. 504.

2531. — One co-trustee—After decree for account & certificate.—*MOORE v. MORRIS*, No. 2485, *ante*.

2532. — Action by equitable mortgagee on life policy—No equitable assignment.—S. having effected two policies on his life for the purpose, as he expressly informed the assurance co., of enabling him to give C. a security for a debt which exceeded the amount of the policies, deposited them with C., at the same time asking him by letter to instruct his C.'s solr. "to prepare the necessary assignment." C., however, never took any assignment. S. died insolvent, having made a will appointing exors., but no representation was taken out of his estate. C. then gave the co. notice in writing of the death, & that he held the policies as security for his debt, & the co. acknowledged the receipt of the notice in the terms of 30 & 31 Vict. c. 144, s. 6. Proper evidence of S.'s death having been subsequently produced to the co., they wrote to C. that the claim under the policies would be paid at the expiration of three months, but that the assent of S.'s legal personal representative would be required before settlement. After the expiration of the three months C., being unable to obtain payment of the policy moneys, although his debt was admitted by S.'s exors., & he offered the co. an indemnity, brought an action for that purpose against the co., insisting that S.'s deposit & letter constituted an equitable assignment of the policies within 30 & 31 Vict. c. 144, s. 6, & therefore enabled him to give a valid discharge for the moneys:—*Held*: (1) there had been no equitable assignment of the policies within the Act, & the co. were justified in refusing to pay him in the absence of S.'s legal personal representative; (2) payment of the policy moneys should be made to pltf. after deducting the co.'s costs, the legal personal representative being dispensed with under the power given to the ct. by Chancery Amendment Act, 1852 (c. 86), s. 44; (3) also payment should be made by the co. of interest at 4 per cent. from the day which had been fixed by them for the payment of the principal.—*CROSSLEY v. CITY OF GLASGOW LIFE ASSURANCE CO.* (1876), 4 Ch. D. 421; 40 L. J. Ch. 65; 36 L. T. 285; 25 W. R. 264.

Annotations:—As to (2) *Follid. Webster v. British Empire Mutual Life Assoc.* (1880), 15 Ch. D. 169. *Consid. Curtius v. Caledonian Fire & Life Incoe.* (1881), 51 L. J. Ch. 80. As to (3) *Consid. Webster v. British Empire Mutual Life Assoc.* (1880), 15 Ch. D. 169. *Reid. Re Rosier's Trusts* (1877), 37 L. T. 426.

E. Effect of Grant.

2533. On rights of persons entitled to general grant—Right to cæterorum grant.—An administration, limited to substantiate proceedings in Chancery, which was decreed, on the next of kin being cited & after due inquiries for a will, & was

long after, directed to be redelivered out, & the exors. who might have taken a *cæterorum* probate condemned in costs.—*HARRIS & WIGGINS v. MILBURN* (1828), 2 Hag. Ecc. 62; 162 E. R. 785.

Annotations:—*Consid. In the Goods of Currey* (1846), 5 Notes of Cases, 54. *Reid. Davis v. Chanter* (1848), 2 Ph. 545; *Dowdeswell v. Dowdeswell* (1878), 38 L. T. 828. *Mentid. Faulkner v. Daniel* (1843), 3 Hare, 109; *Hewson v. Shelley*, [1915] 2 Ch. 13.

2534. ——*In the Goods of CURREY*, No. 1218, *ante*.

2535. ——A. covenanted with a person to pay £500 for the benefit of J. & R., & afterwards died. In order to obtain payment of that sum a suit was instituted by J. & R. against the devisees of the real estate of A., & against D., who was the personal representative of the covenantor, & who had also procured a grant of letters of administration to the effects of A., limited for the purposes of this suit. The objection, that there was not a sufficient representation to the estate of A. was held good, the ct. being of opinion that general letters of administration might have been procured by plffs.—*ROBINSON v. BELL* (1847), 1 De G. & Sm. 630; 17 L. J. Ch. 3; 10 L. T. O. S. 263; 11 Jur. 1049; 63 E. R. 1227.

Annotations:—*Reid. Johnston v. Hodgins* (1873), 21 W. R. 779; *Dowdeswell v. Dowdeswell* (1878), 9 Ch. D. 294.

2536. Whether right to receive funds included.—*BRANT v. KING* (1829), cited 2 Ph. at p. 551.

Annotations:—*Reid. Faulkner v. Daniel* (1843), 3 Hare, 199; *Davis v. Chanter* (1848), 2 Ph. 545.

2537. — Decree against administrator ad litem binds general representative.—The grant of letters of administration *ad litem* makes the grantee complete representative of the estate to the extent of the authority which the letters purport to confer, & a decree obtained against such grantee is therefore binding upon any one who may afterwards take out general administration to the estate.—*DAVIS v. CHANTER* (1848), 2 Ph. 545; 15 Sim. 300; 17 L. J. Ch. 297; 10 L. T. O. S. 477; 41 E. R. 1054, L. C.; *reusg.* (1846), 15 Sim. 93.

Annotations:—*Distid. Groves v. Lane* (1852), 16 Jur. 1061.

Consid. Dowdeswell v. Dowdeswell (1878), 9 Ch. D. 294. *Reid. Hunt v. Peacock* (1847), 16 L. J. Ch. 497; *Robinson v. Bell* (1847), 1 De G. & Sm. 630; *Ashmall v. Wood* (1855), 25 L. J. Ch. 23; *Maclean & Maclean v. Dawson* (1859), 1 Sw. & Tr. 425.

2538. ——Moneys found due to the estate of a deceased person will not be paid over to the representative appointed under 15 & 16 Vict. c. 86, s. 44, but will be carried over to a separate account.—*BYAM v. SUTTON* (1855), 19 Beav. 640; 52 E. R. 501.

2539. ——*In the Goods of DODGSON*, No. 2503, *ante*.

2540. Whether sufficient representation to deceased.—*ROBINSON v. BELL*, No. 2535, *ante*.

2541. ——Administration *ad litem* held sufficient to represent testator's estates in a suit seeking to establish a specific lien on his shares in a co., which had been possessed by defts., his Scottish exors. & residuary legatees, & who had received assets more than sufficient to answer all claims on testator's estate.—*MACLEAN v. DAWSON* (No. 3) (1859), 27 Beav. 369; 33 L. T. O. S. 312; 5 Jur. N. S. 1091; 54 E. R. 145.

2542. ——In a suit against the surviving trustee of a settlement to make him personally liable for part of the trust funds, which he alleged had been received by the deceased tenants for life, who were unrepresented before the ct.:—*Held*: administration to their estates limited to

PART II. SECT. 12. SUB-SECT. 10.—E.

2536 I. Whether right to receive funds included.—After judgment for pltf., deft. having died, pltf. was appointed receiver of the interest of deft. in an

estate; another person was appointed administrator *ad litem* of deft.'s estate & added as a deft. Afterwards, administration of deft. was granted by a surrogate ct. to a trusts co.:—*Held*:

the property to which deft. was entitled at the time of his death never vested in the administrator *ad litem*, but vested in the co.—*MOLEAN v. ALLEN* (1898), 18 P. R. 355, *REAR*.

the purposes of the suit was a sufficient representation, & a general administration was not necessary.—*WILLIAMS v. ALLEN* (1802), 4 De G. F. & J. 71; 31 L. J. Ch. 550; 6 L. T. 313; 10 W. R. 512; 45 E. R. 1110, L. JJ.
Annotation:—Reid. Dowdeswell v. Dowdeswell (1878), 9 Ch. D. 294.

2543. —.]—Jud. Act has not altered the former practice of the Ch. Ct., which required that for the purpose of general administration of an intestate's estate a general administrator must be before the Ct. Where, therefore, A. commenced a suit to administer an intestate's estate, claiming to be the sole next of kin of intestate & alleging that intestate's estate had been improperly distributed amongst his illegitimate children:—*Held*: an administrator *ad litem* appointed by the Probate Div. for the purpose of being made a party to the suit to substantiate the proceedings therein, did not sufficiently represent intestate's estate for the purposes of the suit.—*DOWDESWELL v. DOWDESWELL* (1878), 9 Ch. D. 294; 48 L. J. Ch. 23; 38 L. T. 828; 27 W. R. 241, C. A.

2544. — In action for account against deceased's executors.]—A bill was filed against the Scottish exors. of a domiciled Scotsman, to set aside a sale to their testator of shares in a Scottish co., & to make them account for the dividends received by testator thereon:—*Held*: (1) the suit could not proceed in the absence of a legal personal representative of the testator, duly constituted in England; (2) the objection could not be removed by appointing a person to represent the estate under 15 & 16 Vict. c. 86, s. 44.—*MACLEAN v. DAWSON* (No. 1) (1859), 27 Beav. 21; 33 L. T. O. S. 312; 5 Jur. N. S. 1091; 7 W. R. 354; 54 E. R. 8.

2545. — Foreclosure proceedings—Deceased mortgagor.]—*AYLWARD v. LEWIS*, No. 2508, *ante*.

2546. Whether administrator to be added as defendant.]—*NEAL v. BARRETT*, [1887] W. N. 88.

2547. How far binding.]—Then there are certain special orders, such as R. S. C., Ord. 16, r. 46, which applies to the case of a deceased person interested who has no representative, & empowers the ct. or a judge either to proceed in his absence, or to appoint some one to represent his estate. As I read this rule, it is only when some one has been appointed to represent the estate of the deceased person, that such estate can be bound. "The order so made," in the latter part of the rule, obviously means the order appointing a person to represent the estate (*KAY, J.*).—*MAY v. NEWTON* (1887), 34 Ch. D. 347; 56 L. J. Ch. 313; 56 L. T. 140; 35 W. R. 363.

F. Form of Consequent Orders.

2548. In general.]—When an order is made under R. S. C., Ord. 16, r. 46, it should appear on the face of the order, to render it binding on the estate of a deceased person, either that the ct., having had its attention called to this point, has dispensed with the legal personal representative of the deceased person interested in the matter, or has appointed some person to represent the estate.—*Re RICHESON, SCALES v. HEYHOE* (No. 2), [1893] 3 Ch. 146; 62 L. J. Ch. 708; 69 L. T. 590; 41 W. R. 583; 37 Sol. Jo. 560; 3 R. 643.

Annotations:—Mant. Re Tate, Williamson v. Gilpin, [1914] 3 Ch. 182; *Re Stanley's Settmt. Maddocks v. Andrews*, [1918] 2 Ch. 50.

2549. Where representation dispensed with.]—*RÜCKER v. SCHOLEFIELD*, No. 2530, *ante*.

2550. —.]—*CROSSLEY v. CITY OF GLASGOW LIFE ASSURANCE CO.*, No. 2532, *ante*.

2551. —.]—The order must express that the ct. thought fit under the circumstances to proceed with the hearing of the cause up to the present further consideration in the absence of any such legal personal representative (*HALL, V.-C.*).—*HOBBS v. REID*, [1876] W. N. 95.

2552. Where representation not dispensed with.]—*PEAT v. GOTT*, [1885] W. N. 46.

G. Citation or Notice.

2553. Who must be cited—Next of kin—Not easily ascertainable.]—The beneficial interest of the property is in the next of kin, & the regular course would be to cite them by a personal service; but deceased was a foreigner, & it does not seem easy to ascertain where they are, & delay would be injurious to the proceedings in Chancery (*per CUR.*).—*LINDSAY v. GODMOND* (1841), 5 Jur. 1137.

2554. —.]—Order made under 15 & 16 Vict. c. 86, s. 44, in a creditor's suit for the appointment of a person to represent deceased debtor under an annuity deed, where there was no such representative, upon a motion supported by an affidavit that after payment of incumbrances out of the proceeds of the sale, no surplus would be left, & upon notice being given to debtor's next of kin who were entitled to take out administrations.—*DAVIES v. BOULCOTT* (1860), 1 Drew. & Sm. 23; 8 W. R. 206; 62 E. R. 286.

2555. Notice of order under R. S. C., Ord. 16, r. 46—By advertisement.]—*SCOTT v. SPERATHAM & GENERAL ESTATES CO., LTD.*, [1891] W. N. 153.

SUB-SECT. 11.—GRANTS LIMITED TO SPECIFIC EFFECTS.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 166.

A. In General.

See, now, Probate Rules (Non-Contentious), r. 20; Non-Contentious Probate Rules, 1925, r. 119.

2556. Jurisdiction of court to grant—Whether to part of debt.]—Administration of H.'s goods may be granted to wife or next of kin, or of part to one, & part to the other; but administration of wife's goods must be granted to the husband. Administration cannot be granted of part of entire debt, part to one, & part to another.—*FAWTRY v. FAWTRY* (1692), 1 Salk. 36; 91 E. R. 38; *sub nom. FORTRE v. FORTRE*, Holt, K. B. 42; Show. 351.

2557. —.]—*COSWALL v. MORGAN* (1728), 2 Lee, 571; 161 E. R. 443.

2558. —.]—*In the Goods of CURREY*, No. 1218, *ante*.

2559. Right of general representative to surplus—After claims satisfied.]—*EAMES v. HAGON*, No. 2440, *ante*.

B. When granted.

2560. Strong grounds necessary.]—*In the Goods of WATTS*, No. 2239, *ante*.

2561. Legacy only remaining undistributed.]—*In the Goods of BLOU, INDIGENT BLIND SCHOOL & WESTMINSTER HOSPITAL v. FLACK*, No. 2167, *ante*.

2562. Claimant under Fatal Accidents Act, 1846 (c. 93), abroad.]—*In the Goods of WILLIAMS*, No. 2498, *ante*.

PART II. SECT. 12, SUB-SECT. 11.—A.

a. Jurisdiction of court to grant—When partial intestacy.]—Act No. 230,

authorising the grant of a rule to administer undivided real estate, is applicable to a partial intestacy & in such case a rule will be granted varied in form from that given in the schedule to the Act so as to meet the particular case.—*Re MOORE* (1866), 3 W. W. & A'H. 77.—*AUS.*

Sect. 12.—Special and limited grants of administration: Sub-sect. 11, B., C., D. & E.; sub-sect. 12.]

2563. Creditor insuring life of debtor—Policy made payable to representatives of deceased.]—*PATTESON v. HUNTER*, No. 2589, *post*.

2564. On death of trustee—Where no representative.]—*PEGG v. CHAMBERLAIN*, No. 2568, *post*.

2565. Assets of deceased apart from appointed fund negligible.]—Where the person entitled to a general grant of administration with the will annexed was also an appointee by the same will to a fund of £2,000 in settlement, & the general estate of testatrix, who died insolvent, did not amount to £5, the ct. declined to make a limited grant to the appointee on the suggestion that, by taking a general grant, he rendered himself liable to be harassed with actions by testatrix's creditors.—*In the Goods of SOMERSET (LADY)* (1867), 1 L. R. 1 P. & D. 350.

2566. Deceased possessed of realty dying without heirs.]—*In the Goods of BALI* (1902), 47 Sol. Jo. 120.

See, generally, DESCENT, Vol. XVIII., pp. 31, 32.

C. In respect of What Assets.

2567. Trust funds—Annuity secured by deed.]—A sum had been invested & a deed executed for the purpose of securing an annuity. The trustees were all dead. The surviving exor. of the surviving trustee refused to take probate, or execute a proxy of consent, so as to enable the annuitant to take administration with the will annexed. Administration, limited to the receipt of the annuity, was granted to the annuitant.—*In the Goods of WRIGHT* (1848), 11 L. T. O. S. 47; 12 Jur. 232.

2568. — Limited to interest of grantee—Unless other beneficiaries consent.]—The ct. will grant letters of administration to a *cestui que trust* of a trust fund, limited to that fund, when the trustee in whose name the fund stands is dead & is without a personal representative, the parties entitled to represent deceased trustee having been first cited. When there are several parties interested in the fund, the grant will be limited to the interest of the *cestui que trust* making the application, unless the other *cestuis que trust* assent to the grant extending to their respective interests.—*PEGG v. CHAMBERLAIN* (1860), 1 Sw. & Tr. 527; 2 L. T. 25; 8 W. R. 273; 164 E. R. 844. *Annotations:—Fold.* *In the Goods of Ratcliffe*, [1899] P. 110. *Reid.* *In the Goods of Kingwell* (1899), 81 L. T. 461.

2569. — Appointed by deceased tenant for life—Discretionary grant under Court of Probate Act, 1857 (c. 77), s. 73.]—*In the Goods of PRICE*, No. 1869, *ante*.

2570. — Beneficiary absolutely entitled to corpus of fund.]—Where a *cestui que trust* of a certain fund, after the death of her trustee & of another person who had been appointed exor. under the will of the trustee, became absolutely entitled to the corpus of the fund, the ct., with the consent of all persons interested in the estate, made a grant to the *cestui que trust* to the estate of her trustee, limited to the fund in question.—*In the Goods of RATCLIFFE*, [1899] P. 110; 68 L. J. P. 47; 80 L. T. 170.

2571. Outstanding term of years—Satisfied term.]—The ct. will not enforce a monition to transmit

the original will proved in an inferior jurisdiction, where deceased died, but will grant a limited administration to assign a satisfied term situate in another diocese.—*CROSLY v. SUDBURY* (ARCH-DEACON) (1815), 3 Hag. Ecc. 197; 162 E. R. 1129.

2572. — Mortgage by sub-demise.]—*In the Goods of KINGWELL*, No. 2597, *post*.

2573. Property assigned by deceased—Tradesman's book debts.]—Letters of administration granted to the assignee of deceased tradesman, limited to the book debts specified in the deed of assignment.—*In the Goods of DIXSON* (1864), 10 Jur. N. S. 854.

2574. — For benefit of creditors—No formal conveyance.]—Testator died insolvent, having some few years before executed a deed of assignment for the benefit of his creditors. His exors. renounced, & no one interested under the will would apply for a grant of administration with the will annexed. A personal representative was required for the purpose of conveying certain leaseholds to the trustee of the deed of assignment. The ct. made a grant of administration to the trustee or his nominee, limited to the property to be conveyed, but ordered that the grant should be made with the will annexed.—*In the Goods of BUTLER*, [1898] P. 9; 67 L. J. P. 15; 77 L. T. 376; 46 W. R. 445.

2575. Assets subject to exceptions—Shares of residuary beneficiaries missing or abroad.]—Where there are several parties entitled to shares in the residuary estate of deceased, one of whom is abroad, & has not been heard of for many years, & another is a minor, also abroad, & not likely soon to return, it is the practice of the ct., on consent of the other interested parties, to grant an administration limited to a sum exclusive of those two shares.—*SHOOSMITH v. SAWYER*, *In the Goods of LANSDELL* (1845), 9 Jur. 143.

2576. — Property appointed by will—Will revoked as to testator's own property.]—The will of A., by which he exercised a power of appointment & also disposed of his own personal estate, having been, as to his own estate, revoked by his subsequent marriage, the ct. granted letters of administration of his effects, save as to such of them as he was entitled to appoint by will.—*In the Goods of MASON* (1860), 30 L. J. P. M. & A. 168.

2577. Property within jurisdiction undisposed of by will—English testator dying abroad—Will confined to property abroad.]—A domiciled British subject dying in Norway, having made a will, purporting to be limited to his property in Norway, testator having property likewise in this country, under which his effects in Norway had been administered, the ct. granted a decree citing the legatees in such will to show cause why administration limited to the effects in this country should not be granted to a next of kin.—*In the Goods of HOWARD* (1847), 5 Notes of Cases, 616.

2578. Property specifically disposed of by will—Affidavits that testator possessed no other property.]—*In the Goods of WATSON*, No. 2181, *ante*.

2579. Assets transmitted by foreign administrator—Deceased dying abroad—Discretionary grant under Court of Probate Act, 1857 (c. 77), s. 73.]—*In the Goods of HUGHES*, No. 1868, *ante*.

2580. English assets of deceased domiciled abroad—Passing under decree of foreign court.]—A., a native of & domiciled in Persia, made &

PART II. SECT. 12, SUB-SECT. 11.—C.

1. Trust funds—Subject-matter of power of appointment.]—Where a residuary gift was a good appointment of trust moneys probate in common

form was revoked, & liberty given to the legatee to apply for a grant limited to the real estate & trust moneys, the subject-matter of the power of appointment.—*MURRAY v. CHAMPERNOWNE*, [1901] 2 L. R. 232;

35 L. T. 68.—*IR.*

g. Deceased a foreigner domiciled abroad—Limited to chattels real in Ireland.]—An American subject domiciled & resident in America died

duly executed his will according to Persian law. By the law of Persia, which does not recognise the principle of representation of the estate of a deceased person, his will as well as all his property is taken possession of by the ct., having exclusive jurisdiction in matters of wills, inheritance & succession. This ct. is composed of ecclesiastics called "*Moojateheds*." It is presided over by one of the body, styled the Superior Religious Head & Highest Authority, & his decrees are irrevocable. Neither the original nor any copy of the will is allowed to go out of the possession of the ct. The contents of the will are published by the ct. in the presence of the persons, legatees & heirs, interested in the property of deceased, & a document is given to each, certifying the portion of the property to which he is entitled. Testator died possessed of certain property, funds standing in his name in the books of the Bank of England, & this property was appointed to B., his eldest son, by the Superior Religious Head, who gave a document under his hand & seal certifying that fact: The ct. granted to the duly appointed attorney of B. letters of administration, with the decree of the Persian Court annexed, limited to the property specified in the decree.—*In the Goods of DOST ALY KHAN* (1880), 6 P. D. 6; 49 L. J. P. 78; 20 W. R. 80.

2581. — Allen enemy—Discretionary grant under Court of Probate Act, 1857 (c. 77), s. 73.—*In the Estate of BLUMH*, No. 1872, *ante*.

2582. — — — — ——*In the Estate of MAY*, *In the Goods of BUSCHIE*, No. 1873, *ante*.

2583. Property of married woman—Grant to husband—Limited to property of which she could not dispose of by will—By law of domicile.—*In the Goods of DONOVAN*, No. 1231, *ante*.

2584. — — — — — Marriage before Married Women's Property Act, 1882 (c. 75).—*In the Goods of LEMAN*, No. 1230, *ante*.

2585. — Grant to appointee—Limited to property if she could dispose.—*In the Goods of TRÉFOND*, No. 1232, *ante*.

D. To Whom granted.

See, now, Probate Rules (Non-Contentious), r. 30; Non-Contentious Probate Rules 1925, r. 30.

2586. Beneficiary—Entitled by foreign law—Though minor.—Administration limited to receipt of dividends in the English funds granted to a minor residuary legatee, the wife of a minor, both subjects of & resident in, Portugal, on a certificate being produced, that by the law of Portugal she was entitled.—*In the Goods of DA CUNHA (COUNTESS)* (1828), 1 Hag. Ecc. 237; 102 E. R. 570.

Annotations:—Consd. In the Goods of Earl (1867), L. R. 1 P. & D. 450. *Reid. In the Goods of Veiga* (1862), 32 L. J. P. M. & A. 9.

2587. — — — — ——*In the Goods of DOST ALY KHAN*, No. 2580, *ante*.

2588. — Legacy sole assets remaining undistributed.—*In the Goods of BIOU, INDIGENT BLIND SCHOOL & WESTMINSTER HOSPITAL v. FLACK*, No. 2167, *ante*.

2589. Whether to person entitled to general grant—Discretion of court.—The ct. may, if it think fit, depart from the usual practice of not granting limited administration to a person entitled to a general grant. The district registrars are, by the rules, bound to adhere to such practice. A., a creditor, insured the life of his debtor, but the policy having by mistake been made payable to

the representatives of deceased, the ct. granted administration to A. limited to the policy.—*PATTESON v. HUNTER* (1860), 30 L. J. P. M. & A. 272.

Annotation:—Fold. In the Estate of Von Brentano, [1911] P. 172.

2590. Whether to assignee of official assignee in bankruptcy—Or assignee of assignee.—*In the Goods of COLES, MACNIN v. COLES*, No. 1688, *ante*.

2591. Trustee in bankruptcy of beneficial owner.—*In the Goods of AGNESE*, No. 2245, *ante*.

2592. Controller of clearing house for enemy debts—Deceased enemy alien.—*In the Estate of BLUMH*, No. 1872, *ante*.

2593. — — — — ——*In the Estate of MAY*, *In the Goods of BUSCHIE*, No. 1873, *ante*.

E. Necessity for Citation or Notice.

2594. Representative of residuary legatee—No claim to legacy for many years.—*In the Goods of STEADMAN*, No. 2240, *ante*.

2595. Persons entitled to annuity—Limited grant to nominee.—Administration of intestate's effects, limited to an annuity of which he was sole surviving trustee, the parties entitled being abroad, granted to the nominee of the annuitant, without personal service.—*RIDLEY v. WEATHERLEY* (1848), 6 Notes of Cases, 203.

2596. Executors & residuary legatee of trustee—Limited grant to cestui que trust.—A trust fund in England, over which a widow had a power of appointment, was given by her to her son. The trustee of the fund died in Ireland, & administration to his estate was taken out in Ireland by a creditor, the exor. & residuary legatees named in his will having renounced. The ct. refused to grant administration in England, limited to the trust fund, to a nominee of the *cestui que trust*, without notice to the exors. & residuary legatees of the trustee.—*In the Goods of KEARNEY* (1800), 24 J. P. 471.

2597. Next of kin of mortgagor of leaseholds by sub-demise—Limited grant in respect of outstanding term.—A lessee of certain premises mortgaged them by subdemise for the residue of the term less the last day which he covenanted to hold in trust for the mtgee. The mtgee. entered into possession of the premises. The mtgor. died intestate & insolvent. The mtgee. assigned his interest in the premises. The assignee desired to surrender his interest, but difficulties arose from the existence of the outstanding day. The assignee applied for administration of the estate of the mtgor., limited to the outstanding day:—*Held*: on proof of due citation of the next of kin, the grant might be made as asked for.—*In the Goods of KINGWELL* (1890), 81 L. T. 401.

2598. Next of kin—Grant to sole beneficiary named in will.—*In the Goods of BALDWIN*, No. 1933, *ante*.

SUB-SECT. 12.—GRANTS LIMITED IN TIME.

See, now, Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 166.

2599. Where provisional executor appointed by competent foreign court.—The Ct. of Probate will make a grant to a provisional exor., appointed by the proper ct., of the domicile of deceased, but it will limit it for such time as the appointment by the ct. of domicile remains unrescinded & in force.—*In the Goods of STEIGERWALD* (1864), 10 Jur. N. S. 159.

there intestate, leaving property in America & chattels real in Ireland. The property in America having been

administered by an official administrator appointed by the American Cts. administration was granted to one of

deceased's next of kin, limited to the chattels real in Ireland.—*In the Goods of GRAY* (1901), 35 L. T. 210.—*IR.*

Sect. 12.—Special and limited grants of administration: Sub-sect. 12. Sect. 13: Sub-sects. 1, 2 & 3, A., B. & C.]

2600. Where existence of will uncertain.]—Administration decreed to a widow till a will should appear, in preference to the grant of a simple administration to a brother.—*LLOYD v. LLOYD* (1756), 2 Lee, 321; 161 E. R. 355.

2601. Where original will not available—Grant until will or authentic copy produced.]—*In the Goods of RIOBOO* (1825), 2 Add. 461; 162 E. R. 363.

2602. —.]—The original will being lost & no copy in existence a limited administration with the will, contained in an affidavit, annexed granted to the widow, as extrix. & residuary legatee for life on her giving justifying security.—*VALANCE v. VALANCE* (1828), 1 Hag. Ecc. 693; 162 E. R. 721.

2603. — Original lost after testator's death.]—A will, in existence after testator's death, being accidentally lost & the contents unknown, administration limited till the will be found granted, on justifying securities, to the widow alone with a minor daughter entitled in distribution.—*In the Goods of CAMPBELL* (1829), 2 Hag. Ecc. 555; 162 E. R. 955.

*Annotations:—***Refd.** *In the Goods of Wright*, [1893] P. 21; *Hewson v. Shelley*, [1914] 2 Ch. 13.

2604. — Will stated to have been accidentally destroyed—No evidence of contents.]—On an application for a grant of administration until a lost will could be found, it appeared that testator had duly executed a will, but that it could not be found after his death, & his widow, who refused to attend, & be examined as to its contents, having stated that it had been accidentally destroyed, there was no evidence as to its contents:—**Held:** a grant of administration of the estate & effects of deceased might be made to the only son, with the consent of the other next of kin, limited to dealing with certain specified property, until such time as the will might be forthcoming.—*In the Goods of WRIGHT*, [1893] P. 21; 62 L. J. P. 31; 68 L. T. 25; 41 W. R. 318; 1 R. 476.

*Annotation:—***Refd.** *Hewson v. Shelley*, [1914] 2 Ch. 13.

2605. — Will in custody of foreign court.]—Even where a will is in the possession of a foreign ct. merely for purposes of custody & not for purposes of probate, the ct. here will not admit a notarial copy to probate, but will require the original will or a copy authenticated by the foreign ct.

I will make a grant *ad colligenda* to appct. till the original will or an exemplification can be brought in (*JEUNE, P.*).—*In the Goods of BROWN* (1899), 80 L. T. 360.

2606. Grant limited until foreign judicial administrator obtains administration—Right to hand over assets—Although administration not obtained.]—*DE VIESCA v. LUBBOCK*, No. 2439, *ante*.

Administration durante minore etate.]—*See Sub-sect. 3, ante.*

Administration durante absentia.]—*See Sub-sect. 4, ante.*

Administration durante dementia.]—*See Sub-sect. 5, ante.*

Administration ad colligenda bona.]—*See Sub-sect. 9, ante.*

SECT. 13.—THE ADMINISTRATOR'S BOND.

SUB-SECT. 1.—NECESSITY FOR.

See, now, Administration of Justice Act, 1925 (c. 28), s. 24 (1), (6); Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 187.

2607. General rule.]—The ct. has no power under any circumstances to dispense with an administration bond.

Where security had already been given by appct. as committee in lunacy, the ct. required a bond for one-fourth of the property, with two sureties, each in one-half the amount.—*In the Goods of POWIS* (1864), 34 L. J. P. M. & A. 55.

2608. Particular instances—Public trustee.]—*In the Estate of WOOLLEY*, No. 1906, *ante*.

2609. — Attorney of foreign Sovereign.]—Where a grant of letters of administration was made to the attorney of a reigning sovereign of an estate in this country of a deceased foreign sovereign, the ct. (1) refused to dispense with a bond by the grantee [(2) but dispensed with sureties].—*In the Estate of H.M. CHULALONGKORN, KING OF SIAM* (1912), 107 L. T. 589; 29 T. L. R. 40; 57 Sol. Jo. 61.

2610. — Joint administration pendente lite.]—*In an administration pendente lite* limited to recover certain sums & granted jointly to the nominees of the two parties the ct. will not dispense with a joint bond.—*STANLEY v. BERNES* (1828), 1 Hag. Ecc. 221; 162 E. R. 564.

SUB-SECT. 2.—PARTIES TO BOND.

See, now, Administration of Justice Act, 1925 (c. 28), s. 24 (1); W. N. [1925] 283; Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 167 (1).

2611. Person other than administrator.]—Where a married woman is entitled to administration, & the husband refuses to join in the administration bond, or to assist his wife in obtaining the administration, the ct. will grant the administration to her, allowing a third person to execute the bond for her.—*In the Goods of SUTHERLAND* (1862), 4 Sw. & Tr. 189; 31 L. J. P. M. & A. 126; 26 J. P. 519; 8 Jur. N. S. 465; 164 E. R. 1489.

*Annotation:—***Apld.** *In the Goods of ROSS* (1877), 2 P. D. 274.

2612. — Assets accruing while administrator abroad.]—A. having taken out administration to the goods of deceased went abroad. Subsequently under an order of the Ct. of Ch., a considerable sum became payable to the estate of deceased, & of his brother & sister, who were also deceased. The order could not be passed & entered until the additional duty on these estates had been paid. In the absence of the administrator, who was in Japan, the ct. allowed another person to file an affidavit as to the increase of property, & to execute the bond to cover the increased duty in the place of the administrator, with two sureties, on the understanding that, as soon as possible, the administrator should execute a similar bond.—*In the Goods of ROSS* (1877), 2 P. D. 274; 46 L. J. P. 57; 42 J. P. 8; 25 W. R. 808.

2613. Married woman—Joinder of husband no longer necessary—Married Women's Property Act, 1882.]—Since above Act, when a married woman is administratrix, it is not necessary that her husband

PART II. SECT. 13, SUB-SECT. 1.

26071. General rule.]—Where administration with the will annexed is granted to attorneys of an exor. out of the colony, the usual bond must be given.—*Re JONES' ESTATE* (1900), 21 N. S. W. B. 35; 17 N. S. W. W. N.

181.—AUS.

260711. —.]—In all applications for letters of administration where there are infant children the administrator must put up the usual bond.—*Re LUCHETTA*, [1919] 2 W. W. R. 885.—**CAN.**

h. Absence of — Rebutts presumption that administration granted.]—*Semble:* administration, if granted, is not void for want of an administration bond; but the absence of one is a strong fact to rebut a presumption that administration was granted.—*DOR v. READ* (1850), 1 All. 689.—**CAN.**

should join in the administration bond.—*In the Goods of AYRES* (1883), 8 P. D. 168; 52 L. J. P. 98; 47 J. P. 440; 31 W. R. 660.

SUB-SECT. 3.—TERMS OF BOND.

A. *In General.*

See, generally, Court of Probate Act, 1857 (c. 77), s. 81; Administration of Justice Act, 1925 (c. 28), s. 24 (3); Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 167 (3); Non-Contentious Probate Rules, 1925, Sched. III.

2614. Whether ordinary form departed from—Grant to attorney of person entitled.]—When a party entitled to administration is abroad, & has given a simple power of attorney to his agent in England to take out the administration for his use & benefit, the ct. will only grant administration to the agent on the same terms as it would have granted it to the party himself.

The ct., on application, refused to alter the usual conditions of the administration bond & the terms of the ordinary administration oath.—*In the Goods of GOLDSBOROUGH* (1859), 1 Sw. & Tr. 295; 5 Jur. N. S. 417; 7 W. R. 375; 164 E. R. 736.

2615. Whether court will alter—After bond executed.]—*In the Goods of BRACKENBURY*, No. 2617, *post*.

2616. ———.]—*In the Goods of BELHAM, RICHARDES v. YATES*, No. 2964, *post*.

B. *As to Payment of Debts.*

2617. Right of creditor to retain—Where no condition to pay pro rata.]—Where administration has been granted to a creditor & no application was made at the time the grant issued that the administrator should pay debts ratably, the ct. will not revoke such grant subsequently in order to compel such administrator to give up his right to retain assets sufficient to repay himself his own debt in full. For the future a creditor on taking out administration must, in all cases if required by the ct., enter into a bond conditional to administer the estate ratably amongst creditors of deceased.—*In the Goods of BRACKENBURY* (1877), 2 P. D. 272; 46 L. J. P. 42; 36 L. T. 744; 41 J. P. 729; 25 W. R. 698.

Annotations:—Consol. Davies v. Parry, [1899] 1 Ch. 602; *In the Goods of Belham, RicharDES v. Yates* (1901), 84 L. T. 300.

2618. ——— Where condition not to prefer unduly.]—The personal representative may still retain his own debt, notwithstanding a decree for administration made in a suit by other creditors, notwithstanding the assets out of which he seeks to retain came to his hands after the decree, & notwithstanding the present form of a creditor's administration bond, which provides for a due course of administration "ratably & proportionably & according to the priority required by law & not unduly preferring his own debt or the debts of any other of the creditors of deceased by reason of being an administrator as aforesaid."—*DAVIES v. PARRY*, [1899] 1 Ch. 602; 68 L. J. Ch. 346; 47 W. R. 429; 15 T. L. R. 186.

Annotations:—Consol. Creditors' Bonds (1899), 16 T. L. R. 122. *Apprvd.* *Re Belham, RicharDES v. Yates*, [1901] 2 Ch. 52. *Re Rhoades, Ex p. Rhoades v. Official Receiver* (1899), 80 L. T. 742; *Re Benett, Ward v. Benett*, [1906] 1 Ch. 216.

2619. ———.]—Under the modern form of a creditor's administration bond, by which the creditor administrator undertakes to pay the debts of deceased in a due course of administration ratably & proportionably, & according to the priority required by law, & not unduly preferring his own debt or the debts of any other of the

creditors of deceased by reason of his being an administrator as aforesaid, he may still retain, out of moneys coming to his hands or in ct. in an administration action by other creditors, his own debt as against other debts of equal degree.—*Re BELHAM, RICHARDES v. YATES*, [1901] 2 Ch. 52; 70 L. J. Ch. 474; 84 L. T. 440; 49 W. R. 498; 45 Sol. Jo. 424, C. A.

Annotation:—Reid. *Re Benett, Ward v. Benett*, [1906] 1 Ch. 216.

2620. ———.]—*In the Goods of BELHAM, RICHARDES v. YATES*, No. 2964, *post*.

2621. ——— Where condition not to prefer.]—*CREDITORS' BONDS* (1899), 16 T. L. R. 122.

Right of retainer generally.]—*See* Part IV. Sect. 4, *post*.

C. *Amount of Penalty.*

See Court of Probate Act, 1857 (c. 77), s. 82; Probate Rules (Non-Contentious), r. 39.

2622. When reduced—Administrator solely entitled—Penalty calculated on debts.]—A. died intestate, leaving his mother solely entitled in distribution, property under £3,000, & debts £45. The ct. granted administration on the mother entering into a bond in the amount of £100 with sureties.—*In the Goods of GENT* (1858), 1 Sw. & Tr. 54; 27 L. J. P. & M. 37; 31 L. T. O. S. 26; 4 Jur. N. S. 341; 6 W. R. 400; 164 E. R. 626.

2623. ——— No debts.]—A. died intestate, leaving B. his only next of kin & solely entitled in distribution. His personal estate was of the value of about £55, & it seemed that he had no debts. B. being unable through poverty to obtain sureties to the amount of £200, the penalty of the requisite bond, the ct. under Court of Probate Act, 1857 (c. 77), s. 82, reduced the penalty to £60.—*In the Goods of HARRIGAN* (1863), 32 L. J. P. M. & A. 204; 27 J. P. 770.

2624. ——— Debts nominal.]—Where a testator of foreign domicile died abroad leaving personalty in England of considerable value & nominal debts & his widow had become the only person interested in his estate, the ct. reduced the amount of the administration bond to the actual amount of the estate in England instead of double, & allowed foreign instead of English sureties to be accepted if necessary, & in the case of English sureties allowed the amount to be made up by several persons.—*In the Goods of BLANK* (1894), 70 L. T. 810; 6 R. 563.

2625. ——— To nominal amount—Administration granted for formal purpose—Release under settlement.]—Where letters of administration were granted merely to enable a personal representative of deceased to execute a formal release to the trustee under a marriage settlement, the ct. allowed the property to be sworn under £20.—*In the Goods of STACPOOLE* (1861), 2 Sw. & Tr. 316; 30 L. J. P. M. & A. 191; 5 L. T. 140; 25 J. P. 535; 164 E. R. 1017.

2626. ——— Assignment of legal estate in leaseholds.]—Where a limited administration was granted merely to enable the personal representative of deceased to assign the legal estate in certain leaseholds of the value of £6,000, which had been sold by the trustees, the ct. allowed the administrator's bond to be in the nominal penalty of £200.—*In the Goods of BOWLBY* (1876), 45 L. J. P. 100; 40 J. P. 632.

2627. Where estate partially administered—Calculated as on grant de bonis non—Though strictly cessate grant.]—*In the Goods of FOZARD*, No. 1237, *ante*.

2628. ———.]—An estate having been partly administered & a further bond become necessary.

Sect. 13.—The administrator's bond: Sub-sect. 3, C.; sub-secta. 4, 5 & 6, A.]

the ct. allowed the administrator to take the grant for the amount then due to the estate, & to give security only for double that amount.—*In the Goods of HALLIWELL* (1885), 10 P. D. 198; 54 L. J. P. 32; 49 J. P. 233; 33 W. R. 371.

2629. —.]—Where, after an estate had been partly administered, application was made for a grant of administration, the ct. allowed a bond to be given in double the amount of the unadministered estate.—*In the Goods of OAKLEY*, [1896] P. 7; 65 L. J. P. 38; 44 W. R. 432.

2630. Where estate being administered in Chancery—Order for beneficiaries' shares to be paid direct—Instead of to administrator.]—Where an estate was being administered in the Ch. Div., & the ct. had made an order that each individual share of the estate should be paid directly to the parties entitled, & not to the person who had taken out letters of administration, the judge made an order allowing the administratrix to give security for double the amount of her own beneficial interest only.—*In the Goods of PAXTON*, *In the Goods of BENNISON* (D.), *In the Goods of BENNISON* (H.) (1889), 14 P. D. 40; 58 L. J. P. 55; 60 L. T. 513; 53 J. P. 135.

2631. Where part of estate paid into court.]—The committee of a lunatic having applied for a grant of administration for her use & benefit, it appeared that the estate to be administered consisted of £12,000, of which all but £850 had been paid into the Ch. Div., & the balance would shortly be paid in:—*Held*: sureties for the administration bond could not be dispensed with, but that it would be enough if the sureties entered into a bond for double the value of the estate after deducting the amount paid into the Ch. Div. The ct. required the bond given by the administrator to be for the full amount.—*In the Goods of MORRIS* (1889), 15 P. D. 9; 59 L. J. P. 16; 61 L. T. 652; 38 W. R. 496.

2632. —.]—An exor., who was also sole legatee, having been found to be a lunatic by inquisition, his committee took out letters of administration for his use & benefit, & entered into a bond jointly with a guarantee society for double the sum of £4,569, at which the value of the estate was then estimated. It was afterwards found that the estate was entitled to a further sum of £4,492, & a second bond was required. The administratrix had paid into ct. to the account of the lunatic £6,823, retaining in her hands, after paying debts & testamentary expenses, £650:—*Held*: the administratrix must enter into a bond without sureties in the full penal sum of double the amount of the newly-discovered estate, & then give a bond with sureties in the sum of £1,800, being double the outstanding amount of the estate.—*In the Goods of CORMACK*, [1891] P. 151; 60 L. J. P. 96; 63 L. T. 710.

SUB-SECT. 4.—ATTESTATION OF BOND.

See Probate Rules (Non-Contentious), r. 38.

2633. When requirements of rule dispensed with.]—An administration bond was attested by two witnesses, but not by the person who administered the oath to the administratrix, as required by r. 38. The estate being small, & the administratrix resident in New South Wales, the ct. dispensed with the rule, & made the grant.—*In the Goods of PARKER* (1866), L. R. 1 P. & D. 301; 36 L. J. P. & M. 26; 15 L. T. 248; 31 J. P. 552; 15 W. R. 202.

SUB-SECT. 5.—WHEN ESTATE SWORN AT WRONG AMOUNT.

2634. Estate undersworn—Supplementary bond.]—Administration was taken out under £20,000 & the usual bond in a penalty of double that sum entered into. The administratrix subsequently received a sum of money from a bkpt. estate indebted to deceased which made it necessary to reswear the amount under £25,000. The ct., under Court of Probate Act, 1857 (c. 77), s. 82, directed the registrars of the principal registry to receive a separate bond in the penalty of £10,000, which, together with the original bond, would be double the amount of the sum under which the estate was to be resworn.—*In the Goods of WEIR* (1859), 1 Sw. & Tr. 506; 2 L. T. 191; 164 E. R. 834; *sub nom.* *In the Goods of WIER*, 28 L. J. P. & M. 111.

2635. Estate oversworn—Fresh bond taken—Original bond cancelled.]—Where, under a misapprehension as to the value of the personal estate of intestate, the penalty of an administration bond was too large, the ct., upon the execution of a fresh bond in a penalty proportioned to the actual value of the estate, ordered the original bond to be delivered out of the registry to be cancelled.—*In the Goods of GOOLD* (1865), 4 Sw. & Tr. 20; 34 L. J. P. M. & A. 105; 13 L. T. 193; 11 Jur. N. S. 288; 164 E. R. 1422.

See, also, Nos. 2712, 2717, *post*.

SUB-SECT. 6.—SURETIES.

A. When Dispensed with.

See, now, Administration of Justice Act, 1925 (c. 28), s. 24 (7); Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 167 (7); Non-Contentious Probate Rules, 1925, rr. 39, 114.

2636. General rule.]—The ct. will not by reason of the property being large & the risk small dispense with sureties to an administration bond or lessen the amount to be secured. But it will allow the security to be made up of any number of bonds.—*In the Goods of EARLE* (1885), 10 P. D. 196; 54 L. J. P. 95; 49 J. P. 761; 34 W. R. 48.
Annotation:—*Fold.* *In the Goods of Blank* (1894), 70 L. T. 810.

2637. S. P. In the Goods of MCGOWAN (1885), 10 P. D. 197; 34 W. R. 48; *sub nom.* *In the Goods of M'GAVAN*, 49 J. P. 761.

2638. Administrator—Appointed by foreign court.]—*Qu.*: whether, even on grants of administration to foreigners of the property of foreigners, generally, the administrator is not compellable to give bond here in England with two sureties, British subjects, for the due administration of the effects.—*CAMBIASO v. NEGROTTO* (1825), 2 Add. 439; 162 E. R. 356.

2639. Administrator in official position—Official solicitor.]—*In the Goods of UNWIN* (1902), 87 L. T. 749; 19 T. L. R. 91.

2640. — Solicitor of Duchy of Cornwall.]—*In the Goods of CANNING, CORNWALL, DUCHY (SOLICITOR) v. CANNING*, No. 1665, *ante*.

2641. — Official receiver in bankruptcy.]—Where a grant of administration to the estate of deceased intestate was made to the chief official receiver in bkpy. the ct. while requiring him to give the administration bond, dispensed with the usual sureties.—*In the Goods of COPE* (1890), 15 P. D. 107; 59 L. J. P. 94; 62 L. T. 500; 38 W. R. 688.

Annotations:—*Fold.* *In the Goods of Thacker* (1890), 54 J. P. 759; *In the Goods of Morgan* (1896), 75 L. T. 190; *In the Estate of Astbury* (1899), 80 L. T. 296. *Reid.* *In the Goods of Conolly* (1896), 74 L. T. 461.

2642. ———.]—*In the Goods of KNAPP, In the Goods of ROBINS (1890), 63 L. T. 252.*

2643. ———.]—*In the Goods of THACKER, No. 1841, ante.*

2644. ———.]—Letters of administration may be granted to the trustee in bkpcy. of the next of kin without requiring sureties.—*In the Estate of ASTBURY (1899), 80 L. T. 296.*

2645. ———.]—In a case of a grant of administration to an official receiver in bkpcy., who, as an official of the Board of Trade, had given security for the due performance of his duties, the Probate Ct. dispensed with sureties to the administration bond in the special circumstances of the case.—*In the Estate of CAUSTON, [1906] P. 124; 75 L. J. P. 42; 94 L. T. 613; 22 T. L. R. 247.*

2646. ———.]—*In the Goods of BOWRON, No. 1842, ante.*

2647. ——— Official solicitor—Being committee of estate of lunatic.]—*In the Goods of UNWIN (1902), 87 L. T. 749; 19 T. L. R. 91.*

2648. ——— Nominee of Board of Education.]—The ct. dispensed with sureties to the administration bond where the person applying for administration was a nominee of the Board of Education.—*In the Estate of BRYAN, BOARD OF EDUCATION v. REUBELL, [1905] P. 88; 74 L. J. P. 41; 92 L. T. 426; 21 T. L. R. 107.*

2649. ——— Public trustee.]—*In the Estate of WOOLLEY, No. 1906, ante.*

2650. ——— Controller of clearing house for enemy debts.]—*In the Estate of BLUHM, No. 1872, ante.*

2651. ——— Foreign official—Minister plenipotentiary of foreign state—On behalf of foreign sovereign.]—*In the Estate of H. M. CHULALONGKORN, KING OF SIAM, No. 2600, ante.*

2652. Committee of lunatic appointed by foreign court.]—*CAMBIASO v. NEGROTTI (1825), 2 Add. 439; 162 E. R. 350.*

2653. Where estate in safe custody—Fund being administered in Chancery.]—*CLEVERLY v. GLADISH, In the Goods of CLEVERLY, No. 830, ante.*

2654. ——— Applicant in poverty unable to obtain surety.]—The ct. made an order to dispense with the usual sureties to an administration bond, to be entered into by B., who was beneficially entitled to a fund which had been paid into the Ct. of Ch., & for which the administration was required, it appearing that B. was, in consequence of sickness, in great poverty, & unable to induce any of his relatives or friends to become sureties to the bond.—*In the Goods of DE LA FARQUE (1862), 2 Sw. & Tr. 631; 31 L. J. P. M. & A. 199; 7 L. T. 194; 164 E. R. 1143.*

Annotations:—Apid. In the Goods of Paton, [1901] P. 188.

Reid. In the Goods of Harrigan (1863), 32 L. J. P. M. & A. 204.

2655. ——— Applicant guardian of sole beneficiary.]—The ct. dispensed with sureties upon an administration bond, where the whole estate of deceased was in ct., & where appct. had been appointed by the Ch. Div. guardian of an infant, who was the sole surviving beneficiary.—*In the Goods of WILCOCKS (1892), 67 L. T. 528.*

2656. ——— Where receiver appointed.]—In an estate where there were no debts, & where it appeared that no money could come into the hands of the administratrix except her own share in the estate, owing to the appointment of a receiver, who had given security.

The ct. made an order dispensing with sureties to the administration bond.—*In the Goods of STELFOX (1894), 70 L. T. 814; 6 R. 569.*

2657. ——— Receipts of administrator limited to personal share.]—The administrator of an estate which consists of sums standing to the

credit of an action in the Ch. Div. may be allowed to give a personal bond for due administration without sureties for such sums as will be paid in that action to other beneficiaries directly, & only required to give a bond with sureties for the sum to which he is himself entitled.—*In the Goods of LEACH (1899), 80 L. T. 170.*

2658. ——— Effect of temporary appointment.]—The ct. declined to dispense with justifying sureties, although a receiver of the estate had been appointed by the Ct. of Ch., in accordance with the prayer of a bill filed for that purpose, on the ground that it was not satisfied that the Ct. of Ch. would continue to have the management & control of the estate after the grant of administration had issued.—*In the Goods of JACKSON, JACKSON v. JACKSON & JACKSON (1865), L. R. 1 P. & D. 12; 35 L. J. P. & M. 3; 13 L. T. 336; 14 W. R. 111.*

2659. ———.]—Upon an application for administration it appeared, that the widow of the intestate was a lunatic, & his only other next of kin, his brother, was unable to furnish justifying security. A suit had been instituted in the Ch. Div. for the administration of the estate & a receiver appointed; but a portion of the estate, consisting of stock in a waterworks co., could not be realised except by a personal representative of deceased:—*Held: administration could not be granted to the brother of deceased without requiring justifying security, but a grant might be made to the receiver, to issue when the registrar had been satisfied that the Ch. Div. had continued his appointment.*—*In the Goods of MOORE, [1892] P. 145; 61 L. J. P. 119.*

2660. Foreign will—Debts in this country & legacies paid.]—Where testator was a domiciled Frenchman, & the will was made in France, the ct., on affidavits that the legacies were all paid, & that there were no debts in this country, allowed administration with the will annexed to go, without requiring sureties to the administration bond.—*In the Goods of BEJOT (1869), 20 L. T. 231; 33 J. P. 281.*

2661. All debts paid—Applicants entitled to receive residue.]—In a case of an estate where all the debts had been paid, & the persons applying for administration were entitled, as the duly constituted legal personal representatives in two other estates, to receive the whole of the residue, the ct. dispensed with sureties & directed that the bond of the applts. alone should be accepted.—*In the Goods of PATON, [1901] P. 188; 70 L. J. P. 49; 84 L. T. 570; 17 T. L. R. 434; 45 Sol. Jo. 447.*

2662. Where widow proposes to carry on business.]—While the ct. has no power to give leave to a proposed administratrix to carry on deceased's business, it may, under special circumstances & for good cause shown, allow her a free hand in the administration, by dispensing with sureties to the administration bond, & by accepting the personal bond of the proposed administratrix for the administration of the estate according to law.—*In the Goods of CORY, [1903] P. 62; 72 L. J. P. 24; 88 L. T. 566.*

2663. ———.]—The ct. in special circumstances dispensed with sureties & granted administration to the widow of deceased on her own personal bond.—*In the Goods of RUSHWORTH (1908), 25 T. L. R. 128.*

2664. No answer to advertisement for debts—Undertaking to retain portion of estate for a year.]—The sole extrix. & universal legatee & devisee of deceased died without having obtained probate of his will.

Sect. 13.—The administrator's bond: Sub-sect. 6, A., B., C., D. & E.]

Advertisements having been inserted for any creditors of his estate, & no answers having been received thereto, the exors. of the extrix., on applying for a grant of administration with the will of testator annexed, were excused from finding sureties, & their personal bond alone was accepted, upon their undertaking to retain, for the space of one year, assets of testator equivalent to about four times the amount of his known debts, including his funeral expenses, in order to meet any possible claims against his estate.—*In the Estate of HARPER*, [1909] P. 88; 78 L. J. P. 33; 100 L. T. 196.

2665. Grant to residuary legatees for life.]—Residuary legatees for life taking administration with the will annexed called upon to give some security.—*FRISWELL v. MOORE* (1819), 3 Phillim. 135, 139; 161 E. R. 1280.

2666. Grants to sole executrix legatee of former will—Will lost in testator's lifetime—Fresh will omitting appointment of executor—Earlier will found after testator's death.]—*In the Goods of ALLEN*, No. 2056, ante.

B. Whom Court will Accept.

2667. Responsible persons—Duty of practitioners.]—*DEVVEY v. EDWARDS & TAPPEN*, No. 2745, post.

£668. Persons out of jurisdiction—Administrator out of jurisdiction.]—Administration being granted to a person out of his Majesty's dominions, the sureties to the bond shall be resident within the kingdom.—*In the Goods of O'BYRNE* (1828), 1 Hag. Ecc. 310; 102 E. R. 597.

2669. ———.]—The ct. is at liberty to accept as sureties to an administration bond persons resident out of its jurisdiction, when the principal, who is also residing without the jurisdiction, is unable to procure sureties within the jurisdiction, provided a writ of summons is servable on the sureties under C. L. P. Act, 1854 (c. 77), s. 18.—*In the Goods of BALLINGALL* (1803), 3 Sw. & Tr. 441, n.; 32 L. J. P. M. & A. 138; 9 L. T. 110; 27 J. P. 536; 11 W. R. 591; 164 E. R. 1346.

Annotations:—H.F. Herbert v. Sheil (1864), 3 Sw. & Tr. 479. *Consid. In the Goods of Reed* (1864), 3 Sw. & Tr. 439.

2670. ———.]—Where a limited grant of administration had been made to a person resident without the jurisdiction of the ct., who was unable to procure justifying sureties within its jurisdiction, the ct. accepted sureties resident in Jersey.—*In the Goods of REED* (1804), 2 Sw. & Tr. 439; 4 New Rep. 301; 164 E. R. 1345.

Annotation:—Folld. In the Goods of Hernandez (1879), 48 L. J. P. 31.

2671. ———.]—*HERBERT v. SHEILL*, No. 2083, post.

2672. ——— Administrator only person beneficially entitled—No debts.]—Where the administrator was the only person beneficially interested in the estate of intestate, & there were no creditors, the ct. allowed the bond to be given with two sureties resident in Scotland.—*In the Goods of HOUSTON* (1865), L. R. 1 P. & D. 85; 35 L. J. P. & M. 41.

Annotation:—Folld. In the Goods of Fernandez (1879), 4 P. D. 239.

2673. ———.]—Administration bond allowed to be executed by foreigners resident abroad, upon proof that the administrator was unable to obtain sureties resident here, that de-

ceased had no debts unpaid, & that the person on whose behalf the letters of administration were applied for was solely entitled to the estate in this country.—*In the Goods of FERNANDEZ* (1879), 4 P. D. 229; *sub nom. In the Goods of HERNANDEZ*, 48 L. J. P. 31; 40 L. T. 366; 43 J. P. 432; 27 W. R. 664.

2674. ——— Deceased domiciled abroad—No debts within jurisdiction.]—Testator, a French subject resident in France, made a will there by which he constituted a domiciled French subject his universal & residuary legatee. Part of the estate was in the English Funds, & there were no debts in this country:—*Held: on application for administration with will annexed the administratrix might give an administration bond with two foreign sureties.*—*In the Goods of DE BEAUFORT*, [1893] P. 231; 62 L. J. P. 101; 69 L. T. 420; 57 J. P. 553; 1 R. 483.

2675. ———.]—*In the Goods of BLANK*, No. 2624, ante.

2676. ——— By leave—How leave obtained.]—Where deceased, who was resident abroad, has left debts in England, an application for leave to give an administration bond with foreign sureties should be made to a judge in chambers.—*In the Goods of SCOTT*, [1895] P. 342; 66 L. J. P. 15; 73 L. T. 317.

See, now, Direction dated May 10, 1893, [1895] P. 342, n.

2677. Guarantee society—Though directors exempt from personal liability.]—The ct. accepted the Guarantee Society as security to a bond of administration *pendente lite*, although it contained a clause by which the directors were not held personally responsible.—*CARPENTER v. QUEEN'S PROCTOR* (1882), 7 P. D. 235; *sub nom. In the Goods of STOKES, CARPENTER v. TREASURY SOLICITOR* (SUED AS QUEEN'S PROCTOR), 51 L. J. P. 91; 46 L. T. 821; 46 J. P. 663; 31 W. R. 108.

2678. Corporation—Appointed executors by testator—Administration with will granted to general manager.]—Where testator appointed the "Trustees, Executors & Securities Insurance Corporation, Limited" to be exors. of his will, the ct. made a grant of administration with the will annexed to the general manager for the use & benefit of the co. as exors., & being satisfied of its solvency, & of the sufficiency of its assets accepted the co. itself as sole surety to the administration bond.—*In the Goods of HUNT*, [1896] P. 288; 66 L. J. P. 8; 45 W. R. 236.

Annotation:—Folld. In the Estate of Rankins, [1918] P. 134.

C. Number of Sureties.

See, now, Non-Contentious Probate Rules, 1925, r. 30.

2679. One surety alone accepted—Husband administering to wife's estate.]—Husband, resident abroad, directed, on the application of creditors, to give justifying security resident within the jurisdiction of the ct., on taking a grant of administration to his wife.

By the practice of the ct., a husband, taking administration to a deceased wife, enters into bond with one surety (*per cur.*).—*In the Goods of NOEL* (1832), 4 Hag. Ecc. 207; 162 E. R. 1423.

Annotation:—Expld. Drewe v. Long, Rolf & Cayford (1854), 1 Ecc. & Ad. 391.

2680. ———.]—Where the administrator, who was the sole person entitled in distribution, had no friends in this country willing to become

PART II. SECT. 13, SUB-SECT. 6.—B. k. Necessity for approval of registrar.]—*In the Estate of CRAIG* (1919), 52 N. E. R. 368; 43 D. L. R. 762.—CAN.

l. Residence within jurisdiction requisite.]—The sureties to an administration bond on the resealing in Saskatchewan of letters of adminis-

tration granted by a foreign Ct. of Probate must reside in Saskatchewan.—*Re SPIRITS ESTATE*, [1921] 3 W. W. R. 829; 63 D. L. R. 687.—CAN.

sureties, the ct., though it refused to dispense with the ordinary bonds, allowed the amount to be spread over several sureties, or to be secured by one surety alone.—*In the Goods of SMITH* (1874), 29 L. T. 932; 38 J. P. 168.

2681. —[—]—Where the estate was not under £5,000, & all the debts of intestate, with the exception of a few small debts, amounting to £25, had been paid & satisfied by the administrator, who was the only next of kin & the only person entitled in distribution to the personal estate of deceased, the ct. required only one surety to join in the administration bond.—*In the Goods of BELLAMY* (1875), 44 L. J. P. & M. 49; 33 L. T. 71; 39 J. P. 664; 40 J. P. 72; 23 W. R. 552.

2682. — **Corporation.**—*In the Goods of HUNT*, No. 2678, *ante*.

—[—]—*See Probate Rules (Non-contentious)*, r. 39.

2683. Security made up of several bonds.—Where an administrator was unable to find two sureties to enter into the administration bond to the requisite amount, the ct. allowed four or more to enter into the bond, but refused to accept sureties resident in Scotland.—*HERBERT v. SHIELL* (1864), 3 Sw. & Tr. 479; 33 L. J. P. M. & A. 142; 28 J. P. 616; 164 E. R. 1361; *sub nom.* *In the Goods of SHIELL*, 4 New Rep. 381.

Annotation.—*Reid.* *In the Goods of Houston* (1865), L. R. 1 P. & D. 85.

2684. —[—]—*In the Goods of SMITH*, No. 2680, *ante*.

2685. —[—]—*In the Goods of EARLE*, No. 2636, *ante*.

2686. —[—]—*In the Goods of BLANK*, No. 2624, *ante*.

D. In What Amount Sureties bound.

See Court of Probate Act, 1857 (c. 77), s. 82; *Non-Contentious Probate Rules*, 1925, r. 39.

2687. Right of creditors to question.—[Creditors are entitled to a *constat* of the personal estate, but they have no right to litigate the quantum of security, or to require the sureties to justify.—*HUGHES v. COOK* (1753), 1 Lee, 380; 161 E. R. 142. *Annotation.*—*Reid.* *John v. Bradbury* (1866), L. R. 1 P. & D. 245.

2688. Sureties for a reduced amount accepted—Applicant beneficially entitled.—A. died intestate, leaving personalty sworn under the value of £6,000. A's father, who was his only next of kin & the only person entitled in distribution, being unable to procure sureties to a bond in a penalty for double the amount of the estate, the ct. accepted two sureties in the sum of £1,000 each.—*In the Goods of M'DONALD* (1863), 32 L. J. P. M. & A. 132; 11 W. R. 957.

2689. —[—]—The husband of the sole next of kin of deceased lunatic administered to the estate after her death. The estate was considerable, & appct. being in humble circumstances was unable to find the requisite sureties. The ct. allowed appct. himself to give a bond for the full amount of the usual penalties, & ordered him to find sureties in £100.—*In the Goods of HARROW* (1870), 21 L. T. 834; 34 J. P. 215.

2690. — **Fund in court—Security required only for amount not paid in.**—*In the Goods of MORRIS*, No. 2631, *ante*.

2691. —[—]—*In the Goods of COR-MACK*, No. 2632, *ante*.

2692. — **Security required only for applicant's share.**—*In the Goods of LEACH*, No. 2657, *ante*.

2693. Assets leaseholds—Calculated on annual rent.—An exor. & residuary legatee being out of the country at the time of testator's death, ad-

ministration was granted to a specific legatee, in order to enable her to deal with a portion of the residue for the benefit of the residuary legatee, limited to that portion, upon her bringing in an inventory & giving justifying security. The security was calculated not upon the entire value of the leasehold property to be dealt with, but upon the annual rent derived from it.—*In the Goods of HEATON* (1860), 24 J. P. 697.

E. Justification.

2694. Who may require—Creditors.—*HUGHES v. COOK*, No. 2687, *ante*.

2695. —[—]—The general rule is, that creditors are not entitled to require the next of kin, or the guardians of the next of kin, to give justifying security; a very strong case ought to be made out before a departure from the rule is allowed.—*JOHN v. BRADBURY* (1860), L. R. 1 P. & D. 245; 36 L. J. P. & M. 33; 15 L. T. 414; 31 J. P. 23; 15 W. R. 285.

2696. — **Administrator resident abroad.**—*In the Goods of NOEL*, No. 2679, *ante*.

2697. — **Next of kin—In respect of share of party excluded from administration.**—*COPPIN v. DILLON*, No. 3217, *post*.

2698. — **Legatees.**—*SALMON & BREEZE v. HAYS*, No. 2078, *ante*.

2699. In what circumstances ordered—Grant to residuary legatee during lunacy of exor.—On renunciation of a co-exor. the ct. will not grant administration with the will annexed without justifying securities to the daughter, the residuary legatee, during the lunacy of the mother the other exor.—*In the Goods of HARDSTONE* (1828), 1 Hag. Eccl. 487; 162 E. R. 654.

2700. — **Administrator resident abroad.**—*In the Goods of NOEL*, No. 2679, *ante*.

2701. — **Grant to person other than person primarily entitled—Citation not personally served on person with prior claim.**—Where an administration is granted, without a personal service of a citation on the parties having the prior title, the ct. requires the sureties to justify. In the case of a bkpt. deceased, the ct. declined to dispense with such rule in favour of the official assignee.—*BELCHER v. MABERLY* (1840), 2 Curt. 629; 163 E. R. 531.

2702. — **Grant to official assignee in bankruptcy.**—*BELCHER v. MABERLY*, No. 2701, *ante*.

2703. — **Limited grant.**—Even a limited grant of administration with the will annexed will not be decreed to the residuary legatee, in absence or on renunciation of the exors. without justifying security, save under very extraordinary circumstances.—*In the Goods of TEED* (1844), 2 L. T. O. S. 317.

2704. — **Discretionary grant under Probate Act, 1857 (c. 77), s. 73—Unless all interested parties consent.**—*In the Goods of GRAVES*, No. 1849, *ante*.

2705. — **Grant to next of kin of divorced spouse—Surviving spouse passed over without citation.**—*In the Estate of WALLAS*, No. 1504, *ante*.

2706. Amount for which justification required—General rule.—Where securities are required to justify in ordinary course, the ct. will not dispense with this, even partially, but under very special circumstances. If the ct. decrees a general grant, but, under special circumstances, requires the securities to justify only as to a part of the property it will not allow separate bonds, so that other securities than those who justify in the requisite amount shall enter into the common administration bond in the double amount of the whole property.—*HOWELL v. METCALFE* (1824), 2 Add. 348; 162 E. R. 321.

Sec. 13.—*The administrator's bond: Sub-sect. 6, F., F. & G.; sub-sect. 7, A.]*

2707. — *Reduction allowed—Interest of administrator & persons consenting deducted.]—Administration de bonis non* with a will annexed in which was no exor. granted to one of two legatees, a decree with intimation having issued in their joint names against the residuary legatee; the sureties justifying in the amount of the surplus beyond the interest of the one legatee or on a proxy of consent from the other beyond their joint interests & an affidavit of no outstanding debts being made. —*PICKERING v. PICKERING* (1828), 1 Hag. Ecc. 480; 162 E. R. 651.

2708. — — — — —.]—*COPPIN v. DILLON*, No. 3217, *post*.

2709. — — — — *De bonis grant.]—In the Goods of PENNY*, No. 2203, *ante*.

2710. — — — — —.]—A wife took out administration to her husband's estate, & became insane before completely administering it. The ct. in granting administration to the son allowed the sureties to justify for the present instead of the original value of the estate.—*In the Goods of JAMES* (1870), 21 L. T. 730; 34 J. P. 121.

2711. — — — — *Limited grant.]—In the Goods of HEATON*, No. 2693, *ante*.

2712. — — — — *Estate oversworn.]—Where justifying security had been ordered, & it appeared that though the estate had been sworn under £2,000, its actual value was only £800, the ct. allowed the sureties to justify for double the amount of the actual value, instead of double the amount under which the estate was sworn.—ENGLAND v. WALL* (1861), 31 L. J. P. M. & A. 16.

2713. — — — — *Difficulty in finding surety.]—Where the beneficial residuary legatees were minors, & the value of the residue was about £8,000, subject to a mtge. of £3,900, the ct. granted administration with the will annexed de bonis non to a contingent legatee, & reduced the amount for which the sureties would have had to justify to £1,000 each; it appearing that justifying security to a greater amount could not be given, that the grant was for the interest of the minors & that their guardians did not oppose.—In the Goods of FRASER* (1864), 33 L. J. P. M. & A. 57; 9 L. T. 845.

F. Liability on Breach of Condition by Administrator.

See Sub-sect. 7, B. (b), post.

G. Discharge and Indemnity.

2714. Discharge—By beneficiaries giving time to administrator.]—A. & B. having appointed C., their attorney, for the purpose of taking administration with the will annexed of D., for their use & benefit, & C., having taken out such administration, & entered into the usual bond with two sureties. The ct. refused to permit the bond to be attended with for the purpose of being put in suit against the sureties by A. & B., they never having called for an inventory & account from C., & having given him three years to pay the balance which was due to them under the administration, & he having in the meantime died insolvent.

The essential obligation of the bond is to exhibit an account of payments & receipts; until this is done, there is no *constat* of any residue to be disposed of (*SIR HERBERT JENNER*).—*MURRAY & MALING v. M'INERHENY & IMPEY* (1837), 1 Curt. 578; 163 E. R. 202.

Annotation:—Distd. Godwin v. Knight (1848), 1 Rob. Eccl. 652.

See, generally, GUARANTEE.

2715. — — — — *By advertisements under Law of Property Amendment Act, 1859 (c. 35), s. 29.]—*

(1) Above sect. is not confined to claims of creditors of testator or intestate, but applies also to persons having claims as next of kin. It also affords protection to the sureties in an administration bond, where the administrator, before distributing the assets of intestate, has pursued the course pointed out by that sect. A notice addressed to "creditors & other persons having claims or demands against or upon the estate of the intestate," requiring them to send in particulars of their claims or demands upon the estate to the administrator, or that, in default thereof he will, at the expiration of the time mentioned in the notice, proceed to administer the assets of the deceased, having regard only to the claims & demands of which he should then have had notice:—*Held*: a sufficient notice under the statute to a person having a claim as next of kin.

(2) A., the daughter of the intestate, left her home at an early age in 1857, changed her name, & without notice to any of her relatives, went to America. In 1871 she returned to England & endeavoured to find her mother; but, the mother having changed her residence & married again, she was unable to find her. She again came to England in 1874, when she found that her mother was dead. In the meantime a sister of her mother had obtained letters of administration, & after advertising in the *London Gazette* & in the *Times*, & another London newspaper, in the terms of above sect. distributed the assets amongst the brother & two sisters, herself being one, of deceased, being ignorant that the daughter A. was still living. In an action by A. who had procured the revocation of the letters of administration granted to her aunt, & a fresh grant to herself, & an assignment of the administration bond against the sureties:—*Held*: the notice being good in form, & the publication all that could reasonably be required under the circumstances, above sect., afforded a good defence.—*NEWTON v. SHERRY* (1876), 1 C. P. D. 246; 45 L. J. Q. B. 257; 34 L. T. 251; 40 J. P. 584; 24 W. R. 371.

See, generally, Part IV., Sect. 1, sub-sect. 4, ante.

2716. — — — — *By substitution—Whether court will allow.]—The ct. will not discharge the original sureties to an administration bond & allow other sureties to be substituted for them.—In the Goods of STARK* (1866), L. R. 1 P. & D. 76; 35 L. J. P. & M. 42; 13 L. T. 682; *sub nom. Re STORK*, 14 W. R. 349.

2717. — — — — *Estate resworn & bond with fresh sureties given.]—An administrator executed a bond with one surety under a nominal sum. He subsequently re-swore the value of the property of deceased at a much increased sum, & executed a fresh bond with two new sureties. He afterwards became a bkpt., without having duly administered the estate of deceased, & application was made to the ct. for leave to sue on both the bonds. The ct. refused to grant leave to sue upon the first bond until the action on the second had been disposed of.—In the Goods of IRVING* (1869), L. R. 1 P. & D. 658; 38 L. J. P. & M. 83; 20 L. T. 684; 33 J. P. 777.

2718. — — — — *Surety executing bond conditionally—Condition not fulfilled.]—One surety to an administration bond executed the same on being assured that the other person named in it as co-surety would execute it. The latter refused to do so. The name of another surety was inserted in the bond, & this person executed it. The first surety did not assent to the alteration:—*Held*: the bond*

was void & must be cancelled.—*In the Goods of COWARD JOE* (1901), 86 L. T. 261; 18 T. L. R. 220; 46 Sol. Jo. 163.

2719. — Estate fully administered—Assets left by beneficiaries in administrator's hands.]—(1) Persons of full age & ordinary intelligence entitled to property in equal undivided shares may commit the management of that property to one of their number with authority either qualified or absolute, to deal with it, & such arrangement need not be by deed, but may be established by proof of conduct.

In a case in which the next of kin of an intestate chose to leave the whole property after the estate had been fully administered, in the hands of the administratrix, & in her absolute control:—*Held*: the sureties under an administration bond were not liable in respect of acts of the person so entrusted with the management of the property which resulted in the loss of assets.

(2) It is not contrary to public policy that the next of kin should give a deed of indemnity to sureties under an administration bond.—*BLAKE v. BAYNE*, [1908] A. C. 371; 77 L. J. P. C. 97; 99 L. T. 35, P. C.

Annotation:—As to (1) Reidd. Vaneck v. Benham, [1917] 1 Ch. 60.

2720. Indemnity—By next of kin—Whether contrary to public policy.]—BLAKE v. BAYNE, No. 2719, *ante*.

SUB-SECT. 7.—REMEDIES ON THE BOND.

A. Who may sue.

See, now, Administration of Justice Act, 1925 (c. 28), s. 24 (2), (4), (5); Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 167 (2), (4), (5).

2721. Alien enemy.]—Alien enemy is no plea in debt on bond as administrator. *BROOKS v. PHILLIPS* (1599), Cro. Eliz. 684; 78 E. R. 920.

Annotation:—Mentd. Rodriguez v. Speyer, [1919] A. C. 59.

See, generally, ALIENS, Vol. II., p. 158.

2722. Creditors.]—Plffs. were two sureties with H. in an administration bond to the commissary or York, who exhibited an inventory there of intestate's effects; deft. B., being a creditor by bond of intestate in the penalty of £600, brought his action against the administratrix, who pleaded she had no assets *ultra* £51. B., not satisfied with the inventory, procured the commissary to assign to him the administration bond, & brought three actions on it, one against her, & one against each of the sureties, & assigned for breach of the bond, that H. had not exhibited a true inventory; no defence, & judgment by default. The administratrix & the sureties are bound by the verdict, & no excuse, it was without defence, for that speaks a consciousness she had none; & the ct. ordered the verdict should stand as a security for so much as the account to be taken on the inventory should fall short to satisfy B.'s principal & interest on his bond.—*GREENSIDE v. BENSON* (1745), 3 Atk. 248; Ridg. temp. II. 338; 20 E. R. 944, L. C.

Annotations:—Consd. Canterbury (Archbp.) v. Tappen (1828), 8 B. & C. 151; *Canterbury (Archbp.) v. Robertson* (1833), 1 Cr. & M. 690. *Reidd. Ex p. Stokes* (1848), De G. 618; *Bolton v. Powell* (1852), 2 De G. M. & G. 1; *Hackman v. Black* (1755), 2 Lee, 251; *Sandrey v. Michell* (1863), 3 B. & S. 405.

2723. — Bond given under Statute of Distribution, 1670 (c. 10).]—Creditors cannot sue an administrator on bond taken by virtue of above Act, but may on bonds given by administrators *pendente lite*.—*WALLIS v. PIPON* (1753), Amb. 183; 27 E. R. 124.

2724. — Bond given by administrator pendente lite.]—WALLIS v. PIPON, No. 2723, *ante*.

2725. —]—Creditor has a right *ex debito justitie*, as well as the next of kin, to sue upon an administration bond in the name of the Archbishop or his ordinary.—*CANTERBURY (ARCHBP.) v. HOUSE* (1771), 1 Cowp. 140; Lofft, 622; 98 E. R. 1010.

Annotations:—Consd. Canterbury (Archbp.) v. Robertson (1833), 1 Cr. & M. 690; *Crowley & Sharman v. Chipp & Tubb* (1836), 1 Curt. 456; *Canterbury (Archbp.) v. Tubb* (1837), 3 Hodg. 101. *Mentd. Abbott v. Abbott* (1818), 2 Phillim. 378; *Bolton v. Powell* (1852), 2 De G. M. & G. 1; *West & Smith v. Wilby* (1870), 3 Phillim. 374.

2726. —]—A creditor has a right to call for an inventory, but has no right to interfere in an administration bond.—*HACKMAN v. BLACK* (1755), 2 Lee, 251; 161 E. R. 331.

Annotation:—Reidd. John v. Bradbury (1866), L. R. 1 P. & D. 215.

2727. — But not to recover his own debt.]—*BROWNE v. CANTERBURY (ARCHBP.)* (1683), 1 Lut. 882; 125 E. R. 480, Ex. Ch.

Annotations:—Reidd. Greenside v. Benson (1745), Ridg. temp. H. 338; *Canterbury (Archbp.) v. Robertson* (1833), 1 Cr. & M. 690.

2728. — — — — — (1) Since Statute of Distribution, 1670 (c. 10), administrator is bound to account without citation.

(2) H. entitled to distribution by Statute of Distribution, 1670 (c. 10), may sue administrator to prove his account. But creditor cannot sue on the administration bond for non-payment of a debt, for it does not extend to that.

(3) An administrator under the usual bond to exhibit an inventory, to administer truly & to render an account is bound to perform within the time limited, although not cited by the ct. so to do.

CANTERBURY (ARCHBP.) v. WILLS (1708), 1 Salk. 315; 11 Mod. Rep. 115; 91 E. R. 278.

Annotations:—As to (1) Reidd. Canterbury (Archbp.) v. Robertson (1833), 1 Cr. & M. 690. *As to (2) Reidd. Baker v. Dumaresque* (1740), 2 Atk. 66; *Greenside v. Benson* (1745), 3 Atk. 248; *Canterbury (Archbp.) v. Tappen* (1828), 8 B. & C. 151; *Sandrey v. Michell* (1863), 3 B. & S. 405.

2729. — — — — — Bond assigned under Court of Probate Act, 1857 (c. 77).]—Where an administration bond, under above Act, has been assigned to a creditor, he is not entitled to sue on it, laying as a breach, the non-payment of a debt due to him, even though he alleges that the administrator has wasted the estate, & thereby disabled himself from paying the debt. *SANDREY v. MICHELL* (1863), 3 B. & S. 405; 32 L. J. Q. B. 100; 7 L. T. 840; 9 Jur. N. S. 968; 11 W. R. 363; 122 E. R. 153; *sub nom. SAUNDREY v. MITCHELL*, 1 New Rep. 317.

Annotation:—Consd. Copo v. Bennett, [1911] 2 Ch. 488.

2730. Next of kin.]—CANTERBURY (ARCHBP.) v. HOUSE, No. 2725, *ante*.

2731. Legal personal representative of lunatic next of kin.]—A. died intestate in 1832, leaving B. & C. his only next of kin. B. in 1833 took administration of the effects, entered into the usual bond with sureties, did not distribute, but died insolvent in 1839. C. from 1809, a lunatic, continued such till his death in Feb. 1847, but no commission of lunacy was sued out till after the death of B. D., the committee of the estate of C., & as such administrator *de bonis non* of A., established a debt in Chancery, as a simple contract creditor of the distributive share of A.'s estate, & was paid a small dividend. D. on being cited by E., who became the administratrix of C., exhibited his inventory & account in the Prerogative Ct., & was dismissed. E. then cited the sureties of B.'s bond for the due administration of A.'s estate, to show cause why the bond should be put in suit.

The application to allow the bond to be put in suit was granted.—*GODWIN v. KNIGHT* (1848),

Sect. 13.—The administrator's bond: Sub-sect. 7, A. & B. (a) & (b) & C. (a).]

1 Rob. Eccl. 652; 6 Notes of Cases, 261; 12 L. T. O. S. 66; 12 Jur. 706; 163 E. R. 1167.

2732. Assignee of bankrupt next of kin.]—E. died intestate, leaving C., her husband, surviving. He became bkpt. (A., B., & C. being appointed his assignees), & then died without having administered to his wife. Some property subsequently accrued to his wife. J. then administered to his brother, C., & also to E., & having converted the property to his own use instead of paying it over to his brother's assignees, himself became insolvent. On application of the assignees, the sureties to the bond were cited to show cause *contra*, & the ct. allowed the bond to be delivered out.—*DREWE v. LONG, ROSE & CAYFORD* (1854), 1 Ecc. & Ad. 391; 24 L. T. O. S. 52; 18 Jur. 1060; 164 E. R. 225.

B. Breach of Conditions.

(a) What amounts to.

2733. Conditions must be performed within time limited.—Although no citation to do so.]—CANTERBURY (ARCHBP.) v. WILLS, No. 2728, ante.

2734. ——— But bond will not be put in suit.]—The ct. will not, on the mere non-delivery of any inventory within the time assigned by the bond, & without calling on the administrator to bring in such inventory, permit an administration bond to be attended with for the purpose of being put in suit at law.—*CROWLEY & SHARMAN v. CHIPP & TUBB* (1836), 1 Curt. 456; 163 E. R. 160.

2735. Condition to pay residue to such person as the Ecclesiastical Judge should decree—No breach until decree.]—Under the common administration bond, conditioned to make & exhibit a true inventory, administer according to law, make a just account, & pay the residue to such person as the Ecclesiastical Judge shall decree, it is no breach of the condition that the administrator has not paid the residue to the next of kin, unless an Ecclesiastical Judge has decreed payment.—*CANTERBURY (ARCHBP.) v. TAPPEN* (1828), 8 B. & C. 151; 2 Man. & Ry. K. B. 136; 6 L. J. O. S. K. B. 250; 108 E. R. 1000.

Annotations:—Consd. Canterbury (Archbp.) v. Robertson (1833), 1 Cr. & M. 690. *Reid. Godwin v. Knight & Knight* (1848), 12 L. T. O. S. 66.

2736. ———.]—(1) An administrator having received assets of intestate, converted them to his own use, & became bkpt. before he had exhibited an inventory or made his account pursuant to the bond given under the Statute of Distribution, 1670 (c. 10), & before any decree to pay or deliver the residue to the next of kin was obtained. The Ecclesiastical Ct. discharged him from the suit there, he having obtained his certificate as a bkpt.:—*Held*: his malfeasance in converting to his own use intestate's assets, so that they were entirely lost to his estate, was a breach of the clause of the condition "well and truly to administer" them; & consequently the surety in the administration bond was liable for the full amount of the money misapplied.

(2) No breach of the administration bond accrues by the administrator's not distributing the residue among the next of kin till after decree of the ecclesiastical ct.—*CANTERBURY (ARCHBP.) v.*

ROBERTSON (1833), 1 Cr. & M. 690; 2 Dowl. 78; 3 Tyr. 390; 3 L. J. Ex. 101; 149 E. R. 576.

Annotations:—As to (1) Apld. Dobbs v. Brain, [1892] 29 B. 207. Reid. Crowley & Sharmam v. Chipp & Tubb (1836), 1 Curt. 456; Sandroy v. Michell (1863), 3 B. & S. 405; Cope v. Bennett (1911), 105 L. T. 541. Generally, Reid. Godwin v. Knight & Knight (1848), 12 L. T. O. S. 66.

2737. Condition well & truly to administer—Conversion.]—CANTERBURY (ARCHBP.) v. ROBERTSON, No. 2736, ante.

2738. ——— Loss of legacy to infant by fraud of agent.]—By the terms of an administration bond, the administratrix, to whom a grant of probate with the will annexed had been made, was, among other things, to well & truly administer the personal estate & effects of deceased, "that is to say, pay the debts of deceased which he did owe at his decease, & then the legacies contained in the will. . . ." She got in the estate & paid the debts & the legacies, with the exception of one of £50 bequeathed to a minor. To meet this legacy she handed over £50 to her brother-in-law, who did not pay over the money & could not be found. The residue of the estate was distributed, & none remained in the hands of the administratrix to meet the legacy. In an action against the sureties of the bond, which had been assigned by order of the Ct. of Probate to a guardian on behalf of the legatee who was still a minor:—*Held*: the payment of the £50 out of the estate having become impossible, there was a breach of the condition of the bond to well & truly administer, which rendered the sureties liable.—*DOBBS v. BRAIN, [1892] 2 Q. B. 207; 61 L. J. Q. B. 749; 67 L. T. 371; 57 J. P. 22; 41 W. R. 7; 8 T. L. R. 630, C. A.*

Annotation:—Consd. Cope v. Bennett (1911), 105 L. T. 541.

2739. ——— Payment to next of kin without notice of bankruptcy—Intestate undischarged bankrupt.]—An undischarged bkpt. effected policies on his life & died intestate & undischarged. The administrator of his estate, without notice of the bkpt., distributed the policy moneys amongst the bkpt.'s next of kin before the trustee in bkpt. intervened:—*Held*: the administrator was not personally liable to the trustee for the moneys he had distributed, but the next of kin must refund to the trustee the shares they had respectively received.—*Re BENNETT, Ex p. OFFICIAL RECEIVER, [1907] 1 K. B. 149; 76 L. J. K. B. 134; 95 L. T. 887; 23 T. L. R. 99; 51 Sol. Jo. 83; 14 Mans. 6.*

2740. Payment to person recited in bond to be next of kin—Recital false.]—Declaration against a surety on an administration bond in the form required by the rules under Court of Probate Act, 1857 (c. 77), expressed to be made by B. as the true & lawful attorney of G., only next of kin of deceased, & conditioned "all the rest & residue of the personal estate & effects, to deliver & pay unto such person or persons as shall be entitled thereto under the Act of Parliament entitled 'An Act for the Better Settling of Intestates' Estates,'" assigning, as breach of the condition, that other persons were entitled equally with G. to the residue of the personal estate as next of kin, yet that B. did not deliver & pay the same to such persons, but wrongfully paid over the whole thereof to G., not being sole next of kin, but one of them:—*Held*: the declaration was good, the condition

for the settlement & distribution of the estate, & obtained a decree for payment of the balance of the estate to himself as next of kin, without disclosing the fact that the estate was indebted to the estate of C., of which he & his father were exors. & trustees, for moneys of that estate received & not accounted for:—*Held*: there had been a breach of the condition, for which the sureties were liable to be sued.—*COLFORD v. COMPTON* (1906), 39 N. S. R. 247.—*CAN.*

n. Neglect by administrator to

PART II. SECT. 13, SUB-SECT. 7.—

B. (a).

m. Condition well & truly to administer.]—Deft. obtained administration of his father's estate upon giving the statutory bond. Subsequently he applied to the Ct. of Probate

being absolute & not qualified by the recital in the bond that G. was sole next of kin.—*LESTER v. GOOCH* (1868), 17 W. R. 139.

(b) *Effect of Breach.*

2741. On liability of surety—Administrator given time by beneficiaries.]—MURRAY & MALING v. M'INERHENY & IMPEY, No. 2714, *ante*.

2742. — To carry out administrator's duties.]—The sureties to an administration bond cannot be cited to bring in an inventory & account, or to show cause why the bond should not be attended with, on the bond being sued for.

Sureties are undoubtedly responsible to the extent of the covenants entered into by them in a bond, when the administrator does not do his duty; but it is no part of their bond to bring in an inventory & account (*per* CUR.).—*WHAETON v. ARMITAGE & BOWER* (1852), 2 Rob. Eccl. 543; 163 E. R. 1408.

2743. — Letters of administration revoked on ground of fraud.]—Where a grant of letters of administration was obtained by fraud, & was afterwards cancelled on the ground of fraud:—*Held*: the sureties in an administration bond were none the less liable for the acts & defaults of the fraudulent administrator committed while the letters of administration remained unrevoked, though they were not parties to or cognisant of the fraud.—*DEBENDRA NATH DUTT v. ADMINISTRATOR-GENERAL OF BENGAL* (1908), L. R. 35 Ind. App. 109; 99 L. T. 68, P. C.

Annotations:—*Reid*. Craster v. Thomas (1909), 78 L. J. Ch. 734. *Mentid*. Hewson v. Shelley, [1913] 2 Ch. 384.

2744. Whether debt specialty debt—Bond not put in suit.]—Where no proceedings have been taken to put an administration bond in suit, a sum due from the administrator at his death to the estate of the intestate, is not a specialty debt.—*PARKER v. YOUNG* (1843), 6 Beav. 261; 12 L. J. Ch. 335; 49 E. R. 826.

Annotations:—*Consd*. Godwin v. Knight (1818), 6 Notes of Cases, 261; Bolton v. Powell (1851), 14 Beav. 275.

C. *Pulling the Bond in Suit.*

(a) *In General.*

See Court of Probate Act, 1857 (c. 77), s. 83; Administration of Justice Act, 1925 (c. 28), s. 21 (4); Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 167 (4).

2745. When court will order assignment—Prima facie case of breach sufficient.]—(1) If the ct. be prayed, at the instance of parties of parties in distribution, to pronounce an administration-bond forfeited, etc., in order to its being put in suit, against the sureties to that bond, at common law;

the question for the ct. is not, properly, the ultimate responsibility of the sureties; it is, generally speaking, the mere fact of whether the conditions of the bond have, or have not, been fulfilled. If unfulfilled, it will be the ct.'s duty, generally speaking, to pronounce for the forfeiture of the bond; without any reference to that other question of whether the sureties are, or are not, ultimately responsible; leaving it to the sureties to plead & prove, elsewhere, if they are capable of so doing, that the parties putting it in suit, are, still, as by their own laches or otherwise, not in a condition to recover upon the bond, notwithstanding its forfeiture.

(2) Administration bonds are too frequently considered to be & treated as mere matters of form. It is the duty of practitioners not to countenance this erroneous notion by being privy to parties who, to their knowledge or belief, are not responsible parties, becoming sureties to administration bonds.—*DEVEY v. EDWARDS & TAPPEN* (1826), 3 Add. 68; 162 E. R. 406.

Annotation:—*Consd*. Canterbury (Archbp.) v. Tappen (1828), 8 B. & C. 151.

2746. — — —.]—Where a person interested under the estate of deceased intestate, to whom administration has been taken out, makes a *prima facie* case of breach of the administration bond, the ct. will direct a rule *nisi*, calling on the sureties to show cause why the bond should not be assigned.—*In the Goods of JONES* (1862), 3 Sw. & Tr. 28; 1 New Rep. 182; 32 L. J. P. M. & A. 26; 8 L. T. 90; 27 J. P. 216; 11 W. R. 191; 161 E. R. 952.

2747. — — —.]—The ct. will order an administration bond to be assigned, upon being satisfied that the application for the order is made *bona fide*, & upon a *prima facie* case being made out by the appet. that the condition of the bond has been broken, & that he is entitled to sue the administrator for the breach. Where the alleged breach of the condition of an administration bond was, that the administrator had not paid any part of the personal estate of intestate to one of the next of kin, & the only question in dispute was, whether the appet. was one of the next of kin, the ct. directed the bond to be assigned to him upon condition that he would consent to an order that no execution should issue at common law, but that the money, if any, recovered by the judgment should be paid into the registry.—*In the Goods of YOUNG* (1866), L. R. 1 P. & D. 186; 35 L. J. P. & M. 126; 14 L. T. 634; 14 W. R. 821.

Annotation:—*Reid*. *In the Goods of Young* (1866), 14 W. R. 970.

2748. — — — After notice to sureties.]—On

invest infant's shares in estate.]—*HOLDEN v. BLACK* (1905), 2 C. L. R. 768.—*AUS.*

PART II. SECT. 13, SUB-SECT. 7.—
B. (b).

c. *On liability of surety—Unnecessary administration action—Whether costs recoverable as damages.]—*In an action against a surety of an administration bond, assigning as breach that the administrator had misappropriated moneys of the estate, p'ts. cannot recover as damages the costs of an administration suits not shown to have been necessary to prove the breach assigned.—*MCCARTHY v. RYAN* (1882), 8 V. L. R. 189.—*AUS.*

PART II. SECT. 13, SUB-SECT. 7.—
C. (a).

2745 i. When court will order assignment—Prima facie case of breach sufficient.]—The Ct. of Probate, being satisfied that the conditions of an administration bond given by deft. as adminis-

tratrix of the estate of M. had been broken, assigned the bond to p'tf., who thereby became entitled to sue upon it & to recover for all parties interested.—*McKAY v. McKAY* (1919), 52 N. S. R. 349.—*CAN.*

2745 ii. — — —.]—*THORNEPATTERSON* (1922), 49 N. B. R. 474; 67 D. L. R. 703.—*CAN.*

2745 iii. — — —.]—Under Succession Act, s. 257, the ct. has power to authorise the registrar of the High Ct. to assign an administration bond to the Administrator-General, on the ct. being satisfied that the engagement of such bond has not been kept.—*DEBENDRA NATH DUTT & BANKU BEHARY BANERJEE v. BEGOAL, ADMINISTRATOR-GENERAL* (1906), 1 L. R. 33 Calc. 713; 10 C. W. N. 673.—*IND.*

2745 iv. — — —.]—The ct. will order an assignment of an administration bond to be put in suit against when satisfied that a sub-breach of the condition has

occurred.—*In the Goods of DE MORIN* (1862), 7 L. T. 260.—*IR.*

2745 v. — — —.]—The ct. will make an order for the assignment of an administration bond on being satisfied that a *prima facie* case is made, leaving the parties all the defences possible in a ct. of law.—*In the Goods of SULLIVAN* (1867), 16 W. R. 408.—*IR.*

p. — — *Discretion of court.]—*The assignment of an administration bond is a matter for the discretion of the ct.—*Re DEAN'S ESTATE* (1885), 11 V. L. R. 761.—*AUS.*

q. — — —.]—The ct. may in the exercise of its discretion refuse to order an assignment of an administration bond.—*Re STEELE* (1897), 23 V. L. R. 146.—*AUS.*

r. — — —.]—In the exercise of its discretion the ct. will not order the curator to assign an administration bond in order that it may be put in suit where the only breach of the conditions is the non-filing by the

Sect. 13.—The administrator's bond: Sub-sect. 7, C. (a) & (b). Sects. 14 & 15: Sub-sect. 1.]

a *prima facie* case of breach of administration bond being established, notice in some form having been given to the sureties, the ct. will direct the bond to be assigned; but might refuse to do so if on cause shown the proceeding appeared to be wholly frivolous & vexatious.—*BAKER & MARSHMAN v. BROOKS, MARSHMAN v. HUGHES* (1862), 3 Sw. & Tr. 32; 1 New Rep. 182, 293; 32 L. J. P. M. & A. 25; 8 L. T. 89; 27 J. P. 216; 11 W. R. 110; 164 E. R. 1183.

Annotation:—Folld. In the Goods of Jones (1862), 1 New Rep. 182.

2749. — Discretion to refuse order—Proceedings vexatious.]—*BAKER & MARSHMAN v. BROOKS, MARSHMAN v. HUGHES*, No. 2748, *ante*.

2750. — — — — —.]—*In the Goods of YOUNG*, No. 2747, *ante*.

2751. — Order made subject to conditions.]—*In the Goods of YOUNG*, No. 2747, *ante*.

2752. Against whom put in suit—Sureties only—Administrator dead insolvent—Assets sufficient to pay legacy.]—Administration bond allowed to be put in suit against sureties of deceased insolvent administrator, who had misapplied the assets, where the assets were sufficient to pay the legacy: & the administrator had died insolvent, & no person had applied, or was likely to apply, for administration of his estate.—*RUDGE v. PARTRIDGE* (1841), 1 Notes of Cases, 218.

2753. In whose name action brought—Assignees—Whether in representative capacity.]—(1) An order for the assignment of an administration bond under Court of Probate Act, 1857 (c. 77), s. 83, may be made by a registrar of the Probate Div. on a summons.

(2) The assignees, though bound to hold all moneys recovered as trustees for all persons interested in the estate, need not sue in a representative capacity, but may sue simply in their own names.—*COPE v. BENNETT*, [1911] 2 Ch. 488; 81 L. J. Ch. 182; 105 L. T. 541; 55 Sol. Jo. 725.

2754. Where administrator has given two bonds—Second put in suit first.]—*In the Goods of IRVING*, No. 2717, *ante*.

(b) Practice.

2755. Notice to sureties.]—*BAKER & MARSHMAN v. BROOKS, MARSHMAN v. HUGHES*, No. 2748, *ante*.

2756. — — — — — Rule nisi granted in first instance.]—In debt on an administration bond judgment by default having been suffered & breaches assigned pursuant to 8 & 9 Will. 3, c. 11, s. 8, the ct. allowed the writ of inquiry to be executed before the Chief Trustee notwithstanding 3 & 4 Will. 4, c. 42, s. 16, but only granted a *rule nisi* in the first

instance.—*CANTERBURY (ARCHBP.) v. BURLINGTON* (1841), 1 Dowl. N. S. 285.

2757. — — — — —.]—*In the Goods of JONES*, No. 2746, *ante*.

2758. — — — — — Effect of R. S. C., 1875, Ord. 53, rr. 2, 3.]—An application made to assign an administration bond in order to its being sued upon, is not one made in an action, & consequently above Ord. is not applicable to it, & the old practice will still prevail that there shall be a *rule nisi* in the first instance, calling upon the sureties to show cause why the bond should not be assigned.—*In the Goods of CARTWRIGHT* (1876), 1 P. D. 422; 34 L. T. 72; 40 J. P. 104; 24 W. R. 214; 3 Char. Pr. Cas. 399.

See, now, R. S. C., Ord. 52, rr. 2, 3.

2759. To whom application made—Registrar.]—An application for the assignment of an administration bond should be made to the registrar.—*In the Goods of REES*, [1896] W. N. 57.

Annotation:—Folld. Cope v. Bennett, [1911] 2 Ch. 488.

2760. — — — — —.]—*COPE v. BENNETT*, No. 2753, *ante*.

2761. How application made—By summons.]—*COPE v. BENNETT*, No. 2753, *ante*.

2762. Form of order to assign.]—*BAKER & MARSHMAN v. BROOKS, MARSHMAN v. HUGHES*, No. 2748, *ante*.

See, also, No. 2747, ante.

SECT. 14.—EVIDENCE OF GRANT.

See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 174 (2).

2763. Copy.]—A copy of a probate of a will, where the ct. has jurisdiction, is good, because the probate itself in such case is an original act of the ct.—*R. v. HAINES* (1695), Skin. 584; Comb. 337; 90 E. R. 262.

Annotations:—Reid. Cox v. Allingham (1822), Jac. 514. *Mentd. R. v. Smith* (1828), 8 B. & C. 341; Police Comr. v. Donovan, [1903] 1 K. B. 895.

2764. — — — — —.]—Where the original is evidence without further proof, a copy is evidence.—*HOE v. NATHORP* (1697), 1 Ld. Raym. 154; 3 Salk. 154; 91 E. R. 1000.

Annotations:—Consd. Hennell v. Lyon (1817), 1 B. & Ald. 182. *Reid. Cox v. Allingham* (1822), Jac. 514.

2765. — — — — —.]—*ANON.* (1773), Loft, 302; 98 E. R. 663.

2766. Original act book—Though subsequent grant to another—First grant not recalled.]—The original book of acts directing letters of administration to be granted, with the surrogate's fiat for same, is evidence of the title of the party to whom the administration is directed to be granted of intestate's effects, without producing

administrator of his accounts.—*In the Estate of DOUGLAS* (1908), 8 S. R. N. S. W. 146.—**AUS.**

a. — — — — —.]—*RUSSELL v. RUSSELL* (1863), 9 L. T. 243.—**IR.**

b. — — — — — For purpose of suing surety.]—An assignment of an administration bond was ordered by the ct. for the purpose of suing a surety.—*Re CARPENTER'S ESTATE* (1894), 20 V. L. R. 159.—**AUS.**

a. — — — — —.]—*In the Goods of COLLINS* (1862), 7 L. T. 260.—**IR.**

PART II. SECT. 13, SUB-SECT. 7.—C. (b).

b. Sufficiency of declaration.]—The bond being conditioned to exhibit an inventory into the Ct. of Probate on the first Monday in June, & the breach being that the administratrix did not exhibit an inventory on the first Monday in the year.—*Reid*: the

declaration was bad.—*METCALFE v. MCKENZIE* (1845), 2 U. C. R. 103.—**CAN.**

c. Decree for distribution not obtained—Application by defendant administrator for stay of proceedings.]—The next of kin cannot claim substantial damages in an action on an administration bond, where no decree for distribution has been obtained, by showing merely that the administrator has received moneys for the estate. The proper course for debt. in such a case is, to apply to the ct. to stay proceedings on the bond until a decree for distribution has been obtained.—*ELGIN (EARL) v. CROSBY* (1854), 10 U. C. R. 256.—**CAN.**

d. — — — — —.]—In an action on an administration bond, the want of a decree is a good plea to a breach for not distributing, but it is no ground for staying proceedings.—*NEILL v.*

MCLAUGHLIN (1868), 4 P. R. 312.—**CAN.**

e. Objections to decree—When taken—Whether by way of defence—To action on administration bond.]—*COWLING v. GATES* (1888), 21 N. S. R. (9 L. & G.) 78.—**CAN.**

f. Effect of minor discrepancies.]—A discrepancy between the date of the bond & the date of the notice of appeal is unimportant, the bond reciting that an appeal has been taken, & it not being open to the bondsmen to say that the recital was false, & it not being suggested that any other notice was given to which the recital could refer.—*In the Estate of CRAIG* (1919), 52 N. S. R. 368; 43 D. L. R. 762.—**CAN.**

g. Bond varied—On application for letters of administration.]—*In the Estate of TANCRED* (1913), 32 N. Z. L. R. 991.—**N.Z.**

m. *limited to property within jurisdiction*].—The grant of administration is purely territorial in its operation; it is limited to property within the jurisdiction, & the administrator cannot in virtue of it recover

Sect. 15.—Effect of grant: Sub-sects. 1 & 2, A. & B. (a), (b) & (c).]

granted to the intestate's next of kin. A probate, as long as it remains unrepealed, cannot be impeached in the temporal cts. This case was compared to a probate of a supposed will of a living person; but in such a case the Ecclesiastical Ct. have no jurisdiction, & the probate can have no effect: their jurisdiction is only to grant probates of the wills of dead persons. The distinction in this respect is this: if they have jurisdiction, their sentence, as long as it stands unrepealed shall avail in all other places: but where they have no jurisdiction, their whole proceedings are a nullity (BULLER, J.).—ALLEN v. DUNDAS (1789), 3 Term Rep. 125; 100 E. R. 490.

Annotations:—Consd. Griffiths v. Hamilton (1806), 12 Ves. 298; Hewson v. Shelley, [1914] 2 Ch. 13. **Refd.** Thurston v. Mills (1812), 16 East, 254; *Ex p.* Jolliffe (1845), 8 Beav. 168; Easton v. Carter (1850), 5 Exch. 8; Banks v. Ollerton (1854), 10 Exch. 168. **Mentd.** Phillips v. Hunter (1795), 2 Hy. Bl. 402; Woolley v. Clark (1822), 1 Dow. & Ry. K. B. 409; Wood v. Dunn (1866), 7 D. & S. 94; Martin v. Nadel, [1906] 2 K. B. 26; Ponsford, Baker v. Union of London & Smith's Bank, [1906] 2 Ch. 444; Ranson v. Platt, [1911] 2 K. B. 291.

2780. —[After lapse of time.]—In 1807, the Prerogative Ct. granted letters of administration with the will annexed to B. as substituted legatee, reciting that no exor. had been named in the will, & that C., the universal legatee for life, had survived testator, but died without taking administration. On application for administration *de bonis non*, a doubt arose in the Registry, on looking at the will, whether the property had not been given absolutely to C., & consequently whether the grant in 1807 was not incorrect. The ct. held that, after such a lapse of time, it would presume that the recital in the original grant was correct, & there being no one before it having an interest & calling upon it to do so, would not go into the question of the construction of the will.—*In the Goods of SMITH* (1811), 2 Sw. & Tr. 371; 31 L. J. P. M. & A. 187; 5 L. T. 432; 164 E. R. 1010.

—[*See, generally*, ESTOPPEL, Vol. XXI., p. 237, Nos. 663, 664.

SUB-SECT. 2.—GRANT OF PROBATE OR ADMINISTRATION WITH WILL ANNEXED.

A. In General.

2781. Where administration already granted.]—ANON. (1407), No. 394, *ante*.

2782. —[A. makes his will & appoints an exor., & dies; the ordinary, without taking notice of the will, commits administration to J. S. before the exor. has proved the will, the administrator sells the goods of deceased, & the exor. afterwards proves the will, & brings detinue for the goods against the vendee. Adjudged that he should recover, for the probate supersedes the administration *ab initio*, & the sale made under it; but otherwise if it be averred that the sale was made to discharge the funeral expenses or debts, which the administrator or exor. was compellable to pay, for there such sale shall be indefeasible for ever.

The exors. named are exors. presently & before the probate of the testament, for the probate is but a confirmation & allowance of that which the testator has done (*per cur.*).—GRAYSBROOK v. FOX (1564), 1 Plowd. 275; 75 E. R. 419.

Annotations:—Consd. Mountford v. Gibson (1804), 4 East,

property abroad by action in English cts.—LI CHOK HUNG v. LI PUI CHOI (1910), 6 Hong Kong L. R. 12.—HONG KONG.

PART II. SECT. 15, SUB-SECT. 2.—B. (a).

2792 I. Whether conclusive until re-

441. Exple. Ellis v. Ellis, [1905] 1 Ch. 613. Consd. Hewson v. Shelley, [1914] 2 Ch. 13. **Refd.** Rouse's Case (1588), Owen, 27; Hensloe's Case (1600), 9 Co. Rep. 36 b; Middleton's Case (1604), 5 Co. Rep. 28 b; R. & Waller v. Hanger (1615), 3 Bulst. 1; Wankford v. Wankford (1704), 1 Salk. 299; Douglas v. Forrest (1828), 4 Bing. 686; A.-G. v. Dimond (1831), 9 L. J. O. S. Ex. 90; Daly v. Mahon (1838), 5 Scott, 606; Pemberton v. Chapman (1857), 26 L. J. Q. B. 117; *Re* West, West v. Roberts, [1909] 2 Ch. 180. **Mentd.** Bingham v. Smeatkwick (1595), Cro. Eliz. 455; Knolls v. Dobbins (1623), Palm. 366; Godfrey v. Saunders (1770), 3 Wils. 73; Buckley v. Barber (1851), 6 Exch. 164.

2783. —[Woolley v. Clark, No. 2883, post.

2784. —[Boxall v. Boxall, No. 3009, post.

2785. —[Ellis v. Ellis, No. 2882, post.

2786. —[Hewson v. Shelley, No. 2878, post.

2787. Grant to husband of married woman—Whether assent to dispositions.]—Since the amended rules (15 & 18) for the Probate Registrars in non-contentious business to effect—namely, on Apr. 19, 1887—a grant to a husband of probate of the will of his wife does not necessarily operate as an assent to the will as a disposition of property which she had no right to dispose of by will without his assent.—*Re ATKINSON, WALLER v. ATKINSON*, [1899] 2 Ch. 1; 68 L. J. Ch. 404; 80 L. T. 505; 47 W. R. 469; 43 Sol. Jo. 455, C. A.

Annotations:—Exple. Elliot v. North, [1901] 1 Ch. 424. **Refd.** *Re* Nathan, Herring v. Spyer (1907), 51 Sol. Jo. 428.

2788. —[Under the present practice the assent of a husband to his wife's will, if necessary, is not implied by reason of his having obtained probate of such will in general form.—*Re NATHAN, HERRING v. SPYER* (1907), 51 Sol. Jo. 428.

2789. Evidence of will.]—Probate has a twofold character or operation; viz. granting administration, & also authenticating the will, & evidencing the character of the executor.—*MATSON v. SWIFT* (1845), 8 Beav. 368; 14 L. J. Ch. 354; 5 L. T. O. S. 405; 9 Jur. 521; 50 E. R. 144.

Annotations:—Consd. A.-G. v. Brunning (1860), 8 H. L. Cas. 243. **Refd.** A.-G. v. Partington (1862), 1 H. & C. 457. **Mentd.** Custance v. Bradshaw (1845), 4 Harv. 315; Myers v. Perigal (1852), 2 De G. M. & G. 599; Lord v. Colvin (1867), L. R. 3 Eq. 737; *Re* De Lancey's Succession (1870), L. R. 5 Exch. 102; Forbes v. Steven, Mackenzie v. Forbes (1870), L. R. 10 Eq. 178; A.-G. v. Lomas (1873), L. R. 9 Exch. 29; A.-G. v. Huhbuck (1884), 13 Q. B. D. 275; A.-G. v. Allesbury (1887), 12 App. Cas. 672.

2790. —[A party had a power to appoint by will executed without any particular formality. Upon a petition to obtain the fund out of ct.:—*Held:* it was not necessary to produce the original will, but the evidence of the probate was sufficient.

The question was whether such a will existed or not. The Ecclesiastical Ct. was the exclusive judge of that & its determination on that point properly appeared from the probate (LORD LANGDALE, M.R.).—WARD v. WARD (1848), 11 Beav. 377; 12 L. T. O. S. 490; 50 E. R. 862.

See, now, Court of Probate Act, 1857 (c. 77), ss. 62, 64.

2791. Whether other documents excluded.]—BRENCHELY v. LYNN, No. 2079, *ante*.

B. How far Conclusive.

(a) In General.

2792. Whether conclusive until revoked.]—Fraud in obtaining a will relating only to a personal estate, is not examinable in Chancery, after the will is proved in the Spiritual Ct., so long as that

revoked.]—Held: according to the practice & usage of the Canadian cts. since 1801, the grant of probate was not conclusive, but it was competent

probate is in force.—*ARCHER v. MOSSE* (1686), 2 Vern. 8; 23 E. R. 618, L. C.

Annotation.—*Apprvd.* *Allen v. McPherson* (1817), 1 H. L. Cas. 191.

2793. —.]—Against a probate obtained by fraud, relief must be here, [Ct. of Ch.] where the party will be decreed a trustee.—*BARNESLY v. POWEL* (1748), 1 Ves. Sen. 119; 27 E. R. 930, L. C.; *subsequent proceedings* (1749), 1 Ves. Sen. 284, L. C.

Annotations.—*Distd.* In *Barnesly v. Powell* LORD HARDWICK took a distinction between fraud upon testator, & fraud after his death. In the former case, he said this ct. would not meddle but leave it to the Ecclesiastical Ct. (LORD APSLEY, C.); *Meadows v. Kingston* (1775), Amb. 756; *Gingell v. Horne* (1839), 9 Sim. 539; *Allen v. McPherson* (1817), 1 H. L. Cas. 191. *Consd.* *Birch v. Birch*, [1902] P. 62. *Refd.* *Hindson v. Weatherill* (1854), 5 De G. M. & G. 301. *Mentd.* *Bulkley v. Wilford* (1834), 2 Cl. & Fin. 102; *Price v. Dewhurst* (1838), 4 My. & Cr. 76.

2794. —.]—On plea, sentence in Ecclesiastical Ct. *ex directo* in a matter properly cognisable there, is conclusive evidence where the same matter comes in question collaterally in a ct. of law or equity.—*MEADOWS v. KINGSTON* (DUCHESS) (1775), Amb. 756; 27 E. R. 487.

Annotation.—*Refd.* *Allen v. Macpherson* (1812), 1 Ph. 133.

2795. —.]—*ALLEN v. DUNDAS*, No. 2779, *ante*.

2796. —.]—Probate of an infant soldier's will must be treated as conclusive that he had testamentary capacity, & the will, while the probate remains unrevoked, must be treated as valid.—*Re WERNHER, WERNHER v. BETT*, [1918] 1 Ch. 339; 87 L. J. Ch. 255; 117 L. T. 801; 62 Sol. Jo. 268; *on appeal*, [1918] 2 Ch. 82, C. A. *Annotation*.—*Mentd.* *Nixon v. Prince* (1918), 34 T. L. R. 444.

2797. —.]—After a will of personalty had been proved, *per testes*, in the Ecclesiastical Ct., a bill was filed by the next of kin, alleging that the testator's signature to the will was obtained when he was not of sound & disposing mind; that his medical attendants were not called as witnesses when the probate was obtained; & that the evidence of testator's incompetency did not come to the knowledge of plffs. until after the time allowed for appealing from the sentence of the Ecclesiastical Ct., had expired; & praying that the will might be declared to have been fraudulently obtained, & that the residuary legatee might be declared a trustee for plffs. A demurrer to the bill was allowed, a ct. of equity having no jurisdiction to relieve against the probate of a will, unless the consent of the next of kin to the granting of it was fraudulently obtained.—*GINGELL v. HORNE* (1839), 9 Sim. 539; 3 Jur. 194; 50 E. R. 408.

Annotation.—*Consd.* *Hindson v. Weatherill* (1854), 23 L. T. O. S. 149.

2798. —.]—*ALLEN v. McPHERSON*, No. 717, *ante*.

2799. —.]—*MELUISH v. MILTON*, No. 718, *ante*.

(b) That Document Testamentary.

2800. Whether conclusive.—Where in a marriage settlement a power of appointment by will, signed, sealed, published, & declared in the presence of two witnesses, is given to the wife, notwithstanding her coverture, & an instrument afterwards executed by the wife is proved as a will, this ct. is concluded by the decision of the

Ecclesiastical Ct. that the instrument propounded is a will, & is bound to consider it as a valid execution of the power, if the instrument be proved in this ct. to have been executed with the formalities prescribed by the power.—*DOUGLAS v. COOPER* (1834), 3 My. & K. 378; 40 E. R. 144.

Annotation.—*Refd.* *Whicker v. Hume* (1858), 7 H. L. Cas. 124.

2801. —.]—Personal property was held, under an English will, in trust for such person as an English lady should, by her last will in writing duly executed, appoint. She afterwards married a Frenchman, & died domiciled in France, having appointed the property by an unattested will, valid according to the law of her domicile, & admitted to probate in this country:—*Held*: this will was a valid execution of the power.

The effect of probate is not conclusive as to what this ct. must hold to be its construction as to the rights to the property disposed of by the will, but it is conclusive to this extent, that the instrument admitted to probate is the will of the testator (*ROMILEY, M.R.*).—*D'HUART v. HARKNESS* (1865), 34 Beav. 324; 5 New Rep. 440; 34 L. J. Ch. 311; 11 Jur. N. S. 633; 13 W. R. 513; 55 E. R. 660.

Annotations.—*Consd.* *Hummel v. Hummel*, [1898] 1 Ch. 642; *Poney v. Hordern*, [1900] 1 Ch. 492; *Re Price, Tomlin v. Latter*, [1900] 1 Ch. 442; *Re Simpson, Counts v. Church Missionary Soc.*, [1916] 1 Ch. 502; *Re Wilkinson's Settlement, Butler v. Wilkinson*, [1917] 1 Ch. 620. *Apid.* *Re Wernher, Wernher v. Beit*, [1918] 1 Ch. 339. *Refd.* *In the Goods of Huber*, [1896] P. 209; *Barretto v. Young*, [1900] 2 Ch. 339; *Re Scholefield, Scholefield v. St. John, Re Young, Smith v. St. John*, [1905] 2 Ch. 408.

2802. —. Codicil held void for uncertainty—

After probate in solemn form.—*Re CAMPSILL, READING v. HINDE* (1910), 128 L. T. Jo. 548.

Annotation.—*N.F.* *Re Barrance, Barrance v. Ellis*, [1910] 2 Ch. 419.

2803. —. —.]—A document containing no words of gift, but giving a list of the names of eight persons, & after each name stating a sum of money, was admitted to probate as a codicil:—*Held*: the ct. being bound to assume that all documents admitted to probate are testamentary documents, & it being its duty to construe them in order to ascertain testator's intention as to the disposition of his property & within the limits allowed by law to give effect to that intention, the codicil must be construed as giving to each person named a legacy of the amount set after his name.—*Re BARRANCE, BARRANCE v. ELLIS*, [1910] 2 Ch. 419; 79 L. J. Ch. 511; 103 L. T. 101; 51 Sol. Jo. 651.

Annotation.—*Mentd.* *Re Stoodley, Hooson v. Loeck*, [1915] 2 Ch. 295.

2804. — Will disposing of realty.—Probate held not to be conclusive proof that instruments so far as they affect real estates, are of a testamentary character.—*HUME v. RUNDILL* (1822), 6 Madd. 331; 56 E. R. 1117.

Annotation.—*Mentd.* *Morse v. Martin* (1865), 34 Beav. 500.

See, now, Land Transfer Act, 1897 (c. 65), s. 1 (1), (4) (repealed by Law of Property Act, 1922 (c. 16), s. 156 (11)); Administration of Estates Act, 1925 (c. 23), s. 1 (1).

(c) That Will Duly Executed.

2805. General rule.—To a bill by a legatee against the exor., who has proved the will in this

for resp. to impugn the validity of the will.—*MIGNEAULT v. MALO* (1872), 26 L. T. 329.—*CAN.*

2792 II. —.]—Probate of a will devising real estate is not conclusive evidence of the validity of the will in a ct. of equity.—*TURNER v. TURNER* (1904), 24 C. L. T. 243; 2 N. B. Eq. Rep. 535.—*CAN.*

2792 III. —.]—Probate is conclusive until revoked, & no ct. can admit evidence to impeach it. This proposition is not in its entirety applicable to Ontario because by Judicature Act, R. S. O., 1897, c. 51, s. 38, the Supreme Ct. has jurisdiction to try the validity of wills, whether probate has been granted or not.—*HEZOR v. MORROW*

(1914), 32 O. L. R. 218; 7 O. W. N. 279.—*CAN.*

PART II. SECT. 16, SUB-SECT. 2.—
B. (c).

n. Whether evidence of due execution.—Probate of will, though registered, is not evidence of a due execution to pass real estate.—

Sect. 15.—Effect of grant: Sub-sect. 2, B. (c), (d), (e), (f), (g), (h), (i) & (j).—

country, it is a valid plea that testator was domiciled in a foreign country, & that by the laws of that country the dispositions contained in the will are void; the grant of probate being conclusive as to the validity of the instrument, *quid* will, but not as to the validity of its contents.—*CAMPBELL v. BEAUFOY* (1859), 10 John. 320; 28 L. J. Ch. 645; 33 L. T. O. S. 199; 7 W. R. 513; 70 E. R. 445.

2806. According to law of testator's domicile].—

(1) A will must be executed according to the law of the country where testator was domiciled at the time of his death. The grant of probate not appealed against, conclusively establishes that it was so executed.

(2) The first question made is one that was extremely important, namely, the point, whether probate was or was not conclusive evidence of the domicile. Now, I have no hesitation in saying, that the affirmative of that proposition cannot be a correct exposition of the law. A probate is conclusive evidence that the instrument proved was testamentary according to the law of this country. But it proves nothing else (*LORD CRANWORTH*).—*WHICKER v. HUME* (1858), 7 H. L. Cas. 124; 28 L. J. Ch. 396; 31 L. T. O. S. 319; 22 J. P. 591; 4 Jur. N. S. 933; 6 W. R. 813; 11 E. R. 50, H. L.

Annotations.—As to (2) Follid. Bradford v. Young (1884), 26 Ch. D. 656; *Concha v. Concha* (1886), 11 App. Cas. 541. *Generally, Mentid. Crookenden v. Fuller* (1859), Sea. & Sm. 3; *Tardrow v. Howell, Parry v. Howell* (1861), 9 W. R. 296; *Moorhouse v. Lord* (1863), 10 H. L. Cas. 273; *Drevon v. Drevon* (1864), 34 L. J. Ch. 129; *Jopp v. Wood* (1865), 4 De G. J. & Sm. 616; *Thurburn v. Steward* (1871), L. R. 3 P. C. 478; *Re Patience, Patience v. Main* (1885), 29 Ch. D. 976; *Jex v. McKinney* (1889), 14 App. Cas. 77; *Re Berridge, Berridge v. Turner* (1890), 62 L. T. 365; *Canterbury Corp. v. Wyburn & Melbourne Hospital*, [1895] A. C. 89; *Re Macduff, Macduff v. Macduff*, [1896] 2 Ch. 451; *Winans v. A.-G.*, [1904] A. C. 287.

(d) *That Will Genuine.*

2807. Whether conclusive].—*NOELL v. WELLS & PAGE*, No. 2776, *ante*.

2808. —.]—*MARRIOT v. MARRIOT*, No. 2777, *ante*.

2809. —.]—A probate of a pretended will, before it is avoided, stops claimants as next of kin.—*BENNETT v. CRADOCK* (1751), 1 Keny. 131; 96 E. R. 911.

2810. —.]—*PRIESTMAN v. THOMAS*, No. 716, *ante*.

2811. — In criminal proceedings— For forgery of will.]—A will relating to personal estate cannot be said to be forged, after probate granted. Indictment for forging a will; on the trial a forgery was proved, but defts. producing a probate:—*Held*:—conclusive evidence in support of the will.—*R. v. VINCENT* (1721), 1 Stra. 481; 93 E. R. 648. *Annotation:—N.F. R. v. Gibson* (1802), Russ. & Ry. 343, n.

2812. —.]—On an indictment for forging a will, a probate of the will unrevoked was put in & relied on as a bar:—*Held*: *R. v. Vincent*, No. 2811, *ante*, was not law, & prisoner must be convicted.—*R. v. GIBSON* (1802), Russ. & Ry. 343, n.

2813. —.]—On indictment for forging a will, probate of that will unrevoked is not conclusive evidence of its validity, so as to be

a bar to the prosecution.—*BUTTERY'S CASE* (1818), Russ. & Ry. 342, C. C. R.

Forgery of wills generally, *see* CRIMINAL LAW, Vol. XV., p. 1056.

(e) *That Testator Capable of Making Will.*

2814. General rule.]—*NOELL v. WELLS & PAGE*, No. 2776, *ante*.

2815. —.]—*MARRIOT v. MARRIOT*, No. 2777, *ante*.

2816. —.]—*GINGELL v. HORNE*, No. 2797, *ante*.

2817. —.]—*Re WERNHER, WERNHER v. BEIT*, No. 2796, *ante*.

2818. Where question not raised.]—Will of a lunatic, dated after the time he was found to be of unsound mind, admitted to probate without contest in the Ecclesiastical Ct., a proper subject of inquiry.—*Re GARDEN (A LUNATIC)* (1844), 13 L. J. Ch. 439; 3 L. T. O. S. 177, 258, L. C.

2819. Where question raised.]—The question appears to have been distinctly raised, & evidence given in support of the testator's sanity at the date of the will, the point having been raised before the competent tribunal, & decided, the probate is conclusive (*LORD LYNTHURST, C.*)—*Re HARDCASTLE (A LUNATIC)* (1844), 3 L. T. O. S. 237, L. C.

Testamentary capacity generally, *see* WILLS.

(f) *That Will not Obtained by Fraud or Undue Influence.*

2820. Allegation of fraud—False representations as to character of beneficiary.]—*ALLEN v. M'PHERSON*, No. 717, *ante*.

2821. — Character of beneficiary concealed— Wife not lawfully married.]—*MELUSH v. MILTON*, No. 718, *ante*.

2822. Allegation of undue influence.]—*ALLEN v. M'PHERSON*, No. 717, *ante*.

(g) *That Will not Revoked.*

2823. By subsequent will.]—If there be two wills, the first devising the real estate to charitable uses, & the personal estate to particular legatees; & the second bequeathing the personalty to other legatees & the real estate to such uses as the testator should declare, & a probate be granted of the first will, such probate is conclusive against the claimants under the second will, until reversed by commission of review.—*ANNESLY v. PALMER* (1722), 9 Mod. Rep. 7; 88 E. R. 280.

2824. By subsequent verbal declarations of testator.]—A paper, proved as a will, reciting the marriage articles of testator's daughter with A.; confirming those articles; & directing, that all testator's property & effects shall be vested in A. preferable to any exor. or administrator upon & after testator's decease for all & every the purposes of his said agreement expressed or intended. The probate, obtained by A. as exor., conclusive; & he was held not a trustee for the next of kin upon parol evidence of declarations, subsequent to the will.—*WALTON v. WALTON* (1807), 14 Ves. 318; 33 E. R. 543.

Annotations:—Mentid. Wilkinson v. Atkinson (1823), Turn. & R. 255; *Fitzgerald v. Field* (1826), 1 Russ. 416; *Wood v. Cox* (1837), 2 My. & Cr. 684; *Pickford v. Brown, Brown v. Brown* (1856), 4 W. R. 473; *Stewart v. Stewart* (1880), 15 Ch. D. 539; *Re Ford, Ford v. Ford*, [1902] 1 Ch. 218; *Re Roby, Howlett v. Newington*, [1908] 1 Ch. 71.

HAMILTON v. LOVE (1843), 4 N. B. R. (2 Kerr) 243.—CAN.

PART II. SECT. 15, SUB-SECT. 2.—
B. (e).

c. Only *prima facie* evidence.]—

Letters probate are only *prima facie* evidence as far as real estate is concerned of the testamentary capacity of the testator.—*SPOULE v. WATSON* (1896), 23 A. R. 692.—CAN.

p. —.]—A grant by a surrogate ct. of probate does not stand

in the way of a determination by Supreme Ct. of Ontario of the questions involved in an action in which the will is attacked on the grounds of want of testamentary capacity & undue influence.—*LLOYD v. ROBERTSON* (1916), 9 O. W. N. 339; 35 O. L. R. 264.—CAN.

2825. By destruction or cancellation.]—A person made a will, having signed the prior sheets at the foot; to the last & fifth sheet he attached his signature, & to which was the usual attestation clause. In consequence of alterations in his family by deaths & otherwise, he intended to make a fresh will, & with that view tore off his signature to the prior sheets, & struck his pen through the signature to the last sheet, & it was so found after his death:—*Held*: this was evidence of an *animus revocandi*, & the will declared void, although it had been admitted to probate.—*WILLIAMS v. TYLEY* (1858), John. 530; 32 L. T. O. S. 194; 5 Jur. N. S. 35; 7 W. R. 110; 70 E. R. 531.

Annotation:—*Reid*. In the Goods of Harris (1864), 4 New Rep. 485.

Revocation of wills generally, *see* WILLS.

2826. Cheques payable to servants.]—Testator drew two cheques on his banker in favour of two of his servants, with a direction that they should be presented after his death, & about a year afterwards made a formal will, in which amongst other dispositions he gave two annuities to the same persons, & all the residue of his personal estate to certain other persons, & revoked all former wills. After his death all the three instruments were admitted to probate as constituting his last will:—*Held*: by reason of the probate this *et.* was bound to treat the sums for which the cheques were drawn as legacies, but as such they were constructively, if not expressly, revoked by the will.—*WALSH v. GLADSTONE* (1843), 1 Ph. 204; 13 L. J. Ch. 52; 2 L. T. O. S. 93; 7 Jur. 1113; 41 E. R. 614, L. C.

(h) *That Will Operative by Law of Testator's Domicil.*

2827. Not conclusive.]—An Englishman domiciled in Tuscany executed an instrument in the form of the law of that country, but did not deposit it with a notary as required by that law, professing to be a will of movable property in England. The instrument was admitted to probate in this country as a will. Evidence was given to show that the omission to deposit the instrument had the effect of rendering it inoperative in Tuscany:—*Held*: as the disposition of the movable property was regulated by the domicile of the owner, the instrument had no operation upon it; but the *et.* gave the parties to the suit, which was one for the administration of the owner's estate, an opportunity of taking measures to recall the probate, if they thought fit.

I cannot finally dispose of this case without giving the parties an opportunity of recalling the probate of the instrument in question, a part of the case which is only within the province of a Ct. of Probate & quite out of the jurisdiction of this *et.* (WOOD, V.-C.).—*HOSKINS v. MATTHEWS* (1855), 25 L. T. O. S. 78.

2828. —.]—*CAMPBELL v. BEAUFROY*, No. 2805, *ante*.

(i) *As to Testator's Domicil.*

2829. Not conclusive.]—*WHICKER v. HUME*, No. 2806, *ante*.

(j) *As to Contents, Construction and Condition of Will.*

As to contents.]—*See* Court of Probate Act, 1857 (c. 77), ss. 62, 64; Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 175, Sched. V., Part II.

2830. — Will proved abroad—Probate granted of attested copy.]—Will proved in the West Indies,

established on production of attested copy & prerogative probate.—*BAYLEY v. BAYLEY* (1802), 4 Beav. 143; 49 E. R. 203, L. C.

Annotation:—*Consd.* Rand v. Macmahon (1842), 12 Sim. 553.

2831. —.]—Will established on production of official transcript, & of prerogative probate thereof.—*HARRISON v. WEALE* (1840), 4 Beav. 144; 49 E. R. 294.

2832. —.]—*PULLAN v. RAWLINS*, No. 883, *ante*.

2833. —.]—The copy of a foreign will contained in the ancillary probate granted in this country to the foreign exors., is the only admissible evidence of the will.—*ENOHIN v. WYLIE* (1862), 10 H. L. Cas. 1; 31 L. J. Ch. 402; 6 L. T. 263; 8 Jur. N. S. 897; 10 W. R. 467; 11 E. R. 924, H. L.; *affg.* S. C. *sub nom.* *WYLIE v. WYLIE*, *WYLIE v. ENOHIN* (1860), 1 De G. F. & J. 410, L. JJ.

Annotations:—*Mentd.* Crispin v. Dogliani (1863), 3 Sw. & Tr. 96; Patrick v. Yeatherd (1864), 3 New Rep. 307; In the Goods of Earl (1867), L. R. 1 P. & D. 450; Larivière v. Morgan (1872), 7 Ch. App. 550; Miller v. Jones (1872), L. R. 3 P. & D. 4; King v. George (1876), 4 Ch. D. 435; Travers v. Blundell (1877), 6 Ch. D. 436; Stirling-Maxwell Cartwright (1879), 11 Ch. D. 522; Eames v. Hacon (1880), 16 Ch. D. 407; Bloxam v. Favre (1883), 8 P. D. 101; Ewing v. Orr Ewing (1883), 9 App. Cas. 34; Re Hawthorne, Graham v. Massey (1883), 23 Ch. D. 743; Re Kloebe, Kannreuther v. Gelselbrecht (1884), 54 L. J. Ch. 297; Ewing v. Orr Ewing (1885), 10 App. Cas. 453; Concha v. Concha (1886), 11 App. Cas. 541; Re Truford, Trafford v. Blanc (1887), 36 Ch. D. 600; Abd-El-Messih v. Farra (1888), 13 App. Cas. 431; Re Artola Hermanos, Ex p. André Châle (1890), 24 Q. B. D. 640; Re Bonnetot, Surrey v. Perrin, [1912] P. 233.

2834. Power of Court of Chancery as court of construction—To refer to original will—Accuracy of probate copy doubted.]—As to personal estate, the *et.* is bound by the terms of the will appearing on the probate; but if, on production of the original, a doubt exists as to the accuracy of the probate copy, the *et.* will give an opportunity to the parties to apply to the Ecclesiastical Ct. to set it right.—*HAVERGAL v. HARRISON* (1843), 7 Beav. 49; 49 E. R. 980.

2835. —.]—The original will of personally cannot be looked to contradict the probate, though it may in some cases to explain it.—*OPPENHEIM v. HENRY* (1853), 9 Hare, 802, n.; 68 E. R. 742; *sub nom.* *OPPENHEIM v. HENRY*, 20 L. T. O. S. 201; 1 W. R. 126; *subsequent proceedings, sub nom.* In the Goods of *OPPENHEIM*, 17 Jur. 306.

Annotations:—*Reid*. Houston v. Burns, [1918] A. C. 337; Re Battle-Wrightson, Cecil v. Battle-Wrightson, [1920] 2 Ch. 330.

2836. — For purposes of construction.]—Original will of personally examined in order to arrive at the true construction of certain bequests.—*COMPTON v. BLOXHAM* (1845), 2 Coll. 201; 63 E. R. 699.

Annotations:—*Reid*. Re Battle-Wrightson, Cecil v. Battle-Wrightson, [1920] 2 Ch. 330. *Mentd.* Re Appleton, Barber v. Tebbit (1885), 29 Ch. D. 893.

2837. —.]—In construing a will of personal estate, the *et.*, notwithstanding an objection by counsel that the probate copy alone could be looked at, ordered the original will to be produced, & had regard to certain erasures appearing therein, but which had been omitted in the probate.—*MANNING v. PURCELL* (1855), 7 De G. M. & G. 55; 3 Eq. Rep. 387; 24 L. J. Ch. 522; 24 L. T. O. S. 317; 3 W. R. 273; 44 E. R. 21, L. JJ.

Annotations:—*Consd.* Re Battle-Wrightson, Cecil v. Battle-Wrightson, [1920] 2 Ch. 330. *Reid*. Houston v. Burns, [1918] A. C. 337. *Mentd.* Pellaw v. Horsford (1856), 25 L. J. Ch. 352; Langdale v. Whitfield (1858), 4 K. & J. 426; Stein v. Ritherdon (1868), 37 L. J. Ch. 369; Prichard v. Prichard (1870), L. R. 11 Eq. 232; Hopkins v. Abbott (1875), L. R. 19 Eq. 222; Re Rowson, Field v. White (1885), 52 L. T. 825; Roggio v. Steven (1888), 4 T. L. R.

Secd. 15.—Effect of grant: Sub-sect. 2, B. (j), (k), (l), (m) & (n), & C.]

326; *Strachan v. Universal Stock Exchange* (No. 2), [1895] 2 Q. B. 697; *Re Crommie, Ex p. Waud*, [1898] 2 Q. B. 383; *Re Owen, Peat v. Owen* (1898), 78 L. T. 643; *Ward v. Fry* (1901), 85 L. T. 394; *Re Seton-Smith, Burnard v. Waite*, [1902] 1 Ch. 717; *Re Glendinning, Steel v. Glendinning* (1918), 88 L. J. Ch. 87.

2838. ————]—I know of no rule that for the purpose of construing a will you may not look at the original will itself (LORD ESHER, M.R.).—*Re HARRISON, TURNER v. HELLARD* (1885), 30 Ch. D. 390; 55 L. J. Ch. 799; 53 L. T. 799; 34 W. R. 420, C. A.

Annotations:—Apld. Re Battie-Wrightson, Cecil v. Battie-Wrightson, [1920] 2 Ch. 330. *Mentd. Re Bright-Smith, Bright-Smith v. Bright-Smith* (1886), 31 Ch. D. 314; *Re Tandy, Tandy v. Tandy* (1886), 34 W. R. 748; *Furniss v. Thear* (1888), 36 W. R. 521.

2839. ————]—*Testatrix*, who in fact had accounts at seven banks, bequeathed her balance at "the said bank" to a specific legatee. No bank was named in the probate:—*Held*: in order to ascertain what bank was intended the ct. was entitled to look at the original will, in which a clause, immediately preceding the specific bequest & containing the name of the bank, had been formally erased for ulterior purposes, & the erasure could be read for this purpose.—*Re BATTIE-WRIGHTSON, CECIL v. BATTIE-WRIGHTSON*, [1920] 2 Ch. 330; 89 L. J. Ch. 550; 124 L. T. 84; 36 T. L. R. 693; 64 Sol. Jo. 585.

2840. ————]—*Exercise of power by will.*—PINNOCK v. RIGBY (1843), 1 L. T. O. S. 202, L. C.

2841. Probate granted as of will & codicil—Whether conclusive that distinct instruments.]—Probate being granted as of a will & codicil, is conclusive as to the fact of their being distinct instruments.—*BAILLIE v. BUTTERFIELD* (1787), 1 Cox, Eq. Cas. 392; 29 E. R. 1217.

2842. Probate granted in facsimile.]—An alteration in a will, made by the extrix. & residuary legatee, on her affidavit, admitted to probate in facsimile.

I think the ct. may grant probate of the paper in facsimile, which will leave the whole question open, & the parties may resort to such legal remedy as they may be advised to take (SIR H. JENNER PUST).—*In the Goods of OLIVER* (1842), 1 Notes of Cases, 308.

2843. ————]—In the absence of evidence, the presumption is that obliterations & alterations appearing upon the face of a will were made subsequently to its execution. But probate of the will having been granted in facsimile:—*Held*: the ct. of competent jurisdiction had thereby decided that the obliterations were made before execution, & effect was given to them accordingly.

It must be taken as conclusively settled by the Ecclesiastical Ct. that the will was at its execution in the state in which we now find it; that is, that the testator executed the instrument with the cross lines drawn over it (LORD GRANWORTH, C.).—*GANN v. GREGORY* (1851), 3 De G. M. & G. 777; 2 Eq. Rep. 605; 23 L. T. O. S. 136; 18 Jur. 1063; 2 W. R. 484; 43 E. R. 305, L. C.

Annotation:—Consd. Re Battie-Wrightson, Cecil v. Battie-Wrightson, [1920] 2 Ch. 330.

2844. ————]—Testator bequeathed the residue to three trustees & their heirs, in trust for his daughter for life, with remainder over. He afterwards struck out the names of his trustees & substituted that of his daughter. A facsimile probate was granted:—*Held*: (1) though there was a revocation of the estate & interest given to the trustees, there was no revocation of the subsequent part of the will which declared the

trusts, & consequently the daughter took an estate for life only; (2) a construction must be put upon the whole will as it stood, for to neglect any part of it would be taking upon the ct. itself the province of a ct. of probate. The several parts of the will were not inconsistent, & might well be read together.

The fact of the ct. of probate granting a facsimile probate does not, in the slightest degree, affect the rules of construction, or the manner in which this ct. must deal with the case presented to it. The probate of the will performs its function by telling the ct. what the will consists of; but whether the ct. of probate grants a facsimile probate or not, I apprehend this ct. is bound to look at anything in the original will itself, which may aid & assist it in coming to a correct conclusion as to the construction to be put upon the contents of the will (ROMILLY, M.R.).—*SHEA v. BOSCHETTI* (1854), 18 Beav. 321; 2 Eq. Rep. 608; 23 L. J. Ch. 652; 23 L. T. O. S. 137; 18 Jur. 614; 2 W. R. 281; 52 E. R. 127.

Annotation:—As to (2) Consd. Re Battie-Wrightson, Cecil v. Battie-Wrightson, [1920] 2 Ch. 330.

2845. Interlineations incorporated in probate—Presumption of due inquiries at time of grant—Lapse of time.]—A will made in 1834 contained a general devise & bequest of freehold & personal estates upon trusts for conversion & division of the proceeds upon the death of testator's widow "among my following relatives, M.P., T.C., etc." After the word relatives there appeared in the will an interlineation as follows: "who may then be living." The will with the interlineation had been proved in 1835 in the consistorial ct., but in an action lately commenced for the administration of testator's real & personal estate the chief clerk had certified that there was no evidence that the interlineation was made prior to the execution of the will:—*Held*: having regard to the length of time elapsed since probate of the will, it must be presumed that proper inquiries were taken before probate issued, & that for the purpose of distributing the real estate no further evidence was required.—*Re CRUTTENDEN, DAVEY v. LANSDELL* (1881), 45 L. T. 465; 30 W. R. 57.

2846. Probate granted of translation.]—A will is made in French, & the probate is in English, & varies from the original; probate being in a different language is not conclusive.—*L'FIT v. L'BATT* (1718), 1 P. Wms. 526; 2 Eq. Cas. Abr. 777; 24 E. R. 500.

Annotation:—Consd. & Apld. Re Cliff's Trusts, [1892] 2 Ch. 229.

2847. ————]—An Englishman, who had resided in France, died there, having made a will in the French language, which was registered in France & was retained there. Probate of an English translation was afterwards granted by the P. D. of the High Ct. to the exor. appointed by the will. The translation was certified by an English notary public to be a true & faithful translation of a copy in French of the original will, which was certified by a notary public in France to be a correct copy. The English translation & the certified French copy were both annexed, to the certificate of the English notary, & were both deposited in the probate registry. A question upon the construction of the will being raised in the Ch. Div. & it being alleged that the English translation was inaccurate:—*Held*: none of the parties insisting upon an application being made to the P. D. to correct the English translation, the ct. was entitled to look at the original French as well as at the English translation.—*Re CLIFF'S*

TRUSTS, [1892] 2 Ch. 229; 61 L. J. Ch. 397; 66 L. T. 483; 40 W. R. 439; 36 Sol. Jo. 398.

Annotation.—*Distd. Re Manners, Manners v. Manners*, [1923] 1 Ch. 220.

2848. —.]—Testator, whose domicil was English, while residing in Nicaragua, made his will in the Spanish language, leaving to his wife for life three-fourths of the income derived from the "bonds & moneys" then deposited with a specified bank in London. Upon the death of his wife this same income was to be paid to his sister M., & the income of the other one-fourth was to be equally divided between M. & a brother. No exor. was appointed by testator, & there were no children of the marriage. Testator's widow died on Nov. 15, 1918. On Apr. 27, 1920, letters of administration with the will annexed of testator's estate were obtained by M. from the Probate Registry in England, & a translation of the will into English was registered with it. At the bank in London there were deposited fifteen securities consisting of bonds to bearer, debenture stocks, & one sum of inscribed stock. Two of the certificates of debenture stock were not under seal. There was evidence that "bonds" was the correct translation of the Spanish word "*bonos*" used by testator:—*Held*: the language of the Spanish will must be looked at to ascertain the equivalent expressions in English.—*Re MANNERS, MANNERS v. MANNERS*, [1923] 1 Ch. 220; 92 L. J. Ch. 249; 128 L. T. 564; 67 Sol. Jo. 262.

(k) *As to Executors.*

See Nos. 2776, 2779, ante, 2850, post.

(l) *As to Collateral Matters.*

See Sub-sect. 4, post.

(m) *Upon Whom Binding.*

See, generally, ESTOPPEL, Vol. XXI., pp. 237, 238.

2849. Party cognisant of proceedings—Probate in solemn form—Though not cited.—WYTCHERLEY v. ANDREWS, No. 1155, *ante*.

2850. —.]—YOUNG v. HOLLOWAY, No. 1158, *ante*.

2851. —.]—Action compromised.]—WYTCHERLEY v. ANDREWS, No. 1155, *ante*.

2852. Party propounding will—Allegation of forgery.—PRIESTMAN v. THOMAS, No. 716, *ante*.

2853. —.]—Executor—Allegation of invalidity—Executor also one of next of kin.]—*In the Estate of WILLIAMS, WILLIAMS v. EVANS*, No. 3032, *post*.

2854. Legatees—Unless fraud or collusion proved.—A sentence in favour of a draft will pronounced in a suit against the exors. of a former will is binding on the legatees named therein unless fraud or collusion can be shown between the parties to the suit, or neglect or mismanagement in the conduct of it.

Upon the principle, that the exors. in the former will represent, & are the protectors of the legatees under it, being specially entrusted by the deceased with the care & management of his property, & to see his intentions carried into effect; & who

must be presumed to have performed their duty with fidelity until the contrary is proved (*SIR HERBERT JENNER*).—*HAYLE v. HASTED & PIERSON* (1836), 1 Curt. 236; 163 E. R. 80.

(n) *Where Grant Obtained by Fraud.*

2855. Probate granted by consent—Consent obtained by fraud.—*GINGELL v. HORNE*, No. 2797, *ante*.

2856. Probate obtained in false name—Will forged.—Exors. by accident overlooked stock standing in the name of their testator, & the dividends being unclaimed thereon for ten years, the stock was transferred to the Comrs. for the Reduction of the National Debt, pursuant to 58 Geo. 3, c. 60. A person falsely pretending to be the grandson, exor., & sole residuary legatee of testator, obtained from the Ecclesiastical Ct. probate of a paper writing, purporting to be the will of testator, but of a later date than the real will; & on production of the probate at the bank, obtained a transfer of the stock in question, pursuant to the Act. The forgery having been discovered, the pretended exor. was transported, & so was unable to refund:—*Held*: the exors. of the real will were entitled to a transfer from the comrs.—*Ex p. JOLIFFE* (1845), 8 Beav. 108; 4 L. T. O. S. 309; 10 Jur. 813; 50 E. R. 66; *sub nom. Ex p. JOLIFFE*, 14 L. J. Ch. 134.

Forged grant.—*See No. 2776, ante.*

C. *As to Title or Rights of Executor.*

2857. Confirmation of title.—*GRAYSBROOK v. FOX*, No. 2782, *ante*.

Powers of executor before probate generally, *see Part I., Sect. 10, ante*.

2858. Evidence of title.—*MATSON v. SWIFT*, No. 2780, *ante*.

2859. —.]—Though will proved by one only.]—(1) The title of three, claiming as exors., is well evidenced by the probate granted to one only, of the will appointing them all.

(2) It is a general rule that, if there are two or more exors. & one proves the will, they must all join in bringing actions; & if they do not, deft. may plead in abatement (*LORD TENTERDEN, C.J.*).—*WALTERS v. PEEL* (1820), Mood. & M. 362, N. P. *Annotation*:—*Generally, Mentd. Angus v. Dalton* (1877), 3 Q. B. D. 85.

2860. —.]—Whether conclusive—As to appointment of executor.]—*NOELL v. WELLS & PAGE*, No. 2776, *ante*.

2861. —.]—The probate is conclusive as to who is exor. (*LORD CAMPBELL, C.J.*).—*KERKIN v. KERKIN* (1854), 3 E. & B. 399; 18 Jur. 813; 118 E. R. 1192; *sub nom. KIRKILL v. KIRKILL*, 22 L. T. O. S. 259.

2862. —.]—*CAMPBELL v. BEAUFAY*, No. 2805, *ante*.

2863. —.]—That executor duly constituted.]—*ALLEN v. DUNDAS*, No. 2779, *ante*.

2864. —.]—Probate of forged will—Obtained in false name.]—*Ex p. JOLIFFE*, No. 2856, *ante*.

2865. —.]—In criminal proceedings—Indictment

r. —.]—In an action at the instance of an American, on the death of pursor, a party appeared producing as his sole title a certificate of administration having been granted in his favour, signed by the Judge of an American Probate Ct.:—*Held*: this document could not be received as a title to sue, without evidence of its authenticity.—*DIMROW v. MACINTOSH* (1852), 15 Duval (Cl. of Sess.) 123; 25 Sc. Jur. 86.—*SCOT.*

PART II. SECT. 15, SUB-SECT. 2.—C.

2858 i. Evidence of title.—Where exors. have full power conferred on them to dispose of the real estate of testator it is sufficient for plff. seeking to prove title in the exors., to produce probate of the will granted to them.—*LYONS v. BAKER, LYONS v. BAKER, LYONS v. CURRY* (1884), 5 N. S. W. L. R. 282; 1 N. S. W. N. 23.—*AUS.*

2858 ii. —.]—Probate is now the necessary & only admissible evidence

of the title of exors. claiming in ejectment, & it is no longer necessary to produce or prove the will itself.—*SIMPSON v. STEWART* (1894), 10 Man. L. R. 176.—*CAN.*

q. —.]—Under foreign grant.]—Probate & letters of administration taken out from an English Prerogative Ct. by the survivor of exors. nominated in an English will, held a sufficient title to pursue in a Scotch Ct.—*STEWART v. M'DONALD* (1826), 5 Sh. (Cl. of Sess.) 29.—*SCOT.*

Sect. 15.—Effect of grant: Sub-sect. 2, C. & D.; sub-sect. 3.]

for perjury.]—In an indictment for perjury, it was alleged that A. made his will, & thereby appointed B. his exor.:—*Held*: the production of the probate was the proper proof of this allegation.—*R. v. TURNER* (1849), 2 Car. & Kir. 732.

2866. Probate by one of several executors—On rights of non-proving executors.]—One of several exors. appointed in a will proved the will & the rest refused. On the death of the exor. who proved, a third person took out letters of administration. The ct. held that probate by one exor. made all exors. so that no other person could administer in the lifetime of the surviving exors.—*PAWLET v. FREAK* (1858), Hard. 111; 145 E. R. 406.

*Annotations:—***Consd.** *Harrison v. Harrison* (1846), 1 Rob. Ecol. 406; *Venables v. East India Co.* (1848), 2 Exch. 633. **Refd.** *House & Down v. Petre* (1700), 1 Salk. 311; *Wankford v. Wankford* (1704), 1 Salk. 299; *Strickland v. Strickland* (1841), 12 Sim. 253.

2867. ——— Joinder in action with proving executor.]—If two exors. sue, it cannot be pleaded in abatement that only one of them proved the will.—*BROOKS v. SPROUD* (1702), 7 Mod. Rep. 39; 1 Salk. 3; 87 E. R. 1080.

*Annotations:—***Refd.** *Pemberton v. Chapman* (1857), 7 E. & B. 210. **Mentd.** *Rendall v. Rendall* (1841), 1 Hare, 152.

2868. ———.]—One of two exors. having alone proved the will, had received a debt due to testator, which by his will was appropriated to the payment of specific legacies to his grandchildren, with interest thereon, & afterwards permitted the money to be lent out to a third person, by whom it was paid to A. A., on being applied to by the exor., acknowledged that he had received the money, & that it belonged to the testator's grandchildren, but refused to pay it over to the exor.:—*Held*: both exors. might join in an action brought to recover the money against A.—*WEBSTER v. SPENCER* (1820), 3 B. & Ald. 300; 106 E. R. 694.

*Annotations:—***Distd.** *Brassington v. Ault* (1824), 2 Bing. 177. **Refd.** *Heath v. Chilton* (1844), 12 M. & W. 632. **Mentd.** *Clark v. Hougham* (1823), 2 B. & C. 149.

2869. ———.]—*WALTERS v. PFEIL*, No. 2850, *ante*.

2870. ——— To take out office copy of will—Only if qualified as executor.]—A surviving exor. who has not proved the will, must qualify himself as exor. before he can take out an office copy of will proved by another exor.—*In the Goods of LAWRENCE* (1842), 6 Jur. 504.

— **Right of proving executor—Sale of realty.]**—*See* Part III., Sect. 2, *ante*.

D. On Realty not subject to Land Transfer Act, 1897.

See, now, Court of Probate Act, 1857 (c. 77), s. 64; Land Transfer Act, 1897 (c. 65), s. 1 (1) (4) (repealed by Law of Property Act, 1922 (c. 16), s. 156 (11)); Administration of Estates Act, 1925 (c. 23), ss. 1, 3.

2871. Whether probate conclusive.]—When the probate of a will of lands may, or may not be read. Bill for a legacy; pltf. set forth the substance of the will, & referred to it when produced; deft. in his answer said he believed there was such a will: when pltf. came to make out his proof, he

offered to produce the probate; which was not admitted, because it was in the case of a real estate, of which the spiritual ct. had no consuance.—*MULLINS v. PRATT* (1716), Bunb. 6; 145 E. R. 575.

2872. — As to testamentary nature of document.]—*HUME v. RUNDELL*, No. 2804, *ante*.

2873. — As to copyholds.]—The probate of a will is not a sufficient authentication of it, so far as it relates to copyholds.—*ARCHER v. SLATER*, (1841), 11 Sim. 507; 59 E. R. 969.

2874. Notice to admit probate under Court of Probate Act, 1857 (c. 77), s. 64—On whom served.]

—*Held*: the party receiving the notice, although he had not given a counter notice within four days, was not precluded at the trial from contesting the validity of the will:—*Qu.*: whether the notice ought not to be served on the attorney in the cause & whether service on the party is sufficient.—*BARRACLOUGH v. GREENHOUGH* (1867), 1 L. R. 2 Q. B. 612; 8 B. & S. 623; 36 L. J. Q. B. 251; 15 W. R. 934, Ex. Ch.

*Annotations:—***Mentd.** *Simpson v. Smith* (1871), L. R. 6 C. P. 87; *Ystalyfera Iron Co. v. Neath & Brecon Ity.* (1873), L. R. 17 Eq. 142.

2875. — No counter-notice given—Whether conclusive.]—*BARRACLOUGH v. GREENHOUGH*, No. 2874, *ante*.

2876. — What may be admitted—Whether seal of court necessary on probate.]—Probate of a will admissible without being stamped with the seal of the ct. under above sect. The stamp of the seal of the ct. is required for a copy only.—*RIPPON v. PRIEST* (1863), 3 F. & F. 644.

SUB-SECT. 3.—LETTERS OF ADMINISTRATION.

See, now, Administration of Estates Act, 1925 (c. 23), s. 27.

2877. In general.]—It is essential to bear in mind the nature of such a grant [of administration] as being the act of a ct. of sole jurisdiction, pronouncing as to personal property to the exclusion of all other ct.s., on the question of testacy & intestacy, upon a right to receive & distribute the effects of deceased in the event of intestacy, whether whole or partial. No other ct. can take notice of the right of representation to personal property, & where such ct. has, by the grant of probate or letters of administration, established a right, no other ct. can permit it to be gainsaid (*per* CUR.).—*A.-G. v. PARTINGTON* (1864), 3 H. & C. 193; 33 L. J. Ex. 281; 10 L. T. 751; 10 Jur. N. S. 825; 13 W. R. 54, Ex. Ch.; *on appeal, sub nom. PARTINGTON v. A.-G.* (1869), L. R. 4 H. L. 100, H. L.

*Annotations:—***Mentd.** *Lord v. Colvin* (1867), L. R. 3 Eq. 737; *Fleet v. Perrins* (1869), 9 B. & S. 575; *A.-G. v. Cleave* (1873), 31 L. T. 86.

2878. —.]—The person clothed by the Ct. of Probate with the character of administrator of a deceased person's estate is the legal personal representative of deceased, unless & until the grant of administration is revoked or determined, with power to dispose of deceased's assets, including the real estate, which is vested in him by virtue of Land Transfer Act, 1897 (c. 65), s. 1.

Letters of administration were granted to the

2866 i. Probate by one of several executors—On rights of non-proving executors.]—An action can be maintained by two or more exors. for the goods of testator where probate is only issued to one, or goods taken out of the possession of one of them, possession of one being possession of

all.—*BYRCK v. BEATTIE* (1802), 12 C. P. 409.—**CAN.**

PART II. SECT. 15, SUB-SECT. 3.

2877 i. In general.]—As long as a person remains clothed with the character of personal representative by grant of administration he repre-

sents to the fullest extent the assets & personal estate to which the grant refers.—*SMITHWICK v. HAYDEN* (1889), 23 L. R. Ir. 475.—**IR.**

s. Presumption of validity—Until revoked—Though obtained by fraud.]—Administration, though obtained by fraud, is valid until revoked by some

widow of a man who was erroneously presumed to have died intestate. The administratrix as personal representative of the deceased, by virtue of the Land Transfer Act, 1897 (c. 65), sold & conveyed to a purchaser a portion of the deceased's real estate. Upon the subsequent discovery of a will the exors. thereby appointed obtained a recall of the letters of administration & a grant of probate to themselves. In an action by the exors. to recover possession of the real estate sold by the administratrix:—*Held*: (1) the grant of administration was not void *ab initio* & the purchaser had acquired a good title; (2) even if the grant of administration had been void for want of jurisdiction it was an order of the ct. by virtue of which the purchaser's title would have been protected under Conveyancing Act, 1881 (c. 41), s. 70.

(3) How any of these administrations [administration *lite pendente*, administration *durante minore aetate*, administration *durante absentia*, administration *durante animi aut corporis vitio*] could be other than traps for the unwary if they did not enable the administrator to pass property, how if they do enable an administrator to pass property, they are consistent with a theory that the property immediately on death vests in the exor. & cannot be divested, even temporarily, by the Ordinary of the Ct. of Probate, I fail to understand. It seems to me that the true view is that till the Ordinary was concluded by probate he had for the benefit of all those interested, including, at any rate in ancient times, the soul of deceased for the repose of which masses were to be provided, the power to commit administration & to pass the property thereby, subject to that administration being recalled & the power & title of the administrator determined upon production possibly, upon probate certainly, of a will (PHILLIMORE, L.J.).

(4) There is a separate point under Conveyancing Act, 1881 (c. 41), s. 70. It seems to me that the order granting administration to the widow was a judicial act, & even if that grant could be held void on the ground of want of jurisdiction the title of the purchaser would be protected under that sect. (COZENS-HARDY, M.R.).—HEWSON v. SHELLEY, [1914] 2 Ch. 13; 83 L. J. Ch. 607; 110 L. T. 785; 30 T. L. R. 402; 58 Sol. Jo. 397, C.A. 2879. Where testator left a will.]—ANON. (1467), No. 394 *ante*.

2880. —.—.]—GRAYSBROOK v. FOX, No. 2782, *ante*.

2881. —.— Administration obtained by suppression of will appointing executor.]—Administration, granted upon concealment of a will, is afterwards revoked upon the discovery of the will; mesne acts & sales by the administrator are void, & are not made good by the subsequent refusal of the exor.—ABRAHAM v. CONYNGHAM (1670), 1 Freem. K. B. 445; 2 Lev. 182; 1 Vent. 303; 3 Keb. 725; T. Jo. 72; 2 Mod. Rep. 146; 89 E. R. 333.

Annotations:—*Distd.* Boxall v. Boxall (1884), 27 Ch. D. 220. *Foll.* Ellis v. Ellis, [1905] 1 Ch. 613. *Consd.* Hewson v. Shelley, [1914] 2 Ch. 13. *Reid.* Wankford v. Wankford (1704), 1 Salk. 299; Harrison v. Harrison (1846), 4 Notes of Cases, 434.

2882. —.—.]—A grant of letters of administration obtained by suppressing a will which appointed an exor. is void *ab initio*, & all dispositions of the assets by the supposed administrator are void also, except acts done in a due course of administration.—ELLIS v. ELLIS, [1905]

1 Ch. 613; 74 L. J. Ch. 296; 92 L. T. 727; 53 W. R. 617.

Annotations:—*Distd.* Craster v. Thomas, [1909] 2 Ch. 348. *Consd.* Hewson v. Shelley, [1914] 2 Ch. 13.

2883. —.—.]—The property of a deceased person vests in his exor. from the time of his death; in an administrator from the time of the grant of the letters of administration; & therefore, where A. took out letters of administration under a will by which he was appointed exor., & after notice of a subsequent will, sold the goods of the testator:—*Held*: the rightful exor. in an action of trover was entitled to recover the full value of the goods sold; & A. was not entitled, in mitigation of damages, to show that he had administered the assets to that amount.—WOOLLEY v. CLARK (1822), 5 B. & Ald. 744; 1 Dow. & Ry. K. B. 409; 106 E. R. 1363; *subsequent proceedings*, *sub nom.* WOOLLEY v. KELLY, 1 B. & C. 68.

Annotations:—*Expld.* Thompson v. Harding (1853), 22 L. J. Q. B. 448. *Consd.* Boxall v. Boxall (1884), 27 Ch. D. 220; Ellis v. Ellis (1905), 74 L. J. Ch. 296. *Distd.* Hewson v. Shelley, [1914] 2 Ch. 13. *Reid.* Welchman v. Sturgis (1849), 13 Q. B. 552; Morgan v. Thomas (1853), 8 Exch. 302; Meyappa Chetty v. Supramanian Chetty, [1916] 1 A. C. 603.

2884. —.—.]—BOXALL v. BOXALL, No. 3060, *post*.

2885. —.—.]—HEWSON v. SHELLEY, No. 2878, *ante*.

2886. Successive grants.]—If administration be granted to one & after to another the first is not void, but voidable only.—PRATT v. STOCKE (1594), Cro. Eliz. 315; 78 E. R. 565.

2887. Precludes second grant.—While subsisting.]—In the Goods of HORNBUCKLE, No. 877, *ante*.

2888. Presumption of validity.]—(1) One sues as administrator of S. without showing that S. died intestate; yet an administration taken out of the Archbishop's ct. shall be intended to be a good administration.

(2) Administration granted in a foreign ct. not taken notice of in our cts.—TOURTON v. FLOWER (1735), 3 P. Wms. 369; 21 E. R. 1105.

Annotation:—As to (1) *Reid.* Tyler v. Bell (1837), 2 My. & Cr. 89.

2889. —.— Until revoked.]—Letters of administration may be acted under until they are revoked.—KENNEDY v. KENNEDY (1753), Say. 99; 3 Keny. 20; 90 E. R. 816.

2890. —.— Though a will is alleged.]—WRIGHT v. BLUCK (1682), 1 Vern. 100; 23 E. R. 347.

2891. —.— —.—.]—In trover by an administrator on the possession of intestate it cannot, on the general issue, be given in evidence that deceased made a will & that the exor. is living.—BLAINFIELD v. MARCH (1703), 7 Mod. Rep. 141; 1 Salk. 285; 87 E. R. 1150.

Annotation:—*Mentd.* Leake v. Loveday (1842), 4 Man. & G. 972.

2892. —.— —.— & proof abroad.]—A sole surviving extrix., who was beneficially interested in a moiety of the estate, filed a bill against a person who had received part of that estate, & was abroad:—*Held*: the representative of the party beneficially interested in the other moiety must be before the ct. But the person who has obtained letters of administration to such party from the Prerogative Ct., will be considered a sufficient representative, although it appears that deceased left a will, which has been proved in a foreign country.—PRICE v. DEWHURST (1838),

expressed judicial act.—IRWIN v. BANK OF MONTREAL (1876), 38 U. C. R. 375.—CAN.

t. Extent of power — Of limited

administration.]—A limited administration operates only to the extent of the power which it specifically gives.—JOHNSTON v. HODGENS (1873), 21 W. R. 719.—IR.

a. Evidence of title.]—On grant of administration ct. will not decide as to title of intestate to property.—*Re* MARTIN'S ESTATE (1884), 10 V. L. R. 32.—AUS.

Sect. 15.—Effect of grant: Sub-sects. 3 & 4, A., B. & C.]

4 My. & Cr. 76; 8 L. J. Ch. 57; 2 Jur. 1006; 41 E. R. 30, L. C.

Annotations:—*Reid*. Whyte v. Rose (1842), 3 Q. B. 493; Vanquellin v. Bouard (1863), 15 C. B. N. S. 341. **Mentd.** Lancerville v. Anderson (1860), 2 Sw. & Tr. 24; Wildes v. Russell (1866), L. R. 1 C. P. 722; Ochsenbein v. Papelier (1873), 8 Ch. App. 695; Pemberton v. Hughes, [1899] 1 Ch. 781.

2893. ——— Will abroad—Intention to bring in & prove.]—(1) Semble: payment of a debt to an administrator to whom letters of administration have been regularly granted, exonerates the debtor, though it should turn out that there is a will existing; (2) the ct. refused to stay the proceedings in an action at the suit of an administrator, upon a suggestion that there was a will in India, which the intestate's widow, who was thereby appointed extrix., had intimated her intention to bring to this country to prove.—*PROSSER v. WAGNER* (1856), 1 C. B. N. S. 289; 26 L. J. C. P. 81; 28 L. T. O. S. 160; 5 W. R. 146; 140 E. R. 120.

Annotation:—*As to (1) Reid*. Hewson v. Shelley, [1914] 2 Ch. 13.

2894. ——— Though irregularly granted.]—MOHAMIDU MOHIDEEN HADJIAR v. PITCHAY, No. 853, *ante*.

2895. ——— Rebuttal of presumption—Claim for larger sum than sworn value of estate.]—If an administrator shows that he sues for a greater value than is covered by the *ad valorem* stamp of his letters of administration, he shows his administration to be void, & cannot recover, although he sues for a doubtful claim. It will not suffice to sue out new letters of administration on a larger stamp after he has obtained judgment.—*HUNT v. STEVENS* (1810), 3 Taunt. 113; 128 E. R. 46.

Annotations:—*Reid*. A.-G. v. Hope (1834), 1 Cr. M. & R. 530; *Re* Rowe, Jacobs v. Hind (1889), 60 L. T. 596. **Mentd.** Carr v. Roberts (1831), 2 B. & Ad. 905; A.-G. v. Bouwens (1838), 4 M. & W. 171; A.-G. v. Brunning (1860), 8 H. L. Cas. 243.

2896. ——— Administration obtained on misdescription of administrator.]—A. being entitled to a fund in ct., died, & administration was granted to a person as "the natural & lawful sister" of A. It appearing from the proceedings in the cause, that A. was illegitimate, the ct. refused to pay the fund to the administratrix, but directed it to be carried over to a separate account, with directions that it should not be paid out of ct. without notice to the Crown.—*LONG v. WAKELING* 1 Beav. 400; 48 E. R. 995.

Annotation:—*Reid*. *Re* De Penny, De Penny v. Christie, [1891] 2 Ch. 63.

————— **Where testator leaves will.]—***See* Nos. 304, 2878, *ante*.

2897. Grant to attorney of executor.]—SUWERKROP v. DAY, No. 2435, *ante*.

2898. Grant to creditor—Right to contest claim of alleged next of kin.]—A creditor in possession of a grant of administration entitled to contest suit against a person asserting himself to be next of kin.—*ELME v. DA COSTA* (1791), 1 Phillim. 173; 161 E. R. 952.

Annotations:—*Consd.* Menzies v. Pulbrook & Ker (1841), 2 Curt. 845. **Reid**. Dabbs v. Chisman, Jennings v. Beauchamp (1810), 1 Phillim. 155; Crane v. Rehelle (1852), 19 L. T. O. S. 192; Hawke v. Wedderburne (1868), L. R. 1 P. & D. 594.

2899. Grant to debtor—Effect on time under Statute of Limitations.]—Where a debtor takes out administration to his creditor, the running of the above statute will be suspended during the

administration.—*SEAGRAM v. KNIGHT* (1867), 2 Ch. App. 628; 36 L. J. Ch. 918; 17 L. T. 47; 15 W. R. 1152, L. C.

Annotations:—*Mentd.* Dashwood v. Magniac, [1891] 3 Ch. 306; *Re* Benzon, Bower v. Chetwynd (1914), 83 L. J. Ch. 658.

2900. Grant to supposed husband of married woman—True husband still alive.]—A married woman went through a form of marriage with another man, her real husband still being alive, & died many years later. Thereupon the man with whom she had been living took out administration as her lawful husband, & later still her real husband arrived from abroad, & heard what had happened, & brought an action:—*Held:* the ct. could make a declaration that the administrator was a trustee for the real husband.—*MINERS v. LAWRY* (1916), 60 Sol. Jo. 666.

2901. Grant to wrong person—Whether void or voidable.]—(1) Administration committed to a wrong person is not for that cause void, but only voidable.

(2) A grandmother is nearer of kin to her grandson than an aunt to her nephew.

(3) The next of kin may bring a citation to repeal the letters of administration.—*BLACKBOROUGH v. DAVIS* (1701), 1 Ld. Raym. 684; 1 Com. 96, 108; Holt, K. B. 43; 1 P. Wms. 41; 1 Salk. 38, 251; 12 Mod. Rep. 615; 91 E. R. 1355.

Annotations:—*As to (1) Reid*. In the Goods of Belham, Richardes v. Yates (1901), 84 L. T. 300; Hewson v. Shelley, [1914] 2 Ch. 13. *As to (2) Reid*. Lloyd v. Tench (1751), 2 Ves. Sen. 213. **Generally, Mentd.** Pettit v. Smith (1695), 1 P. Wms. 7; Clements v. Scudamore (1703), 1 P. Wms. 63; Paul v. Knight (1732), Kel. W. 223; Ryall v. Rolle (1749), 1 Atk. 365; Thomas v. Ketteriche (1749), 1 Ves. Sen. 333; Evelyn v. Evelyn (1754), Amb. 191; *Re* Goodman's Trusts (1881), 17 Ch. D. 266.

SUB-SECT. 4.—HOW FAR CONCLUSIVE AS TO COLLATERAL MATTERS.

A. In General.

2902. General rule.]—Sentence of the Spiritual Ct. in a cause within their jurisdiction, is conclusive evidence in the point tried; otherwise of a collateral matter.—*BLACKHAM'S CASE* (1709), 1 Salk. 290; 91 E. R. 257, N. P.

Annotations:—*Consd.* Barrs v. Jackson (1845), 1 Ph. 582. **Reid**. Meadows v. Kingston (1775), Amb. 756; Spencer v. Williams (1871), L. R. 2 P. & D. 230.

B. Death of Testator or Intestate.

2903. Probate of will—In particular circumstance.]—The probate of testator's will, admitted as proof of his death.

An act of the Prerogative Ct. cannot certainly be admitted as original evidence of a fact in this ct.; but in this case, as at the time of proving the will, it must be proved the party was dead, & the probate was granted so long since as 1742, & it would be difficult at this distance of time, & considering the place of his death, to get more positive proof, & the exor. who would be entitled to the rent accrued before the death, as his personal representative admitting his death; the probate may be read, as proof of his death (*LOUP HARDWICKE, C.*)—*FRENCH v. FRENCH* (1755), 1 Dick. 268; 21 E. R. 271, L. C.

2904. ——— Action by executor—Office of executor not disputed.]—In an action by an exor., he cannot be called upon to show that the testator is dead, unless there is a plea of *ne unques exor.*—*LOYD v. FINLAYSON* (1797), 2 Esp. 564, N. P.

2905. ————*BATEMAN v. BUTLER* (1843), 1 L. T. O. S. 167.

PART II. SECT. 15, SUB-SECT. 4.—B.

29051. Probate of will.]—Where probate is used as evidence it is evidence of testator's death, as well as of the will.—*DAVIS v. VAN NORMAN* (1870), 30 U. C. R. 437.—*CAN.*

2906. Letters of administration.]—To prove a person dead, the prosecution of the letters of administration granted by the ordinary, is not of itself sufficient evidence.—**THOMPSON v. DONALDSON** (1799), 3 Esp. 63, N. P.

Annotation:—*Reid*. Doe d. Bacon v. Brydges (1843), 7 Scott, N. R. 333.

2907. —.]—The production by a plff., suing as administrator to A., of the letters of administration, is not, *prima facie*, evidence of A.'s death.—**MOONS v. DE BERNALES** (1826), 1 Russ. 301; 38 E. R. 117.

Annotation:—*Reid*. Hood v. Pimm (1831), 4 Sim. 101.

2908. —.]—I cannot, sitting as a judge, admit a party's death from the mere letters of administration; it is neither the law, nor is it proper to assume death from that evidence alone, because experience has often proved the contrary (**SHADWELL, V.-C.**).—**BREEZE v. ENGLISH** (1844), 4 L. T. O. S. 230.

C. Other Matters.

2909. As to next of kin.]—The first question is, whether I am not concluded by what the Ecclesiastical Ct. has done? I think I am, & cannot determine contrary. That ct. is bound to grant it to the next of kin; & though plff. is an infant, yet if nearer than deft., it must have been granted to some person during his minority; but both being in equal degree, that ct. has an election to which to grant it, & has given it to deft.: then if I should determine them not to be equal, but plff. nearer, it is directly contrary to the foundation of this sentence, which would make it erroneous, & to be reversed (**LORD HARDWICKE, C.**).—**THOMAS v. KETTERICHE** (1749), 1 Ves. Sen. 333; 27 E. R. 1005, L. O.

Annotations:—*Fold*. Barrs v. Jackson (1845), 1 Ph. 582. *Reid*. Meddowcroft v. Huguenin (1844), 4 Moo. P. C. C. 386; *Spencer v. Williams* (1871), L. R. 2 P. & D. 230.

2910. —.]—After a sentence in the Ecclesiastical Ct., determining the question of who are the next of kin of an intestate; & granting letters of administration to the person found to be such next of kin; the Ct. of Ch. is precluded from directing any issue to try that question.—**BOUCHIER v. TAYLOR** (1770), 4 Bro. Parl. Cas. 708; 2 E. R. 481, H. L.

Annotations:—*Fold*. Barrs v. Jackson (1845), 1 Ph. 582. *Consd*. Boyse v. Colclough, Boyse v. Rossborough (1854), 1 K. & J. 124. *Distd*. Concha v. Concha (1886), 11 App. Cas. 541. *Reid*. *Spencer v. Spencer & Williams* (1871), 40 L. J. P. & M. 45.

2911. —.]—If the sentence of an Ecclesiastical Ct. in a suit for administration turns upon the question of which of the parties is next of kin to the intestate, such sentence is conclusive upon that question in a subsequent suit in this ct. between the same parties for distribution.—**BARRS v. JACKSON** (1845), 1 Ph. 582; 14 L. J. Ch. 433; 5 L. T. O. S. 365; 9 Jur. 609; 41 E. R. 754, L. O.

Annotations:—*Fold*. *Spencer v. Williams* (1871), L. R. 2 P. & D. 230. *Apld*. *R. v. Hutchings* (1881), 6 Q. B. D. 300; *Priestman v. Thomas* (1884), 53 L. J. P. 109. *Reid*. *Enohin v. Wylie* (1862), 31 L. J. Ch. 402; *Nelson v. Couch* (1863), 15 C. B. N. S. 99; *A.-G. v. Partington* (1864), 3 H. & C. 193; *Hobbs v. Henning* (1864), 17 C. B. N. S. 791; *Finney v. Finney* (1868), L. R. 1 P. & D. 483; *Abouloff v. Oppenheimer* (1882), 10 Q. B. D. 295; *De Mora v. Concha* (1885), 29 Ch. D. 268; *Caird v. Moss* (1886), 33 Ch. D. 22; *Stephenson v. Garnett*, [1898] 1 Q. B. 677; *R. v. Ollis*, [1900] 2 Q. B. 754; *Ord v. Ord*, [1923] 2 K. B. 432. *Mentd*. *Hope v. Gloucester Corp.* (1855), 7 De G. M. & G. 647; *Re Allsop & Joy's Contract* (1889), 61 L. T. 213; *Re De Penny, De Penny v. Christie*, [1891] 2 Ch. 63; *Bedford v. Cowtan*, [1916] 1 K. B. 980.

2906 i. Letters of administration.]—**SCRIBNER v. GIBSON** (1858), 4 All. 182.—**CAN.**

2906 ii. —.]—**SIMPSON v. MALCOLM** (1914), 43 N. B. R. 79.—**CAN.**

2912. —.]—Letters of administration of the estate of an intestate were granted *ex p.* to deft. as "his natural & lawful brother of the half blood." Plff., who was an uncle of the intestate, then commenced an action in the Ch. Div. for the administration of the estate, alleging that deft. was illegitimate, & that he himself was next of kin; & moved for a receiver & an injunction:—*Held*: the application must be refused, for that as long as the letters of administration remained in force they were conclusive evidence that deft. was one of the next of kin, & plff.'s proper course of procedure was to apply in the Probate Div. to have them recalled.—*Re* **IVORY, HANKIN v. TURNER** (1878), 10 Ch. D. 372.

Annotations:—*Reid*. *De Mora v. Concha* (1885), 29 Ch. D. 268. *Mentd*. *Polini v. Gray*, *Sturla v. Freccia* (1879), 11 Ch. D. 741.

2913. As to declarations of testator as to pedigree.]—The probate of a will is not admissible to prove declarations of the testator as reputation in a question of pedigree.—**DOE d. WILD v. ORMEROD** (1835), 1 Mood. & R. 466, N. P.

2914. — Marriage of legatee.]—It was necessary to prove that W. T. married M. D.; there was no certificate of marriage found, but the will of her uncle T. D. was produced. It was in these words: "All this I give to my nephew, W. T." (who was identified as the W. T. in question). The Act Book from Doctors Commons was produced, granting administration to "W. T., nephew, minor, & universal legatee." Received as proof that a marriage had taken place between W. T. & M. D.—**SHREWSBURY PERRAGE** (1858), 7 H. L. Cas. 1; 11 E. R. 1, H. L.

Annotations:—*Reid*. *Sturla v. Freccia* (1880), 50 L. J. Ch. 86. *Mentd*. *Berkeley Peckage* (1861), 8 H. L. Cas. 21; *Freud v. Buckley* (1870), 10 B. & S. 973; *Lyell v. Kennedy*, *Kennedy v. Lyell* (1889), 14 App. Cas. 437.

2915. As to due execution of power.]—**DOUGLAS v. COOPER**, No. 2800, *ante*.

2916. As to domicile of testator.] The grant of probate is not conclusive as to domicile; it merely proves that the instrument admitted to probate was testamentary according to the law of the country where the grant was made.

A ct. of the Ch. Div. will, in the exercise of its discretion, refuse to exercise the jurisdiction, assuming it to be conferred by the Jud. Act, 1873 (c. 66), to recall a grant of probate, & will, moreover, refuse to enter into the question of whether a grant of probate should or should not be recalled.—**BRADFORD v. YOUNG** (1884), 26 Ch. D. 656; 54 L. J. Ch. 96; 50 L. T. 707; 32 W. R. 901; *on appeal* (1885), 29 Ch. D. 617, C. A.

Annotation:—*Mentd*. *Re Cunningham, Healing v. Webb*, [1924] 1 Ch. 68.

2917. —.]—A native of Chili made his will in London & died. A caveat having been entered on behalf of his daughter, the exors. propounded the will in solemn form, alleging that testator was domiciled in England. The daughter pleaded that deceased was at the date of the will & until his death domiciled in Chili, & that the will was not duly executed according to the law of Chili. Upon this plea (*inter alia*) the exors. took issue. The judge of the Probate Ct. made a decree by which he pronounced for the validity of the will, found that deceased was at the date of the will & at his death a domiciled Englishman, & decreed probate to the exors. The daughter afterwards filed a bill against the exors., alleging that testator

PART II. SECT. 15, SUB-SECT. 4.—C.

2909 i. As to next of kin.]—Where plff. in ejectment claims the possession of lands by descent from a deceased

tenant for years, he must produce either letters of probate or of administration, as he is entitled to such possession as heir.—**PEARCE v. PEARCE** (1865), 2 Old. 73.—**CAN.**

Sect. 15.—Effect of grant: Sub-sect. 4, C.; sub-sects. 5 & 6.]

was a domiciled Chilian, that his will being executed in England according to English law was good by the law of Chili but so far only as testator could by the law of Chili dispose by will of one-fourth of his personal estate, & that the other three-fourths belonged to the daughter. The exors. by answer set up the decree of the Probate Ct. as a bar. An order having been made for inquiry as to testator's domicile, in an administration suit under circumstances which, it was contended, made it equivalent to an order in the suit by the daughter against the exors.; the question whether the order was right was litigated between the daughter & the residuary legatee:—*Held*: (1) the decree of the Probate Ct. was not conclusive *in rem* as to the domicile, because the finding as to the domicile was not necessary to the decree; (2) for the same reason the decree of the Probate Ct. was not conclusive *inter partes* as to the domicile, as between the daughter & the residuary legatee.—*CONCHA v. CONCHA* (1886), 11 App. Cas. 541; 56 L. J. Ch. 257; 55 L. T. 522; 35 W. R. 477, 11 L. & J. S. C. sub nom. *DE MORA v. CONCHA* (1885), 29 Ch. D. 208, C. A.

Annotations:—As to (2) Held. *Worman v. Worman* (1889), 43 Ch. D. 296; *Re Lazard, Ex p. Yeomans & Hoap* (1896), 3 Munt. 317. *Generally, Consd.* *Re Allison & Joy's Contract* (1889), 61 L. T. 213. *Held.* *Mirza Kurratullah Bahadur v. Peera Sahel* (1905), 21 F. L. R. 650; *Ord v. Ord* (1923) 2 K. B. 432. *Mentd.* *The Parisian* (1887), 13 P. D. 16; *Strauss v. Goldschmidt* (1892), 8 T. L. R. 239; *Re De Nicola, De Nicola v. Curlier* (1898), 46 W. R. 532.

2918. — Grant by foreign court—Question of domicile not in issue.—I cannot see how the fact of the Ct. of Scotland having granted probate of the paper can conclude the ct. on the question of domicile. I do not understand that the question of domicile was raised in the Scottish Ct.; the application to that ct. was to grant probate in common form. Neither do I understand the principle on which the jurisdiction of this ct. is objected to; & if the ct. feels that it has jurisdiction, assuredly it cannot stay its hand (*Sir H. JENNER IUST.*)—*CRAIGIE & CRAIGIE v. LEWIS* (1843), 3 Curt. 435; 2 Notes of Cases, 185; 163 E. R. 782.

Annotations:—Mentd. *Forbes v. Forbes* (1854), Kay, 341; *Hodgson v. De Bouchesne* (1858), 12 Moo. P. C. C. 286; *Alkman v. Alkman* (1861), 4 L. T. 374; *A.-G. v. Pottinger* (1861), 6 H. & N. 733; *Jopp v. Wood* (No. 3) (1864), 34 Beav. 88.

2919. — Question of domicile in issue.—The finding of the commissary as to Scottish domicile under (confirmation of Executors Act, 1858 (c. 50), ss. 9, 12, is conclusive evidence of the fact of domicile for the purposes of that Act only, *i.e.* for rendering it unnecessary to take an English probate in respect of assets in England; but it has no effect in determining any issues raised in this ct., which will proceed to try such issues, though a confirmation of the will in question be tendered for the seal of the ct.—*HAWARDEN v. DUNLOP* (1861), 2 Sw. & Tr. 340; 31 L. J. P. M. & A. 17; 5 L. T. 765; 164 E. R. 1027.

Annotation:—Held. *Re De Penny, De Penny v. Christie*, [1891] 2 Ch. 63.

Proof of change of domicile generally, see *CONFLICT OF LAWS*, Vol. XI., p. 335.

2920. As to character in which person subscribes

PART II. SECT. 15, SUB-SECT. 6.

b. Will proved abroad.—The ct. will not recognise any probate or letters of administration, except those issued by themselves.—*ARNOT v. CHAPMAN* (1884), 5 N. S. W. L. R. 66.—*AUS.*

c. —.—*BALFOUR v. DRUMMOND*,

9 C. L. T. Occ. N. 201.—*CAN.*

d. —.—Probate of a will in Nova Scotia gives no title in another province.—*MITCHELL v. LONG* (1827), 1 N. B. R. (Ship.) 76.—*CAN.*

e. —.—Probate of a will granted by the ct. of Canterbury,

will.]—*Re LANCELEY, BESWICK v. LANCELEY* (1889), 5 T. L. R. 245.

SUB-SECT. 5.—WHERE EQUITY WILL RELIEVE AGAINST A GRANT.

See Sect. 16, sub-sect. 1, *post*.

SUB-SECT. 6.—EFFECT OF FOREIGN GRANT.

How far foreign court followed.—See *CONFLICT OF LAWS*, Vol. XI., pp. 367, 378, 380.

2921. Will proved abroad—Necessity for English representation—Reality & personalty within jurisdiction.—*LEE, MOORE & ROBLIN'S CASE* (1621), Palm. 163; 81 E. R. 1028.

2922. — Personalty within jurisdiction—Fund in court.—Probate in a foreign ct. of the will of a person residing in a foreign country, will not entitle the exor. to payment of money out of ct., though there are affidavits as to the genuineness of the will, & the identity of the exor. with the appet.; & though the sum is only £34, & testator has no other property in this country a prerogative probate is necessary.—*LASSEUR v. TYRCONNEL* (1846), 10 Beav. 28; 8 L. T. O. S. 153; 50 E. R. 492.

2923. — — — — —.—*Re VAILLANCE, Ex p. LIMEHOUSE BOARD OF WORKS*, No. 858, *ante*.

2924. — — — — —.—Where persons entitled were domiciled in Scotland, but the property to be divided was in England:—*Held*: a Scottish probate is not recognised by the Ct. of Ch. in England.—*M'DONALD v. BRYCE* (1853), as reported in 23 L. J. Ch. 779; 17 Jur. 335.

Annotations:—Mentd. *Carver v. Burgess* (1853), 18 Beav. 541; *Pago v. May* (1857), 24 Beav. 323; *Corneck v. Wadman* (1868), L. R. 7 Eq. 80.

2925. — — — — —.—**Dividend in winding-up of English company.**—A chartered bank, whose head office was in England, but whose business was chiefly carried on in India, was ordered to be wound up, & the Indian assets were remitted to this country. A creditor domiciled in India proved his debts, received a dividend, & died, leaving a will which was proved in India. After his death a final dividend became payable:—*Held*: the dividend ought not to be at once remitted to the exors. in India, but could only be paid to them on their producing a properly stamped English probate.—*Re COMMERCIAL BANK CORPN. OF INDIA & THE EAST, FERNANDES' EXECUTORS CASE* (1870), 5 Ch. App. 314; 22 L. T. 219; 18 W. R. 411; *sub nom.* *Re COMMERCIAL BANK CORPN. OF INDIA & THE EAST, Ex p. INLAND REVENUE COMRS.*, 39 L. J. Ch. 497, L. J.

Annotations:—Mentd. *Nicholl v. Eberhardt Co.* (1888), 58 L. J. Ch. 399; *A.-G. v. New York Breweries Co.*, [1898] 1 Q. B. 205.

— — — — —.]—*See, also*, Sect. 4, *ante*.

2926. — — — — —.—**Assets remitted to agent within jurisdiction—Administration action.**—Testator, resident in India, & having all his property there, bequeathed his residuary estate to H., but if she should die before him, then to her children. H. died before testator, & the exor. who was also resident in India, proved the will there, & remitted

England, gives no title to an exor. to sue for a cause of action accruing in this country, the testator having died here. He must produce letters testamentary from the proper authority in this province.—*WHITE v. HUNTER* (1844), 1 U. C. R. 452.—*CAN.*

f. —.—*Re ONTARIO MUTUAL*

the residue to his agent in England, with directions to pay it to H. or her children. A suit having been instituted by the children, who were infants, against the exor. & his agents to have the residue secured:—*Held*: administration to testator ought to have been taken out in this country, & the administrator made a party to the suit.—*LOGAN v. FAIRLIE* (1825), 2 Sim. & St. 284; 3 L. J. O. S. Ch. 152; 57 E. R. 355; *reversd.* on another point (1835), 1 My. & Cr. 59.

Annotations:—*Folld.* Bond v. Graham (1842), 6 Jur. 620. *Refd.* Tyler v. Bell (1837), 2 My. & Cr. 89; Hervey v. Fitzpatrick (1854), 2 Eq. Rep. 444. *Mentd.* *Re* Kwin (1830), 1 Cr. & J. 151; A.-G. v. Dimond (1831), 1 Cr. & J. 356; *Re* Bruce (1832), 2 Cr. & J. 436; A.-G. v. Forbes (1834), 2 Cl. & Fin. 48; A.-G. v. Hope (1834), 4 Tyr. 878; Arnold v. Arnold (1837), Donnelly, 252; Charitable Donations Comrs. v. Devereux (1842), 13 Sim. 14; Thompson v. Advocate-General (1845), 12 Cl. & Fin. 1; A.-G. v. Napier (1851), 20 L. J. Ex. 173.

2927. ————.]—A., by his will, made in India, appointed B., C. & D. his exors. B. renounced, & C. & D. proved the will in India, & both acted & received the assets. D., being about to come to England, rendered an account of his receipts & payments, & handed over the balance to C., who then continued to act as sole exor. in India. C. afterwards remitted to D. in England a sum of rupees, part of the estate, & for the purposes thereof, & died. On a bill by the residuary legatee of A. against D. for an account & payment of the sum so remitted:—*Held*: D. must be taken to have received that sum as exor. & not as agent or trustee; & consequently, that he was entitled to have the accounts taken generally, & that a legal representative in this country was necessary.—*BOND v. GRAHAM* (1842), 1 Hare, 482; 11 L. J. Ch. 306; 6 Jur. 620; 66 E. R. 1121.

2928. ————.]—*Assets paid into court in England.*—M., a domiciled Scotsman, died, leaving a will, whereby he appointed exors. The exors. proved the will in Scotland, & authorised F. & Co. to take out administration as their agents in India, where deceased possessed considerable property. F. & Co. did so, & having realised the assets, they paid the money for their own protection into the Ct. of Ch. in England. On a suggestion that personal representation was also necessary in this country to enable the exors. to take the money out of the Ct. of Ch. The ct. expressed its willingness to grant probate of the will, but declined to allow the exors.' oath to be altered to meet the facts of the case by having the property sworn under £20.

My belief is that this probate is not in the least necessary for the purpose for which it is wanted (SIR J. P. WILDE).—*In the Goods of MURRAY* (1867), 16 L. T. 206.

2929. ————.]—*Administration action brought in England—Against executor abroad.*—A suit cannot be instituted for an account of assets of testator, possessed by an exor. in Honduras, unless the will is proved here, or a sufficient reason assigned why it is not proved here.—*LEWIS v. GENTLE* (1828), 7 L. J. O. S. Ch. 43.

Annotation:—*Refd.* Tyler v. Bell (1837), 2 My. & Cr. 89.

2930. ————.]—*As evidence of will.*—For the purposes of the usual preliminary judgment in a partition action letters testimonial of the Supreme Ct. of Victoria, Probate Jurisdiction, setting out the will verbatim, were accepted as sufficient proof of a will made in Victoria of real estate in England.

LIFE ASSURANCE CO. & FOX (1899), 30 O. R. 666.—*CAN.*

g. Letters of administration.—Where administrations are granted in different countries each portion of the estate must be administered in the country in which possession of it is

taken & held under lawful authority; & the administrator under a foreign grant has a right to hold the assets received under it against the home administrator even after they have been remitted to the country where deceased was domiciled.—*DORRISAY v.*

—*WAITE v. BINGLEY* (1882), 21 Ch. D. 674; 51 L. J. Ch. 651; 30 W. R. 698.

2931. ————.]—*Re* VALLANCE, *Ex p.* LIMEHOUSE BOARD OF WORKS, No. 858, *ante*.

2932. ————.]—*Whether conclusive as to testator's domicile—Question of domicile not in issue.*—*CRAIGIE & CRAIGIE v. LEWIN*, No. 2918, *ante*.

2933. ————.]—*Question of domicile in issue.*—*HAWARDEN v. DUNLOP*, No. 2919, *ante*.

2934. *Letters of administration—Necessity for English representation—Assets within jurisdiction.*—

—If intestate have *bona notabilia* in England & in Ireland, there shall be several administrations by the Ordinary in each country for all within his province. A bond is *bona notabilia* in the diocese where it is at the time of the death.—*DANIEL v. LUKER* (1572), 3 Dyer, 305 a; 73 E. R. 687; *sub nom.* *DANIEL v. WATFORD* (MERCHANT OF), Dal. 76, pl. 5.

Annotations:—*Refd.* Byron v. Byron (1596), Cro. Eliz. 472; A.-G. v. Dimond (1831), 1 Cr. & J. 356; Whyte v. Rose (1842), 3 Q. B. 493.

2935. ————.]—*Tourton v. Flower*, No. 2888, *ante*.

2936. ————.]—Colonial letters of administration will entitle the administrator to sue in this country in respect of a sum of stock standing in the names of trustees, to a share of which intestate was entitled. *McMAHON v. RAWLINGS* (1848), 16 Sim. 429; 66 E. R. 940.

2937. ————.]—A surviving trustee of a settlement of stock having died, his widow took out administration with the will annexed in Ireland. There was no representative in England. A petition was presented for the appointment of new trustees, & for a vesting order, under Trustee Act, 1850 (c. 60), but the order was refused.

There is here personal estate in England, & there is a personal representative of the surviving trustee under an Irish administration; but no administration has been granted in England, & the case as to the property in question is the same as if there were no personal representative of the surviving trustee (KNIGHT BRUCE, V.-C.).—*Re FROST'S TRUST* (1851), 20 L. J. Ch. 112; 16 L. T. O. S. 481; 15 Jur. 644.

2938. ————.]—*Administration action brought in this country—Necessary parties.*—To a bill which seeks an account of the assets of intestate who died in India possessed by a personal representative there, a personal representative of the intestate constituted in England is a necessary party, although it does not appear that the intestate at the time of her death had any assets in England, & it is not sufficient, in order to avoid a demurrer for want of parties in such a case, that the personal representative constituted in India, who is out of the jurisdiction, is made a party, & that process is prayed against her when within the jurisdiction; although the bill alleges that the Indian Ct. was the proper ct. for granting administration, & that the administratrix constituted by it is the sole legal personal representative of intestate.—*TYLER v. BELL* (1837), 2 My. & Cr. 89; Donnelly, 190; 6 L. J. Ch. 169; 40 E. R. 575, L. C.

Annotations:—*Folld.* *Cressor v. Robinson* (1851), 14 Beav. 589. *Consd.* *Silver v. Stein* (1852), 21 L. J. Ch. 312; *Smith v. Smith* (1856), 21 Beav. 385. *Refd.* Bond v. Graham (1842), 1 Hare, 482; *Carmichael v. Carmichael* (1846), 9 L. T. O. S. 17; Hervey v. Fitzpatrick (1854),

CONNELL (1883), 22 N. B. R. 564.—*CAN.*

h. — Right of foreign administrator to sue.—A foreign administrator may maintain an action in the Alberta etc. in his representative capacity where his title has been already

Sect. 15.—Effect of grant: Sub-sects. 6 & 7. Sect. 16: Sub-sect. 1, A. & B.; sub-sect. 2, A., B. & C.]

Kay, 421; Vanquellin v. Bouard (1863), 15 C. B. N. S. 341. *Mentd.* Kay v. Wall (1846), 9 Jur. 128.

2939. — Assets remitted to agent within jurisdiction—Proceedings against agent.]—A., the widow of an officer who died intestate in India, obtained letters of administration of her husband's effects in the recorder's ct. at Bombay, & remitted the proceeds of the effects in government bills to her agent in England. **B.**, a creditor of intestate, took out letters of administration in this country of intestate's effects, & brought an action against the widow's agent for money in his hands, part of intestate's effects:—*Held*: the Indian letters of administration prevailed over those granted in England, & the action would lie only at the suit of the widow.—*CURRIE v. BIRCHAM* (1822), 1 Dow. & Ry. K. B. 35.

Annotation:—*Refd.* Whyte v. Rose (1842), 3 Q. B. 493.

Irish, Scottish & colonial grants—Necessity for resealing.]—See Sect. 18, post.

SUB-SECT. 7.—ADMISSIBILITY AS EVIDENCE.

2940. Grant insufficiently stamped—Additional duty not paid within statutory period.]—After the passing of 5 & 6 Vict., c. 45, the administrator of the author of a dramatic piece first acted in 1843, by deed, dated Apr. 14, 1859, in consideration of £100 assigned to *pltf.*, the copyright & acting right in all dramatic pieces written by the author: no entry of the assignment to *pltf.* had been made in the registry book in pursuance of 5 & 6 Vict., c. 45, s. 22. The letters of administration were not stamped until Mar. 1863:—*Held*: *deft.* could not object to the admissibility of the letters of administration in evidence, on the ground that they had not been stamped within six months after the discovery of the mistake in omitting to get them stamped, & the penalty had not been paid, in pursuance of Stamp Act, 1815 (c. 184), s. 43.—*LACY v. RHYS* (1864), 4 B. & S. 873; 3 New Rep. 374; 33 L. J. Q. B. 157; 9 L. T. 607; 10 Jur. N. S. 612; 12 W. R. 309; 122 E. R. 687.

Annotation:—*Mentd.* Marsh v. Conquest (1864), 17 C. B. N. S. 418.

Estate duties generally.]—See ESTATE & OTHER DEATH DUTIES.

Of what matters evidence.]—See Sect. 15, sub-sect. 2, ante.

SECT. 16.—REVOCATION OF GRANT.

SUB-SECT. 1.—JURISDICTION TO REVOKE.

A. Probate.

2941. Before Judicature Acts.]—HOSKINS v. MATTHEWS, No. 2827, *ante*.

2942. Since Judicature Acts.]—PRIESTMAN v. THOMAS, No. 710, *ante*.

2943. —.]—BRADFORD v. YOUNG, No. 2016, *ante*.

Jurisdiction of court of equity to relieve against probate.]—See Sect. 15, sub-sect. 2, B. (a), ante.

established & does not have to be established in the action through his grant.—*BROWNS v. BROWNS*, [1919] 2 W. W. R. 754.—*CAN.*

PART II. SECT. 15, SUB-SECT. 7.

k. Foreign grant—Corroboration of representative character of executor.]—American probate of a will may be received as corroborative evidence of the representative character of the executor.—*SLOAN v. WHALEN* (1865), 15 C. P. 319.—*CAN.*

l. — Requirements of certified

copy.—Certified copy of a will proved in a foreign ct. held insufficient, there being no evidence that the ct. was a ct. of record; or that the seal was the official seal of the ct.—*Re WOLF* (1908), 8 W. L. R. 690.—*CAN.*

m. As to intestacy.]—Production of letters of administration is not sufficient proof of death intestate.—*Re LEWIS* (1887), 5 Man. L. R. 44.—*CAN.*

PART II. SECT. 16, SUB-SECT. 1.—B. n. Grant made by surrogate court.]

B. Letters of Administration.

2944. General rule.]—Where the ordinary commits the administration he may revoke it, & commit to another, but mean acts done by the first administrator shall stand.—*BROWN v. SHELTON* (circa 1544), Bro. N. C. 8; 73 E. R. 850.

2945. —.]—Administration may be revoked.—*ANON.* (1589), Cro. Eliz. 164; 78 E. R. 421.

2946. —.]—If the ordinary grants the administration of goods of B. to A. & after grants the administration to R., this second grant is an appeal of the first, without any further sentence of repeal, for the administrator is but a servant to the ordinary whom he may charge at any time.—*NEWMAN v. BEAUMOND* (1593), Owen, 50; 74 E. R. 892.

Annotation:—*Mentd.* R. v. Stevens & Agnew (1804), 5 East, 244.

2947. Where administration properly granted.]—ANON. (1628), Het. 48; 124 E. R. 332.

2948. —.]—SAND'S CASE (1664), 1 Sid. 179; 1 Keb. 667; 3 Salk. 22; T. Raym. 93; 82 E. R. 1042.

Annotations:—*Refd.* Pierce v. Perks (1666), 1 Sid. 280; Blackborow v. Davis (1700), 1 Com. 96; Harrison v. Mitchell (1731), 2 Barn. K. B. 20. *Mentd.* Smith v. Tracy (1677), Freem. K. B. 294.

2949. —.]—Administration duly granted according to the statute, cannot be revoked without just cause.—*PRICE v. PARKER* (1666), 1 Lev. 157; 83 E. R. 347; *sub nom.* *PIERCE v. PERKS*, 1 Sid. 280; 1 Keb. 854.

Annotation:—*Refd.* Allen v. Dundas (1789), 3 Term Rep. 125.

2950. —.]—Administration, if granted according to the statute, cannot be revoked without cause.—*OFFLEY v. BEST* (1666), 1 Lev. 186; 1 Sid. 370; 2 Keb. 392, 420; 83 E. R. 361.

Annotations:—*Consd.* Blackborough v. Davis (1701), 12 Mod. Rep. 615. *Refd.* Price v. Parker (1664), 1 Lev. 157.

2951. —.]—At common law the ordinary might repeal an administration at pleasure; but now since 21 Hen. 8, c. 5, when once it is duly granted according to that statute, it cannot be repealed, for his power is then executed; but if it is not duly granted according to the statute, as for instance, if granted to a wrong person, in such case he may repeal it & grant it to another, for he hath not executed his power. *Sed nota*, if the administration is repealed for want of form in the grant, in such case the ordinary must regrant it to the same person, though there are others in equal degree.—*ANON.* (1628), 3 Salk. 21; 91 E. R. 667.

2952. Where administration improperly granted —Grant to person not entitled—Mistake.]—ANON. (1628), No. 2951, *ante*.

2953. —.]—ANON. (1628), No. 2951, *ante*.

SUB-SECT. 2.—GROUNDS FOR GRANTING OR REFUSING.

A. In General.

2954. Estate partly got in—Suits pending for remainder.]—THOMAS v. BUTLER, No. 2101, *ante*.

—The High Ct. of Justice for Ontario has no jurisdiction to revoke the grant by a surrogate ct. of letters of administration.—*McPHERSON v. IRVINE* (1895), 26 O. R. 438.—*CAN.*

PART II. SECT. 16, SUB-SECT. 2.—A.

o. General rule—In discretion of court.]—The revocation of probate is a matter of discretion depending on the circumstances of each case.—*Re LAMONT'S WILL* (1881), 7 V. L. R. 87.—*AUS.*

2955. Administration long outstanding.]—The ct. will not revoke an administration which has been outstanding for a considerable time, unless weighty reasons be shown for its revocation. A decree having been taken out to show cause why letters of administration with will annexed, limited to property in this country, of a person who died domiciled at Leghorn, should not be revoked, as being void under a sentence of the cts. at Leghorn, & also as having been obtained through a suppression of facts, the party calling in the administration not having proved the sentence of the ct. at Leghorn, nor the other ground alleged, to the satisfaction of the ct.; the administrator, who appeared under protest, dismissed with costs.—*KOSTER v. SAPTE* (1838), 1 Curt. 691; 163 E. R. 241.

2956. Strong grounds necessary.]—Where a former administration is revoked, & a fresh administration decreed, the grant will be special, containing the facts of the case; the ct. always requiring very strong reasons for revoking a former grant.—*In the Goods of BARTHOLOMEW* (1845), 9 Jur. 95.

2957. Probate rightly granted.]—The note or memorandum on a probate, that deceased died domiciled in England, mentioned in sect. 14 of Confirmation of Executors Act, 1858 (c. 56), must be written before the probate issues.

The ct. will not revoke a probate rightly granted, & not issued under a mistake. Therefore, when A. died domiciled in England possessed of personalty in Scotland, & probate of his will was issued without a note that deceased died domiciled in England written on it, the ct. refused to allow such a note to be made on it, & also refused to revoke the probate, that a new one might be obtained, stating such fact.—*In the Goods of MUIR* (1859), 1 Sw. & Tr. 291; 28 L. J. P. & M. 49; 33 L. T. O. S. 61; 5 Jur. N. S. 445; 7 W. R. 361; 161 E. R. 735.

Annotation.—*Apld. In the Goods of Faulkner* (1860), 8 W. R. 454.

2958. Where executor has not intermeddled.]—A married woman has taken probate without the consent of her husband; the husband is now consenting to its being revoked, & she brings in an affidavit that she has not intermeddled with the effects; I shall allow probate to be brought in & revoked, & the administration with the will annexed to be granted to the residuary legatees (*per* CUR.).—*In the Goods of WILKINSON* (1819), 3 Phillim. 96; 161 E. R. 1269.

2959. —.]—*MEEK & DONALD v. CURTIS*, No. 3267, *post*.

2960. —.]—Testator appointed S., a married woman, to whom he devised & bequeathed certain property to her sole & separate use, & M., exors. They took probate, but, in consequence of the Bank of England refusing to allow a transfer of stock in the absence of S.'s husband, who was in foreign parts, the ct. was moved to revoke that probate & to decree it to M. alone. S. had not intermeddled with the estate. The ct. granted the motion, but directed the practice of allowing a married woman to take probate without requiring the consent of her husband to be reconsidered in the registry.—*In the Goods of DYE* (1850), 2 Rob. Eccl. 342; 163 E. R. 1339.

Annotation.—*Distd. In the Goods of Reid* (1886), 55 L. J. P. 48.

2961. Where executor has intermeddled.]—Administration with the will annexed was granted to a woman, who intermeddled with the estate, & subsequently married. Her husband deserted her & could not be found, & an application was

accordingly made for a revocation of the grant, & a fresh grant to another person:—*Held*: administratrix having intermeddled with the estate the grant could not be revoked.—*In the Goods of REID* (1886), 11 P. D. 70; 55 L. J. P. 75; 54 L. T. 590; 34 W. R. 577, C. A.

2962. Only where grantee becomes incapable—Unless grantee a creditor.]—*In the Goods of MORRIS*, No. 1006, *ante*.

2963. Whether fraud necessary.]—A husband & wife separated in 1863, & the wife went back to her mother's house resuming her maiden name.

In 1881 she died, & letters of administration to her estate were taken out by the exors. of her father's will as if she had been a spinster, although it appeared that one of them knew she was a married woman. In 1888 the husband first became aware of his wife's death, & after making inquiries, he instituted a suit in the county ct. for the revocation of the grant. The county ct. judge directed a non-suit on the ground that no such fraud had been shown as to justify him in revoking the letters of administration:—*Held*: the county ct. judge was wrong in holding that fraud must be shown to justify him in revoking the grant of administration. *COPELAND v. SIMISTER*, [1893] P. 16; 62 L. J. P. 38; 68 L. T. 257; 41 W. R. 269; 1 R. 469, D. C.

2964. Improper behaviour of administrator necessary.]—The creditor of a deceased person, who has taken out letters of administration to the personal estate, & has entered into the customary bond to administer the estate according to law ratably, etc., is entitled to retain a debt of his own, which is owing by the estate, even though it may exceed the total assets. The ct. cannot alter an administration bond, nor compel an administrator to execute a further bond, & will not revoke a grant of letters of administration unless it is satisfied that the administrator has acted improperly.—*In the Goods of BELHAM, RICHARDS v. YATES* (1901), 84 L. T. 300; 49 W. R. 448; 17 T. L. R. 340; 45 Sol. Jo. 302.

B. Where Grant made without Jurisdiction.

2965. General rule.]—Administration granted according to the statute repealed, when granted *inverso ordine*, or by a ct. which has not jurisdiction.—*RAVENSCHOF v. RAVENSCHOF* (1671), 1 Lev. 305; 2 Keb. 726; 83 E. R. 419.

Annotations.—*Held. Price v. Parker* (1664), 1 Lev. 157; *Blackborough v. Davis* (1701), 1 P. Wms. 41; *Harrison v. Mitchel* (1731), 2 Barn. K. B. 20.

C. Mistake.

2966. As to person entitled—Interest of party with prior claim established.]—The interest of a minor son being established, an administration granted to a brother is revoked.—*BURGIS v. BURGIS* (1752), 1 Lee, 121; 161 E. R. 45.

2967. —.]—The interest of a sister being established, an administration granted to a more distant relation is revoked.—*PURNGLE v. BROWN, In the Goods of CONNELL* (1752), 1 Lee, 123; 161 E. R. 46.

2968. As to interest of grantee.]—P. took out administration as next of kin, supposing herself & one other person the only persons entitled in distribution. Finding shortly afterwards that there were several others, application was made, with the consent of all interested, to revoke the administration, & make a fresh grant to H.; P. had not intermeddled with the estate:—*Held*: (1) the grant, having been properly made, could not be revoked for the mere convenience of the parties;

Sect. 16.—Revocation of grant: Sub-sect. 2, C., D., E., F. & G.]

(2) nor on the suggestion that it would be for the benefit of the estate, although all parties interested consent.—*In the Goods of HESLOP* (1846), 1 Rob. Eccl. 457; 5 Notes of Cases, 2; 8 L. T. O. S. 348; 10 Jur. 953; 163 E. R. 1100.

2969. Testator not dead.—*In the Goods of NAPIER* (1809), 1 Phillim. 83; 161 E. R. 921.

2970. Grant made within fourteen days of death.—*WEBB v. FIELD* (1849), Tristram & Coote's Probate Practice, 15th ed., p. 241, n.

2971. Grant to supposed widow—Marriage void.—Letters of administration, granted to A., as the widow of deceased, but whose marriage was *ipso facto* void, revoked.—*In the Goods of MOORE* (1845), 3 Notes of Cases, 601.

2972. ———.—*—A., an intestate, married his deceased wife's sister. On his death she obtained letters of administration to his personal estate & effects, & died leaving part of the estate unadministered. The ct. revoked the grant so made in error, & decreed administration to the natural & lawful daughters & next of kin of deceased.*—*In the Goods of WELLS* (1867), 17 L. T. 123; 32 J. P. 24.

2973. Will revoked—Decision after probate granted.—*WILLIAMS v. TYLEY*, No. 2825, *ante*.

2974. Intention to have domicile noted on probate after issue.—*In the Goods of MUIR*, No. 2957, *ante*.

2975. ———.—Where a grant had been taken out under the misapprehension that a note or memorandum under Confirmation of Executors Act, 1858 (c. 56), s. 14, might be indorsed after it had issued, the ct. refused to revoke the grant.—*In the Goods of FAULKNER* (1860), 8 W. R. 454.

2976. ———.—A note or memorandum on a probate that deceased died domiciled in England may, under Confirmation of Executors Act, 1858 (c. 56), s. 14, be written after the probate has issued.—*In the Goods of ALLISON* (1864), 3 Sw. & Tr. 574; 34 L. J. P. M. & A. 20; 11 L. T. 514; 29 J. P. 24; 10 Jur. N. S. 1244; 13 W. R. 277; 164 E. R. 1398.

See, now, Tristram & Coote's Probate Practice, 15th ed., pp. 260, 261.

2977. Widow believed to be dead—Found to be alive.—C. died in Sept. 1891. His half-sister, in the absence of his widow, & believing the latter to be dead, took out administration, & swore the usual oath that C. died a widower. In May, 1892, the widow was ascertained to be living, & upon her application, the ct. recalled the grant, & condemned the administratrix in costs.—*In the Goods of CARR* (1892), 67 L. T. 357.

D. Will or Later Will Discovered or Incorporated Will not Proved.

2978. Will produced.—Administration which had been granted to a creditor revoked, on the production of a will.—*CAROLUS v. LYNCH* (1752), 1 Lee, 13; 161 E. R. 6.

2979. ———.—An administration revoked on the production of a will.—*BAKER v. RUSSELL* (1752), 1 Lee, 167; 161 E. R. 62.

2980. Later will produced—& proved—Former grant ordered to be brought in.—*TIEW v. BAINES* (1752), 1 Lee, 15; 161 E. R. 7.

2981. ———.—Probate of a former will revoked, in order that probate might be given of a later

will.—*LAST v. BROWN* (1753), 1 Lee, 433; 161 E. R. 160.

2982. Will established—Believed to have been revoked.—A., a native of Marburg, came to England in 1822, aged thirteen, & remained here till his death in 1856, having made occasional visits to Germany. In 1835 he was married in this country to B., a native of Frankfort-on-the-Maine; in 1836 he obtained letters of naturalisation; in 1841 he made a will; in 1844 his wife died, leaving children, & in 1846 he married, at Frankfort, C., who was B.'s sister of the half blood, & had children by her. On his death his brother took out letters of administration as the uncle & guardian of all the children, none of whom were of age, on the supposition that the will was revoked by the second marriage. The eldest son of the first marriage, on coming of age, called in the letters of administration, & set up the will:—*Held*: the disability of a native-born English subject to contract such a marriage, applied equally to a naturalised subject; though, by the law of Frankfort, C.'s domicile, such a marriage would have been valid, yet the disability of either party to the contract would invalidate the marriage; the letters of administration must be revoked, & the probate of the will granted.—*In the Goods of METTE, METTE v. METTE* (1859), 1 Sw. & Tr. 416; 28 L. J. P. & M. 117; 33 L. T. O. S. 139; 7 W. R. 543; 164 E. R. 792.

Annotations:—Reid. Re Martin, Loustalan v. Loustalan, [1900] P. 211. Mendt. Sottomayer v. De Barros (1879), 5 P. D. 84; Ogden v. Ogden, [1908] P. 46; Chetti v. Chetti, [1909] P. 67.

2983. ———.—*CLARK v. DIXON* (1891), 8 T. L. R. 11.

2984. Two wills produced—Administration not revoked until one will established.—A husband obtained administration to his wife as dead intestate. Two wills were afterwards produced. The ct. would not revoke the administration till one of the wills was proved to be good in law.—*PHILLIPS v. ALCOCK* (1755), 2 Lee, 97; 161 E. R. 277.

2985. One will incorporating another—One will already proved—New grant of probate of both.—*In the Goods of WILSON (or WILSON) (BP.)* (1864), cited in L. R. 2 P. & D. 84; 39 L. J. P. & M. 48; 22 L. T. 630; 34 J. P. 455; 18 W. R. 901.

Annotations:—Folld. In the Goods of Harris (1870), L. R. 2 P. & D. 83. Reid. In the Goods of Howden (1874), 43 L. J. P. & M. 26.

2986. ———.—*—In the Goods of HARRIS, No. 1399, ante.*

2987. ———.—*One will testamentary appointment only.*—The testator, whose domicile of origin was Scottish, executed a testamentary appointment while on a visit to this country, in the exercise of a power contained in his marriage settlement. He afterwards acquired a domicile in New Zealand, & there duly executed a will in which he referred to this testamentary appointment & confirmed it. The exors. named in the will obtained probate of it in New Zealand; but no mention of the testamentary appointment was made in the probate. The registrar of the English ct. refused to pass an exemplification of the probate on the ground that the testamentary appointment was not referred to in it. The appointee then moved for a grant of limited administration with the testamentary appointment annexed:—*Held*: the application must be refused, the proper course being for the exor. to

named in the will to take out probate.—*In the Goods of BYRNE* (1910), 44 L. L. T. 192.—*IR.*

PART II. SECT. 16, SUB-SECT. 2.—D.

p. Later will produced—Revocation of limited grant.—A will of

deceased was discovered after a limited administrator had acted, the ct. impounded the limited grant & empowered & directed the extrix.

apply to the New Zealand ct. for the grant of a fresh probate including the testamentary appointment.—*In the Goods of CRAWFORD* (1890), 15 P. D. 212; 60 L. J. P. 16; 63 L. T. 232; 54 J. P. 504.

E. Grant obtained by Fraud.

2988. Administration granted on false affidavit—As to person entitled.]—Administration which had been granted to an illegitimate son on a false affidavit, revoked.—*CORNISH v. CORNISH* (1752), 1 Lee, 14; 161 E. R. 6.

2989. ———.]—An administration, surreptitiously & unduly obtained by a party falsely representing herself to be the widow of the deceased, revoked, without being brought in, upon personal service of the decree by Ways & Means upon the husband of the party.—*SCOTTER v. FIELD* (1848), 6 Notes of Cases, 182.

2990. ———.]—An administration granted to a woman, falsely swearing herself to be the lawful widow of deceased, was, after the necessary decrees had been taken out & attempts made to serve her but without success, decreed to be null & void, & administration was decreed to the lawful widow, notwithstanding the prior administration was outstanding.—*In the Goods of LANGLEY* (1851), 2 Rob. Eccl. 407; 163 E. R. 1361.

2991. ——— As to value of estate.]—An administration granted on false suggestion, revoked.

I revoked the administration because it was granted on false suggestions, in fraud of the stamp duty & of the fees of the office (*per CUR.*). *SMITH v. CORRY* (1753), 1 Lee, 418; 161 E. R. 154.

2992. Codicil forged.]—Probate of a codicil had been granted. The person who had taken the probate had died. It appeared sufficiently from the evidence of the writer of the codicil & others that it was a forgery. The probate of the codicil was therefore revoked.—*In the Goods of RUSH* (1849), 13 L. T. O. S. 450; 13 Jur. 712.

2993. Fraud as a ground of appeal—Fresh evidence.]—In order to maintain an action to set aside, on the ground of fraud, a judgment establishing a will & granting probate of it, pltf. must adduce evidence of facts discovered since the judgment which raise a reasonable probability of the success of the action. If pltf. does not do this, the proceedings in the action will be stayed on the motion of deft.

The evidence need not necessarily be of such a character that it would be evidence in the action. The question in each case is, whether the fact alleged to have been discovered is so evidenced & so material as to make it reasonably probable that the action will succeed. If it is, the action ought to be allowed to proceed, so that pltf. may have an opportunity of obtaining discovery in it. Though in most cases a judgment obtained by fraud can be set aside only as against the person who committed or procured the fraud, this limitation does not apply to an action to set aside a judgment granting probate of a will, inasmuch as a will must be either good or bad against all the world.—*BIRCH v. BIRCH*, [1902] P. 130; 71 L. J. P. 58; 86 L. T. 364; 50 W. R. 437; 18 T. L. R. 485; 46 Sol. Jo. 393, C. A.

*Annotations:—**Reid v. Bright v. Sellar*, [1904] 1 K. B. 6. *Mentel. Re Page, Hill v. Fladgate*, [1910] 1 Ch. 489.

PART II. SECT. 16, SUB-SECT. 2.—E. q. Administration granted by suppression of will—Subsequent revocation of grant.]—A grant of letters of administration obtained by suppressing a will containing no appointment of exors. is not void *ab initio*, & a sale of property by an administrator, who

has obtained a grant of administration under such circumstances to a purchaser, who was ignorant of the suppression of the will, is valid, although the grant was revoked after the sale.—*GOPAL DAS AGARWALLAH v. BIDDERE DASS SUREKA* (1906), 1 L. R. 33 Cal. 657; 10 C. W. N. 662.—IND.

F. Grant obtained by Surprise.

2994. General rule.]—*AYLIFFE v. AYLIFFE* (1671), 2 Keb. 812; 84 E. R. 513.

2995. ———.]—The ordinary is at liberty to repeal an administration, obtained by fraud or surprise.

There is not one case, where the suit in the spiritual ct. for a repeal of an administration either granted irregularly or obtained by fraud & surprise was prohibited; & it would be monstrous that any Ct. of Justice should not have a power to set aside any judgment, or other act obtained from them by deceit & imposition (*per CUR.*).—*HARRISON v. MITCHELL* (1731), Fitz-G. 303; 2 Barn. K. B. 20; 94 E. R. 767; *sub nom. HARRISON v. WELDON*, 2 Stra. 911.

G. Representative Disappearing or Becoming Incapable.

2996. Where administrator disappears—Not confined to disappearance of creditor administrator.]—The practice by which a grant of administration may be revoked & a fresh grant made in the absence of the holder of the outstanding grant, is not confined to cases where administration has been taken by creditors.

Where an intestate died leaving a widow & six children by a former marriage, & the widow, who obtained administration, could not be found, the ct., upon the application of the children, revoked the grant & directed administration *de bonis* in favour of one of their number.—*In the Goods of LOVEDAY*, [1900] P. 154; 69 L. J. P. 48; 82 L. T. 692.

2997. ——— Creditor absconding after satisfying debt.]—Administration granted to a creditor revoked he having settled his own debt & gone away. *In the Goods of JENKINS* (1819), 3 Phillim. 33; 161 E. R. 1249.

*Annotations:—**Apld. In the Goods of Bradshaw* (1887), 13 P. D. 18; *In the Goods of Covell* (1889), 15 P. D. 8.

2998. ———.]—A grant of administration of the estate of an intestate was made to a creditor, who, after his debt had been fully satisfied, absconded, & could not be found. A personal representative of the estate being required in an action in the Ch. Div., the ct. revoked the grant to the creditor without citing him, & made a new grant to the sole next of kin of the deceased.—*In the Goods of BRADSHAW* (1887), 13 P. D. 18; 57 L. J. P. 12; 58 L. T. 58; 52 J. P. 56; 36 W. R. 848.

*Annotations:—**Apld. In the Goods of Covell* (1889), 15 P. D. 8; *In the Goods of Loveday* (1900), 69 L. J. P. 48.

2999. ——— Widow.]—*In the Goods of LOVEDAY*, No. 2996, *ante*.

3000. ———.]—Administration with the will annexed was granted in Nov. 1833. The administrator not having been heard of since 1834, administration granted to a legatee, the original administration being revoked, though not brought in.—*In the Goods of SPARKE* (1853), 17 Jur. 812.

3001. ——— Administrator bankrupt.]—An administrator became bkpt., & in his capacity as administrator proved for a debt owing by him to deceased's estate. A dividend became payable to deceased's estate, but in the meantime the administrator became bkpt. again, & left the country. The ct. refused to recall the letters of

administration.—*CRASTER v. THOMAS*, [1909] 2 Ch. 348.—IND.

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s. Illness of executor—Grant imposed by court—Limited grant to another—During executor's disability.]

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administration granted to him, & to make a fresh grant to his creditors' assignee.—*In the Goods of HAMMOND* (1874), 30 L. T. 76; 38 J. P. 425, 825; 22 W. R. 353.

3002. ——— *After estate partly administered.]*—An administrator, who was also one of the residuary legatees, having partly administered the estate, left his home, & though several years had elapsed no trace of him could be discovered. The ct. revoked the grant made to him, & made a fresh grant *de bonis non* to another of the residuary legatees.—*In the Goods of COVELL* (1889), 15 P. D. 8; 59 L. J. P. 7; 61 L. T. 620; 38 W. R. 79. *Annotation:—Consd. In the Goods of Loveday*, [1900] P. 154.

3003. ——— *Fresh assets coming to hand.]*—*In the Estate of FRENCH*, No. 2201, *ante*.

3004. *Where one of two representatives becomes insane—Grant revoked & new grant to the sane one.]*—One of two exors. having become lunatic, the probate brought in & a fresh one granted.—*In the Goods of MARSHALL* (1836), 1 Curt. 297; 163 E. R. 101.

3005. ——— *—.]*—*In the Goods of NEWTON*, No. 2348, *ante*.

3006. ——— *Limited till the other recover.]*—*In the Goods of SOWERBY*, No. 2349, *ante*.

H. Cesser of Interest of Grantee.

3007. *Administration granted durante minore etate—Death of executor under age.]*—*DUBOIS v. TRANT*, No. 2306, *ante*.

3008. *Administration granted to a tenant for life limited to his life interest—Life interest assigned to remainderman.]*—The tenant for life of certain property having assigned over his interest to the remainderman, an administration with a will annexed, limited to that interest, & granted to the tenant for life, may be revoked, & a new administration limited to that property decreed to the remainderman, then possessed of the sole entire interest therein.—*In the Goods of FERRIER* (1828), 1 Hag. Ecc. 241; 162 E. R. 571. *Annotation:—Consd. In the Goods of Reid* (1886), 11 P. D. 70.

3009. *Administration granted to a mortgagee—Revoked when mortgage paid off.]*—*In the Goods of HOARE* (1833), 2 Sw. & Tr. 361, n; 164 E. R. 1036.

Annotations:—Apld. In the Goods of Bradshaw (1887), 57 L. J. P. 12. *Reid. In the Goods of Morris* (1862), 2 Sw. & Tr. 360; *In the Goods of Covell* (1889), 15 P. D. 8.

3010. *Administration to estate of bankrupt granted to official receiver—Revoked when debts paid.]*—H. T., who had been bkpt. in 1887 & subsequently obtained his discharge, died in 1896 again a bkpt. & intestate, leaving a widow & children. In 1897 a grant of administration was made to his trustee in bkpcy., who was also official receiver of the local county ct., on renunciation by the widow & children of H. T. L. T., the first wife of H. T., died in 1887, during her husband's first bkpcy., & a grant of administration had been made to his trustee. This grant was revoked in 1892, & a fresh grant made to H. T. as the lawful husband of L. T. The official receiver having paid off all debts due from the estate of H. T., & having a balance in hand to divide amongst his widow & children, the ct. ordered that they be allowed to retract their previous renunciations, revoked the existing grants, & made a joint grant of administration to

the widow & two of the children of the first marriage to the unadministered personal estate & effects of H. T., his representatives being entitled as a matter of course to represent the first wife's estate.—*In the Goods of THACKER*, [1900] P. 15; 69 L. J. P. 1; 81 L. T. 790.

3011. *Grant to person entitled by law of supposed domicile of deceased—Agreement to treat deceased as domiciled elsewhere.]*—A Sardinian, who had settled in Brazil, died intestate on his voyage from Bahia to Genoa. He had wound up his affairs in Brazil & intended to resume his domicile of origin at Genoa. An agreement had been come to between the Brazilian & Italian Govts., with respect to the administration of his property & the guardianship of his children, some of whom were in Genoa & others in Brazil, by which the Brazilian Govt. gave up to the Italian Govt. all claim to such administration & guardianship. The ct. revoked a grant of administration which had been made to the representative of the person entitled to it according to the Brazilian law, & made a grant to the person entitled to it according to the Italian law.—*In the Goods of BIANCHI* (1862), 3 Sw. & Tr. 16; 1 New Rep. 108; 8 L. T. 171; 11 W. R. 240; 164 E. R. 1177.

3012. *Grant to attorney of executor of foreign will—Will subsequently upset by foreign court.]*—A British subject, domiciled in Kentucky, died leaving several wills, the last of which was proved in one of the inferior cts. of that State, & thereupon administration, with the will annexed, was granted to the attorney in England, of the widow, who was sole extrix. Subsequently, the superior cts. of Kentucky upset the will, & the widow commenced a suit for revocation of the said letters of administration, & for probate of an earlier will. Upon affirmative proof of the testamentary capacity of deceased. The ct. revoked the letters of administration, & granted probate of the earlier will, now propounded by plff.—*NEWCOMB v. NEWCOMB* (1895), 73 L. T. 317.

Interest of party with prior claim established.]—*See Nos. 2966, 2967, ante.*

I. Limited Grants.

3013. *Grant limited to carrying on proceedings—Application by person entitled to general grant—After long delay.]*—Where administration of the effects of an intestate had been granted to his solr., limited to proceedings in Chancery, the widow & children, in whom the property vested, & who were domiciled & resident abroad, being cited by notice & not appearing; the ct., on application of the widow, eight years after, representing that she had been ignorant of her rights, refused to revoke the grant.—*LOPES v. HARTLEY* (1837), 7 Notes of Cases, Supp. 31.

3014. ——— *Cæterorum.]*—A grant of administration in the goods of a deceased limited to carry on proceedings in Chancery having lawfully issued & being still in force, the ct. will not revoke it in order that a general grant may be made to the party who in the first instance would have been entitled thereto. The proper course is to supplement the limited grant with a grant of administration of the rest of the goods of deceased.—*In the Goods of BROWN* (1872), L. R. 2 P. & D. 455.

J. Other Grounds.

3015. *Failure of administrator to bring in inventory.]*—An administration cannot be revoked

—Where an exor.'s bodily health is such that he is unable to perform the duties of his office the ct. has jurisdiction to imound the grant made to

him, & to make a grant of administration to another person, limited during the exor.'s incapacity.—*In the Goods of KNOTT*, [1920] 3 I. R. 397.—IR.

PART II. SECT. 16, SUB-SECT. 2.—J. t. Immovability of administration.]—The ct. has power to cancel letters of

for the not bringing in of the inventory & account by the administrator (ROLL, J.).—HILL v. BIRD (1648), Sty. 102; 82 E. R. 563.

3016. Where effect of revocation to release judgment.]—The ct. will not grant an injunction to stay proceedings to repeal letters of administration, on a suggestion that a judgment will consequently be released.—KENNEDY v. KENNEDY (1753), 3 Keny. 28; Say. 99; 96 E. R. 1295, L. C.

3017. Administration with will granted without notice to caveator—After caveat expired—Will in suit in forum domicilii.]—Administration with will annexed, obtained after a caveat entered had expired, but without notice to the adverse party & while the will was in suit in Ireland, the *forum domicilii*, revoked as surreptitiously obtained, & the party condemned in costs of a petition in support of it.—TRIMLESTOWN (LORD) v. TRIMLESTOWN (LADY) (1830), 3 Hag. Ecc. 243; 102 E. R. 1145.

3018. Conditional grant by consent in common form—Conditions not complied with.]—Probate of a testamentary paper in the nature of a codicil, having been granted by consent in common form, cannot afterwards be revoked, on the allegation that the conditions on which such consent was given have not been complied with, there being no proof of fraud or circumvention practised either upon the ct. or the parties.—NICOL v. ASKEW (1837), 2 Moo. P. C. C. 88; 12 E. R. 936, P. C.

3019. Identity of testator not proved.]—Probate of a will revoked, on failure of proof of the identity of a testator.—MURPHY v. MASON (1753), 1 Lee, 349; 101 E. R. 129.

3020. Benefit of estate—Where all parties consent.]—In the Goods of HESLOP, No. 2968, *ante*.

3021. Bankruptcy of grantee.]—In the Goods of HAMMOND, No. 3001, *ante*.

3022. Alleged latent ambiguity of will—Application to incorporate portion of earlier will.]—PATON v. ORMEROD, No. 3185, *post*.

SUB-SECT. 3.—PRACTICE.

A. How Application made.

3023. Whether on motion—Former grant limited in amount.]—*Re FOWLER*, No. 3016, *post*.

3024. — Where all parties consent.]—An application to revoke a grant of administration can only be decided by way of motion, if all parties consent to its being so heard. If such consent is withheld, the ct. will decline to deal with the matter upon motion, & an action must be commenced for the revocation of the grant.—In the Goods of BADDELEY (1888), 60 L. T. 237; 53 J. P. 40.

3025. By action.]—BIRCH v. BIRCH, No. 2993, *ante*.

B. Who May apply.

3026. Next of kin.]—BLACKBOROUGH v. DAVIS, No. 2901, *ante*.

3027. Executor of person entitled.]—REES v. CART, No. 1474, *ante*.

3028. Creditor.]—A creditor not entitled to contest an administration already granted, though

prima facie fraudulently obtained.—In the Goods of NEWSOM (1842), 2 Notes of Cases, 15.

3029. —.]—In the Estate of FRENCH, No. 2201, *ante*.

3030. Administrator under void grant.]—An administrator under a void grant applied to have the letters revoked. The ct. required security as to the interests of the parties entitled to the property.

In all cases where property has got into the hands of an administrator under void letters of administration, the ct. should take care to protect the interest of the persons entitled to it (SIR H. JENNER FUST).

It is a very dangerous thing to revoke an administration without some security for the ultimate disposition of the property (SIR H. JENNER FUST).—In the Goods of BERGMAN (1842), 2 Notes of Cases, 22.

Annotation:—Held. In the Estate of French, [1810] P. 169.

3031. Executor—Of deceased executor—Will proved in common form.]—A. died leaving a will, & appointed B., who proved it in common form, sole exor. & trustee. B. died leaving a will, & appointed C. his exor. & trustee of A.'s will. C. took probate of it, but subsequently circumstances came to his knowledge which caused him to believe A.'s will invalid:—*Held*: he had no such interest as would entitle him to question its validity, & could not be allowed to cite the legatees named in the will to prove it in solemn form of law, or to show cause why it should not be pronounced null & void.—In the Goods of CHAMBERLAIN (1807), L. R. 1 P. & D. 316; 36 L. J. P. & M. 52; 10 L. T. 97; 31 J. P. 247; 15 W. R. 680.

Annotation:—Consid. Williams v. Evans, [1911] P. 175.

3032. — Also next of kin—Though proving with full knowledge of facts.]—An exor. who is also next of kin of testator, & who takes probate with knowledge of all the facts, is not disabled from taking proceedings to contest the validity of the will in the same manner as a bare exor. would be in similar circumstances. The fact of his having taken probate, if a reasonable explanation is given for having done so, does not estop him from afterwards instituting proceedings to disaffirm the will.

Whether there have been laches on the part of the person disputing a will is a question of fact. A certain amount of delay on the part of an exor. who is also next of kin, in instituting proceedings to prevent probate, does not necessarily amount to negligence on his part or warrant the ct. in holding, notwithstanding that he had all along full knowledge of the facts, that it would be inequitable to allow him to proceed to impeach the will, especially if the assets have not been distributed & if his conduct has not led other persons to alter their position to their own detriment.—In the Estate of WILLIAMS, WILLIAMS v. EVANS, [1911] P. 175; 80 L. J. P. 115; 105 L. T. 79; 27 T. L. R. 506.

Operation of grant by way of estoppel, *see*, generally, Sect. 15, sub-sect. 2, E., *ante*.

3033. Whether interest at death of deceased necessary.]—To entitle a person to intervene in a suit for revocation of letters of administration,

administration, & immoral conduct after the grant might afford sufficient for doing so.—GALLOWAY v. GALLOWAY, 3 J. R. N. S. 29.—N.Z.

PART II. SECT. 16, SUB-SECT. 3.—B.

a. Brother of intestate—Resident abroad.]—Only one of the next of kin, the sister, of intestate, resided in

Ontario, &, upon the consent of the sister & her children, letters of administration were granted by a surrogate ct. to deft., the husband of the sister's daughter. A brother of intestate, resident in U.S.A., brought this action to revoke the grant:—*Held*: having regard to the nature of the property of deceased, & the age & illiteracy of his sister, the judge had

not exercised his discretion improperly in directing the grant to be made to deft.—CAIRN v. O'ROURKE (1902), 22 C. L. T. 207; 3 O. L. R. 632; 1 O. W. R. 331.—CAN.

b. Purchaser of property—From heir of deceased.]—A purchaser of properties from the heir of deceased has a *locus standi* to apply for revocation of letters of administration of a will

Sect. 16.—Revocation of grant: Sub-sect. 3, B., C., D., E., F., G., H., I. & J.; sub-sect. 4, A. (a) & (b) i. & ii.]

it is not necessary that he should have had an interest at the time of the death of deceased; an interest acquired subsequently by purchase of part of the estates from the administrator is sufficient.—*LINDSAY v. LINDSAY* (1872), 42 L. J. P. & M. 32; 27 L. T. 592; 37 J. P. 24; 21 W. R. 272.

C. Loss of Right to apply.

3034. Effect of delay—Applicant not cited on previous grant.]—An administration *de bonis non* granted in 1827, of an intestate who died in 1790, limited to assign a leasehold property not reserved in deceased's lifetime & only mortgaged during an original creditor administration, which was granted on the renunciation of the next of kin at the time of the death & which expired in 1806, revoked; the next of kin for the time being, in whom all the beneficial interest in deceased's estate was vested, not having been cited when the limited grant was made, & there being a suggestion that such grant was surreptitiously obtained, & that there was a surplus belonging to deceased's estate.—*SKEFFINGTON v. WHITE* (1829), 2 Hag. Ecc. 626; 162 E. R. 978.

3035. — Applicant only seeking to follow estate.]—(1) The ct. will not revoke letters of administration at the instance of a person guilty of delay & acquiescence, & whose only object in seeking the revocation is to follow the estate into the hands of the persons to whom it has been distributed in an action in the Ch. Div.

(2) There is no need to revoke the letters of administration in order to maintain an action in the Ch. Div. for the purpose of following the estate into the hands of the persons to whom it has been distributed, including the administrator, if such an action is otherwise maintainable.—*MOHAN v. BROUGHTON*, [1900] P. 56; 69 L. J. P. 20; 82 L. T. 29; 48 W. R. 371; 44 Sol. Jo. 210, C. A.
Annotation:—As to (1) Consd. Williams v. Evans, [1911] P. 175.

3036. — Executor also next of kin—With full knowledge of facts.]—*In the Estate of WILLIAMS, WILLIAMS v. EVANS*, No. 3032, *ante*.

Laches generally.]—See *EQUITY*, Vol. XX., pp. 524 *et seq.*; *ESTOPPEL*, Vol. XXI., pp. 347 *et seq.*

D. Whether Prior Grant must be brought in.

3037. General rule.]—The ct. refused to hear a motion for the revocation of a grant of probate, & a declaration of the validity of a draft will, where the probate & draft had not been lodged in the registry.—*In the Goods of RILEY*, [1896] P. 9; 65 L. J. P. 41.

3038. Where holder of outstanding grant cannot be served—Service on husband of administratrix.]—*SCOTTER v. FIELD*, No. 2989, *ante*.

said to have been executed by deceased.
—*LALIT MOHAN BHUTTACHARJEE v. NAVADIP CHANDRA KAPARIA* (1901), 1 L. R. 28 Calc. 587.—*IND.*

PART II. SECT. 16, SUB-SECT. 3.—C.

a. Acquiescence & lapse of time.]—It does not matter by what facts knowledge of the grant of probate & acquiescence in it are established, for neither knowledge, nor acquiescence, nor lapse of time are of themselves operative as a bar to the proceeding which every person interested in the estate of testator has a right to bring, if he was not made a party in the probate proceeding. His application must be *bona fide*, & he must give some

reasonable & true explanation of the delay.—*MANORAMA CHOWDHURANI v. SHIVA SUNDARI MOZUMDAR* (1914), 1 L. R. 42 Calc. 480.—*IND.*

d. — Action groundless & vexatious.]—A person claiming to be sole next of kin of testator brought an action to revoke the grant of probate made to the exor. in common form. Pltf. was shortly after the death of testator aware of the existence of the will & of its terms, but took no steps to contest the will, & allowed the exor. to administer the estate. No grounds were alleged for disputing the will:—*Held: It would be contrary to settled principle to allow pltf. to proceed with the action, which was groundless*

3039. —.]—*In the Goods of LANGLEY*, No. 2990, *ante*.

3040. —.]—*In the Goods of SPARKE*, No. 3000, *ante*.

3041. — Grant taken out of the jurisdiction.]—A grant of administration which cannot be brought in for cancellation, the administrator having taken it with him out of the jurisdiction, may nevertheless be revoked, & a new grant *de bonis non* may be issued without citing or giving notice to the administrator, where the goods unadministered are of small value, on the ground of avoidance of delay & expense.—*In the Estate of THOMAS*, [1912] P. 177; 81 L. J. P. 91; 107 L. T. 201.

3042. Where holder of outstanding grant refuses to bring it in.]—*WILKINSON & WEBSTER v. ROBINSON*, No. 1330, *ante*.

3043. — Former grant noted on probate.]—*In the Goods of INGALL, INGAIL v. DRAYTON*, No. 1331, *ante*.

3044. — Claim of lien.]—The proctors who had obtained a grant of administration with the will annexed held the letters in their hands, having a lien on them for their costs, & declined to deposit them in the registry for the purpose of being cancelled. The administrator having been cited did not show cause against their revocation, & on proof that they were improperly issued, the ct. ordered them to be revoked without being brought into the registry, & further ordered that the person at whose instance they were revoked should bring them into the registry as soon as they came into his possession, & that the proctors should be served with a copy of the order.—*BARNES v. DURHAM* (1869), L. R. 1 P. & D. 728; 38 L. J. P. & M. 46; 20 L. T. 545; 33 J. P. 454.

3045. Where grant is lost—Undertaking required to bring in if found.]—Upon the revocation of letters of administration, which have been lost, an undertaking will be required from the person to whom they were granted, that, if found, he will bring them into the registry, & that they will not be acted upon.—*In the Goods of CARU* (1858), 1 Sw. & Tr. 111; 161 E. R. 652.

E. Necessity for Citation or Notice.

3046. Former grant limited in amount—Motion to revoke & increase limits.]—A decree to show cause why letters of administration, limited to the sum of £1,000, should not issue. On default of appearance of the party cited, the grant so limited passed. Motion to revoke such grant, & for a new grant limited to £3,000 rejected.

In the present instance, the parties *prima facie* entitled to the grant have only had notice that administration is asked limited to £1,000. It is one thing to consent or not object to a grant of £1,000 & another thing when a grant of £3,000 is asked (*per CUR.*).—*Re FOWLER* (1843), 8 Jur. 48.

3047. Former grantee—Creditor administrator.]—*In the Goods of BRADSHAW*, No. 2998, *ante*.

& vexatious, & an order was made staying further proceedings.—*MAHON v. QUINN*, [1901] 2 L. R. 267.—*IR.*

PART II. SECT. 16, SUB-SECT. 3.—E.

a. General rule.]—A ct. which has once granted letters of administration cannot revoke them without notice to the person in whose favour they have been granted.—*PARMAN v. BOHRA NEK RAM* (1915), 1 L. R. 37 All. 380.—*IND.*

f. Non-compliance with rule as to citation—Proceedings stayed.]—Where a rule requiring the issue of a citation calling on deft. to produce the probate has not been complied with, proceedings

3048. — Departing from country & taking grant—Goods unadministered of small value.]—*In the Estate of THOMAS, No. 3041, ante.*

F. Pleading.

3049. What may be pleaded—Where later will propounded.]—*ROSBOTHAM v. ROSBOTHAM, No. 1208, ante.*

G. Whether Security ordered.

3050. Application by former representative—After receiving assets.]—*In the Goods of BERGMAN, No. 3030, ante.*

H. Evidence and Onus of Proof.

3051. Evidence—Necessity for—Parties interested consenting.]—An exor. took probate of a will & codicil, & was subsequently cited to propound the codicil, which was alleged to have been executed when deceased was incompetent. He refused to propound. The other persons interested consented to a revocation of the codicil; but, in the absence of affidavits stating all the facts, the ct. refused to revoke the probate. — *DRUMMOND v. KNIGHT (1849), 13 L. T. O. S. 263; 13 Jur. 502.*

3052. — Representative cited but not appearing.]—*CROSBY v. NOTON, No. 1166, ante.*

3053. —]—The ct., with hesitation, in the absence of any cited authority, gave judgment for plff., with costs, revoking a grant of probate previously obtained by defts., in common form, without requiring any evidence to be given, on behalf of plffs., against the will. — *MARTYR v. PERRY (1891), 65 L. T. 791.*

3054. — Fresh evidence.]—*BIRCH v. BIRCH, No. 2993, ante.*

3055. Onus of proof—On party seeking revocation.]—A party in possession of an administration is not bound to propound her interest, till the party calling it in question, has established her own. — *HIBBEN v. CALEMBERG (1751), 1 Lee, 655; 1 Phillim. 166; 161 E. R. 239.*

Annotation:—Consd. Dabbs v. Chisman, Jennens v. Beauchamp (1810), 1 Phillim. 155.

3056. —]—*FORREST v. WILSON (1766), cited in Phillim. at p. 163; 161 E. R. 948.*

Annotation:—Consd. Dabbs v. Chisman, Jennens v. Beauchamp (1810), 1 Phillim. 155.

3057. —]—A person in possession of an administration is not bound to propound his interest till the party calling in question the grant has first propounded & proved his. — *DABBS v. CHISMAN, JENNENS v. BEAUCHAMP (LORD) (1810), 1 Phillim. 155; 161 E. R. 946.*

Annotations:—Consd. Menzies v. Pulbrook & Ker (1841), 2 Curt. 845. Rejd. Crane v. Tobello (1852), 19 L. T. O. S. 192. Mentd. Hawke v. Wedderburne (1868), L. R. 1 P. & D. 594.

See, generally, EVIDENCE, Vol. XXII., pp. 35 et seq.

will be stayed until this has been done. — *McLAGAN v. McLAGAN (1905), 11 B. C. R. 325; 2 W. L. R. 12.—CAN.*

PART II. SECT. 16, SUB-SECT. 3.—G.

*g. Plaintiff ordinarily resident in Canada—Resident in Ireland for purposes of litigation.]—*Testator by his will gave all his property to his wife subject to the payment of a legacy of £50 to pltf. The will was duly proved & the sum of £50 was, in Dec. 1913, paid to pltf., then residing in Canada, who gave a receipt for it. In Sept. 1919, pltf. returned to Ireland & brought an action to recall the grant of probate & to have the will condemned. Left., who was extric. under the will, alleged that pltf. was only temporarily resident within the jurisdiction & had no visible means of satisfying any costs that might be given against him, & she applied for

security for costs:—*Held: pltf. had not taken up any permanent residence in Ireland, but being ordinarily resident in Canada was only in Ireland for the purposes of litigation; & he should give security for costs.* — *PARR v. JONES (1920), 54 L. L. T. 59.—IR.*

PART II. SECT. 16, SUB-SECT. 3.—H.

3055 I. Onus of proof—On party seeking revocation.]—*Re JOHNSTONE (1899), 20 N. S. W. L. R. (B.) 1.—AUS.*

3055 II. —]—*Re DINTARINI DEBI'S PETITION (1882), 1 L. R. 8 Calc. 880; 11 C. L. R. 190.—IND.*

PART II. SECT. 16, SUB-SECT. 4.—A. (a).

*h. General rule.]—*An exor. is not liable for money paid, though the will is afterwards set aside. — *RANDALL*

I. The Hearing.

3058. Whether fresh decree necessary—Administration decreed but not extracted—Former grant to nominee of crown—Application by creditor.]—*In the Goods of GOLDHAM (1850), cited in Dea. & Sw. at p. 271; 28 L. T. O. S. 148; 3 Jur. N. S. 72; 5 W. R. 123; 164 E. R. 573.*

Annotation:—Fold. In the Goods of Steinorth (1856), Dea. & Sw. 270.

3059. —]—*In the Goods of STEINORTH, No. 1715, ante.*

J. Form of New Grant.

3060. Recital of facts of case.]—*In the Goods of BARTHOLOMEW, No. 2950, ante.*

SUB-SECT. 4.—EFFECT OF REVOCATION.

A. On Acts of Representative.

(a) Executor.

3061. Receipt of money—Whether party paying discharged.]—Payment to an exor. having a probate, if the probate is afterwards repealed, does not discharge the party against the legal exor. — *ANON. (1705), 1 Com. 150; 92 E. R. 1008.*

Annotation:—Dbid. & N.E. Allen v. Dundas (1789), 3 Term Rep. 125. The case in Comyns seems to be grounded on a false principle, namely, that probate of a will gives no authority to the exor.; but I think it does, & so much so that it cannot be traversed or denied (GROSE, J.).

3062. — Probate of forged will.]—*ALLEN v. DUNDAS, No. 2779, ante.*

See, generally, Sect. 15, ante.

(b) Administrator.

i. Where Deceased died Testate and appointed Executors.

On acts of administration.]—*See Nos. 394, 2878, ante.*

3063. — Effect of Conveyancing Act, 1881 (c. 41), s. 70.]—*HEWSON v. SHELLEY, No. 2878, ante.*

3064. Receipt of debt—Whether debtor discharged.]—*PROSSER v. WAGNER, No. 2893, ante.*

See, now, Administration of Estates Act, 1925 (c. 23), s. 27 (2).

ii. Where New Administrator Appointed.

3065. General rule.]—A sale made by a stranger during his administration, & pending a citation by the next of kin to have the administration repealed, is good, although the administration is revoked by sentence, & the first sentence declared null & void.

An appeal suspends the former sentence, a citation does not. — *PACKMAN'S CASE (1590), 6 Co. Rep. 18 b; 77 E. R. 281; sub nom. WILSON*

v. DELAP (1885), 18 N. S. R. (6 R. & G.) 106; 6 C. L. T. 144.—CAN.

*k. Validity of acts of executor without title.]—*A partner by will purported to appoint his co-partner sole exor. On the death of the former, the latter took out letters of administration. Acting in good faith, in order to liquidate deceased's estate, he took the business over at a proper valuation, paid out the legacies & filed an administration & distribution account with the master. Thereafter the deceased's wife discovered that the appointment of the exor. had not been made validly, & had it set aside. The wife & X. were then elected co-exors., but by arrangement the latter alone took out letters of administration:—*Held: the liquidation & distribution account was not binding on the estate.* — *GUNN v. GUNN (1911), W. L. D. 48.—S. AF.*

Sect. 16.—Revocation of grant: Sub-sect. 4. A. (b ii., B. & C.; sub-sects. 5 & 6. Sects. 17 & 18 Sub-sect. 1.]

v. PACKMAN, Cro. Eliz. (459); sub nom. WILSON v. PATEMAN, MOORE, K. B. 396; sub nom. ANON., 3 Salk. 22.

Annotations:—Consd. Anon. (1706), 1 Com. 150. Expi. & Dist. Woolley v. Clark (1822), 1 Dow. & Ry. K. B. 409. Consd. Boxall v. Boxall (1884), 27 Ch. D. 220; Hewson v. Shelley, [1914] 2 Ch. 13. Refd. Hornigold v. Bryan (1616), 3 Bulst. 72; Semine v. Semine (1672), 2 Lev. 90; Blackborough v. Davis (1701), 12 Mod. Rep. 615.

3066. —[Administration was committed to A. & afterwards repealed & committed to B. B. cannot avoid any grant made by A. & if he sue any one for it prohibition lies, but B. may sue A. in the spiritual ct. to make account to see how much remains, & prohibition does not lie.—*WADES WORTH v. ANDREWS* (1615), 2 Dyer, 166 b, n.; 73 E. R. 305.

3067. Acts pendente lite.—[*PACKMAN'S CASE*, No. 3065, *ante*.

3068. Administration obtained by fraud.—[Sale of East India stock by a wrongful administrator, the purchaser having notice of the fraud: decreed to be transferred back to the rightful administrator & that the administratrix of the purchaser shall account.—*JOHNSON v. EAST INDIA CO. & CHESTER* (1679), *Cas. temp. Finch*, 430; 23 E. R. 234.

3069. —[Suppression of will—No executors appointed.]—[A grant of letters of administration obtained by suppressing a will containing no appointment of exors. is not void *ab initio*, & accordingly a sale of leaseholds by an administratrix, who had obtained a grant of administration under such circumstances, to a purchaser who was ignorant of the suppression of the will, was upheld by the ct., although the grant was revoked after the sale.—*BOXALL v. BOXALL* (1884), 27 Ch. D. 220; 53 L. J. Ch. 838; 51 L. T. 771; 32 W. R. 896. *Annotations:—Refd. Ellis v. Ellis*, [1905] 1 Ch. 613; *Hewson v. Shelley*, [1914] 2 Ch. 13.

3070. Fraudulent dealing with assets—After administration revoked—Administration obtained by fraud.—[*JOHNSON v. EAST INDIA CO. & CHESTER* (1679), *Cas. temp. Finch*, 430; 23 E. R. 234.

3071. —[For own benefit.]—[Assignment of a term by the administrator to his own use, set aside by subsequent administrator.—*JONES v. WALLER* (1682), 2 *Cas. in Ch.* 120; 22 E. R. 880.

3072. Receipt of debt—Whether debtor discharged.—[Rent was paid to the administrator of the lessor; the grant of administration was revoked & a new grant made:—*Held*: the payment made to the visible administratrix was valid & the rent was not payable over again to the new administrators.—*STEPHENS v. LANGLEY* (1673), *Cas. temp. Finch*, 40; 23 E. R. 22. *Annotation:—Refd. Howson v. Shelley*, [1914] 2 Ch. 13.

B. On Proceedings Pending.

3073. Revocation after judgment—Before execution.—[An administrator recovered in debt against A. The administration was revoked, yet the administrator sued A. & took him in execution:—*Held*: he could not sue him to execution after the administration was revoked.—*BARNHURST v. YELVERTON* (1605), *Noy*, 15; *Brownl.* 91; *Yelv.* 83; 74 E. R. 986.

3074. —[—]—[An administrator who obtains judgment in trover, on a conversion in his own time, for goods of the intestate, cannot take out execution thereon, if the administration be afterwards revoked.—*TURNER v. DAVIES* (1670), 1 *Mod. Rep.* 62; 2 *Keb.* 608; 2 *Saund.* 148; 86 E. R. 732. *Annotations:—Refd. Jenkins v. Plombe* (1704), 6 *Mod. Rep.*

92; *Kennedy v. Kennedy* (1753), *Say.* 99. *Monb. Clerk v. Moor* (1693), 1 *Salk.* 92; *Howard v. Bartolozzi* (1833), 4 B. & Ad. 555; *Connop v. Levy* (1848), 11 Q. B. 769; *Bailey v. Haines* (1850), 15 Q. B. 533; *Thompson v. Gillespy* (1855), 24 L. J. Q. B. 340; *Staffordshire Banking Co. v. Emmott* (1867), L. R. 2 *Exch.* 208.

3075. Revocation before decree in administration suit.—[A., the exor. of the surviving extrix. of the testator, obtained probate to her estate; this was challenged by her next of kin, & recalled, & pending that recall a suit was instituted for the administration of the estate of the original testator; & upon the question whether a decree for account could be taken, treating A. as the legal personal representative of the original testator & his testatrix:—*Held*: it could not, although, if the litigation in the Ecclesiastical Ct. was prolonged, means might be found to prosecute the suit.—*WAY v. WAY* (1854), 2 W. R. 395.

3076. Revocation after decree in administration suit—Suit stayed on application of new administrator.—[Where after a decree has been made in an administration suit pltf.'s letters of administration are revoked, the suit may be stayed on the application of the new administrator, although he is not a party to the suit, & has merely been served with notice of the decree.—*HOUSEMAN v. HOUSEMAN* (1876), 1 Ch. D. 535; 34 L. T. 633; 24 W. R. 592, C. A.

3077. —[New will discovered—Suit dismissed.]—[A decree was made at the suit of residuary legatees for the administration of the real & personal estate of a testator. After this a subsequent will was discovered by which the estate was disposed of in a different way. Probate of the old will was recalled, & letters of administration with the latter will annexed were granted to one of the beneficiaries. Under these circumstances the Ct. of Appeal made an order dismissing the action.—*Re DEAN, DEAN v. WRIGHT* (1882), 21 Ch. D. 581; 47 L. T. 501; 31 W. R. 174, C. A.

3078. Payment out of court—Money paid in by former representative.—[The administrator of a supposed intestate paid into ct., under Trustee Act, 1888 (c. 59), several sums of money, part of her estate, to the credit respectively of several infants who were some of her next of kin. A will having been afterwards discovered, the grant of administration was revoked, & probate of the will was granted. Upon a petition by the exor. & the ex-administrator, to which the infants were made respondents:—*Held*: there was jurisdiction to order the funds in ct. to be paid out to the exor., & an order was made accordingly. But the ct. required an affidavit that some legacies bequeathed by the will to the infants had been paid.—*Re Hood's Trusts*, [1896] 1 Ch. 270; 65 L. J. Ch. 372; 74 L. T. 77; 44 W. R. 382.

3079. Costs of pending proceedings—Action by executor under probate fraudulently obtained.—[A pltf. suing as exor., having been appointed under a former will which the testator had afterwards revoked, & having obtained probate surreptitiously of the first will which was soon after annulled, by the Prerogative Ct. who also revoked the probate, on that ground after the action commenced, held liable to the costs of the cause.—*SHAW v. MANSFIELD* (1819), 7 *Price*, 709; 146 E. R. 1109.

C. On Liability of Former Representative and His Sureties.

3080. Liability of former representative—To new representative—To account.—[*WADES WORTH v. ANDREWS*, No. 3066, *ante*.

3081. —[—]—[A grant of administration which had been made as upon intestacy was

subsequently revoked, & probate granted to an exor. of a will which had recently been discovered. Upon application by the exor. for an account showing how the administrator had dealt with the estate, objection was taken that the ct. had no jurisdiction, in view of the fact that the grant had been revoked, & the registrar so held & dismissed the application. But, upon appeal, the judge reversed the registrar's decision with costs, & ordered deft. to furnish to pltf. within fourteen days after probate should be exhibited to him, an account showing how he had disposed of the estate.—*In the Goods of JENKINS, JENKINS v. JENKINS* (1897), 76 L. T. 104.

3082. — In money received.]—Administrator makes attorney to receive the intestate's debts; a will appearing, the letters of administration are repealed. Exor. may bring *indebitatus assumpsit* against the attorney for money received to his use, *quia* administration void.—*JACOB v. ALLEN* (1703), 1 Salk. 27; 91 E. R. 26.

Annotations:—Mentd. A.-G. v. Perry (1734), 2 Com. 481; *Sadler v. Evans* (1766), 4 Burr. 984; *Baylis v. London (Bp.)*, [1913] 1 Ch. 127.

3083. — —.]—Where a person who has no right to administer to an intestate obtains letters of administration to him & sells his property, if his administration is repealed, & a fresh one granted to the person legally entitled to administer, the latter may recover from the former the money for which he sold the intestate's property in an *indebitatus assumpsit* for money had & received.—*LAMINE v. DORRELL* (1705), 2 Ld. Raym. 1216; 92 E. R. 303.

Annotations:—Mentd. Neate v. Harding (1851), 6 Exch. 349; *Arnold v. Cheque Bank, Arnold v. City Bank* (1876), 1 C. P. D. 578; *Phillips v. Homfray* (1883), 24 Ch. D. 439.

3084. — To third parties.—Liable to be sued while goods in his hands.]—How deft., administrator, shall plead, when the administration is revoked & granted to another.

He ought to have set forth that he had fully administered all the goods in his hands, or else that he had delivered them over to the new administrator; for otherwise the debtee might be at a loss; for those goods shall not be assets in the hands of the new administrator till they come into his possession (*WILD, J.*).—*GARTER v. DEE* (1671), *Freem. K. B.* 13; 89 E. R. 11.

3085. Liability of sureties.—For acts of representative.—While grant unrevoked.]—*DEBENDRA NATH DUTT v. ADMINISTRATOR-GENERAL OF BENGAL*, No. 2743, *ante*.

SUB-SECT. 5.—RESCISSION OF REVOCATION.

3086. Where supposed ground for revocation does not exist.—Party with right to grant not renouncing.—But cognisant of proceedings.]—When, after the death of a brother administrator, administration had been revoked, because the mother had not formally renounced, that revocation rescinded on the mother's affidavit that she was aware of her son's application for the administration, & had under it received her distributive share.—*In the Goods of STABLES* (1831), 3 Hag. Ecc. 560; 162 E. R. 1263.

SUB-SECT. 6.—COSTS OF REVOCATION.

3087. Liability of former representative.—Though acting bonâ fide.]—*In the Goods of CARR*, No. 2977, *ante*.

SECT. 17.—ALTERATION OF GRANT.

3088. Description of deceased.—Correction of name.]—*In the Goods of LIND* (1841), 5 Jur. 1041.

3089. — Fuller description added.]—The ct. allowed a probate to be amended after it had issued by the addition of a fuller description of testator than therein contained in the first instance.—*In the Goods of TOWGOOD* (1872), L. R. 2 P. & D. 408; 41 L. J. P. & M. 84; 26 L. T. 984; 36 J. P. 615; 20 W. R. 802.

3090. Cancellation of documents.—Promissory notes forming part of probate.]—*In the Goods of HUGHES*, No. 694, *ante*.

3091. Striking out power reserved to other executors.]—Testator appointed A. his sole extrix. in England, & B. & C. exors. of his will in India. Probate was granted in England to A., reserving power of making a like grant to B. & C., & was accepted by A. An application by A. that the grant should be altered by striking out the reservation of power to B. & C. as having been improperly inserted, was refused upon the ground that such reservation, if improperly inserted, in no way prejudiced A.—*In the Goods of PULMAN* (1863), 3 Sw. & Tr. 269; 33 L. J. P. M. & A. 20; 9 L. T. 347; 27 J. P. 760; 9 Jur. N. S. 1204; 164 E. R. 1277; *sub nom. In the Goods of PUTMAN*, 12 W. R. 60.

Annotation:—Reid. In the Goods of Wallich (1864), 33 L. J. P. M. & A. 87.

3092. Correction of date of will.]—In a grant of administration, with the will annexed, the date of the execution was wrongly stated as Jan. 11, 1803, instead of 1864, both in the grant & in the original will. On affidavits showing that the will had really been executed in 1864, the ct. ordered the grant to be amended so as to show on the face of it the true date.—*In the Goods of ALCHIN* (1869), L. R. 1 P. & D. 664; 38 L. J. P. & M. 84; 20 L. T. 757; 33 J. P. 503.

3093. As to inclusion of foreign property to satisfy foreign court.]—An intestate died leaving personal estate to the amount of £273 in this country, & £8,100 in the Italian rentes. The Italian ct. refused to grant the authority required to deal with the property within its jurisdiction, on the ground that the letters of administration granted by the Ct. of Probate here were on the face of them limited to the smaller amount in this country, & that this ct., if it had been made aware of the full value of the estate would have required greater security for its administration. The ct. allowed the letters of administration to be amended, the Board of Inland Revenue having signified its consent to accept the succession duty on the Italian rentes as probate duty, so as to state on the face of them that the larger sum was also included.—*In the Goods of HENLEY* (1886), 11 P. D. 120; 55 L. J. P. 61; 56 L. T. 895; 50 J. P. 520; 35 W. R. 184.

Notation of domicil on probate after issue.]—*See Nos. 2957, 2975, 2976, ante*.

SECT. 18.—RESEALING IRISH, SCOTTISH AND COLONIAL GRANTS.

SUB-SECT. 1.—IRISH GRANTS.

See Probates & Letters of Administration (Ireland) Act, 1857 (c. 79), ss. 94, 95; Court of Probate Act, 1858 (c. 95), s. 29; Government of Ireland (Resealing of Probates, etc.) Order, 1922; Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 169.

3094. Effect of Government of Ireland Act, 1920 (c. 67)—Northern Ireland.]—The above Act gives

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to His Majesty's High Ct. of Justice in Northern Ireland all such jurisdiction as was then exercised by the High Ct. of Justice of Ireland. This includes the granting of probate; & therefore, a probate granted by that ct. can be resealed in the Probate Ct. in England, according to the practice before the above Act.—*In the Estate of GAULT*, [1922] P. 195; 91 L. J. P. 144; 127 L. T. 402; 38 T. L. R. 400.

Annotation :—*Reid. In the Goods of Brogan*, [1922] P. 276.

3095. Letters of administration granted in Ireland—Compliance with statutory conditions—Court of Probate Act, 1858 (c. 95), s. 29.]—Letters of administration granted in the Irish Probate registry, limited to a certain fund, were presented in the principal Probate registry in England to be resealed. They had attached to them a certificate from the Inland Revenue Office that deceased had no personal estate within the jurisdiction of the Probate Ct. to be affected by the administration; & from the registrar of the Irish Probate Ct. that a bond had been given sufficient in amount to cover the property to which the administration was limited:—*Held*: the requirements of Probates & Letters of Administration (Ireland) Act, 1857 (c. 70), & Court of Probate Act, 1858 (c. 95), had not been complied with, & the letters of administration could not be resealed.—*In the Goods of ROCHE* (1861), 7 Jur. N. S. 784.

3096. — Will propounded in England & declared invalid.]—After a testamentary suit had been determined by a decree that a paper writing, propounded as the last will of deceased, was invalid, the ct. ordered an Irish grant of administration, which had been brought into the registry to be resealed with the seal of the Ct. of Probate in England under Probates & Letters of Administration (Ireland) Act, 1857 (c. 70), s. 95.—*In the Goods of COLLINS, DIVENNY v. CORCORAN* (1862), 32 L. J. P. M. & A. 26; 11 W. R. 154.

3097. — Requirements of court.]—When letters of administration granted by the High Ct. of Justice in Northern Ireland are deposited for the purpose of being resealed in England, the ct. will require an affidavit accounting for estate duty with respect to the assets in England pursuant to the Government of Ireland (Resealing of Probates, etc.) Order, 1922, Order 3, & a bond with regard to the assets in England in the same form as would be required in the case of the same assets on an application for an original grant of probate under Court of Probate Act, 1857 (c. 77).—*In the Estate of BROGAN*, [1922] P. 276; 91 L. J. P. 212; 127 L. T. 845; 38 T. L. R. 843.

3098. Effect of not resealing—On jurisdiction of English court.]—*In the Estate of MILLAR, IRWIN v. CARUTH*, No. 700, ante.

3099. — Probate of person entitled to administer to intestate—Whether executor represents intestate.]—Deceased died intestate, leaving her husband surviving her, who did not take administration to her estate. The will of the husband was proved in the Prerogative Ct. of Armagh, Ireland, but no grant was made in this country. The will of the sole exor. of the husband

was also proved in Ireland, but was resealed in London:—*Held*: the exor. under the last mentioned will did not represent the husband in England so as to be entitled to obtain administration of the goods of deceased.—*In the Goods of GAYNOR* (1869), L. R. 1 P. & D. 723; 38 L. J. P. & M. 79; 21 L. T. 367; 33 J. P. 762; 17 W. R. 1062.

SUB-SECT. 2.—SCOTTISH GRANTS.

See, generally, Confirmation & Probate Act, 1858 (c. 50), ss. 12, 16; Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 168.

3100. Jurisdiction of English court to refuse—On ground that Confirmation & Probate Act, 1858 (c. 56) does not apply.]—An additional confirmation [or *eik*], granted under sect. 12 of the above Act, does not apply to an original confirmation granted before that Act came into operation. *Semble*: an additional confirmation, which does not include personal estate in Scotland besides personal estate in England, is not entitled to be sealed with the seal of the Probate Ct. under the above sect.

The question turns upon sect. 12 of the statute. This sect. made an alteration in the law, which was to take effect after Nov. 12, 1858, & of course the original confirmation, which was granted previous to that date, is not within its operation. It appears to me that the additional confirmation does not come within the terms of the Act, because it does not include personal estate in Scotland besides the personal estate in England. All the personal estate in Scotland had been previously confirmed by the original grant. This Act cannot have a retrospective operation. It was contended that I ought to act ministerially; but I think I am bound to act upon my own opinion, whether the statute is applicable or not; & being of opinion that it is not applicable, I cannot order the registrar to affix the seal of the ct. (SIR C. CRESSWELL).—*In the Goods of GORDON* (1859), 2 Sw. & Tr. 622; Sea. & Sm. 141; 29 L. J. P. M. & A. 67; 164 E. R. 1139.

Annotations :—*Apld. In the Goods of Wingate* (1861), 2 Sw. & Tr. 625. *Reid. In the Goods of Ryde* (1870), 39 L. J. P. & M. 49.

3101. — Scottish domicile of testator disputed before English court.]—An exor. obtained a grant of confirmation from a commissary ct. in Scotland, & took the steps prescribed by sect. 12 of Confirmation & Probate Act, 1858 (c. 50), to give it the like force & effect in England as if probate had been granted by the Ct. of Probate. The next of kin, wishing to set aside the will by establishing that testator had not a Scottish domicile at the time of his death, applied for leave to cite the exor. to show cause why the confirmation should not be brought in & the probate cancelled. The ct. held that it had merely a ministerial duty to perform in granting probate upon the production of the Scottish confirmation, & refused the application.—*In the Goods of CUMMING* (1859), 23 J. P. 761.

3102. — Higher duty payable in England than Scotland.]—Personal property having been bequeathed to A. for life, & after her death to B. absolutely, B., who was domiciled in Scotland, died there in 1838, & in A.'s lifetime, leaving per-

PART II. SECT. 18, SUB-SECT. 1.

30971. Letters of administration granted in Ireland—Requirements of court.]—Deceased, domiciled in New Zealand, died intestate in Ireland while on a visit. He had a brother & sister in Ireland & two sisters in New Zealand. Administration of his estate were granted to his brother in Ireland,

whose attorney applied to reseat the letters of administration under Administration Act, 1908, s. 43. The Public Trustee lodged a caveat under s. 27 of the same Act. The attorney applied to the registrar to reseat the letters, which he declined to do without an order of the ct.:—*Held*: the administrator had a statutory

right to have the original letters resealed unless special cause be shown. The ct. made it a condition that the attorney for the administrator should undertake not to remit any part of the realised estate outside New Zealand without the authority of the ct.—*Re MILLER* (1915), 34 N. Z. L. R. 239.—N.Z.

sonal estate in England; but confirmation, which corresponds to probate in England, was not applied for by his exors. till 1858, after A.'s death, which took place in 1857. Confirmation was granted to B.'s exors. by a commissary ct. in Scotland, & duty was paid in respect of his reversionary interest, according to the practice in Scotland, at its estimated value at the time of the death of B. The Comrs. of Inland Revenue put in a claim for duty according to the value of B.'s interest at the time of the death of A., the tenant for life:—*Held*: according to Confirmation & Probate Act, 1858 (c. 56), s. 12, the ct. was bound by the proceedings of the Scottish ct., by which confirmation had been granted; & no additional probate duty could be claimed.—*Re BOOTH'S TRUSTS* (1859), 1 Giff. 46; 28 L. J. Ch. 800; 33 L. T. O. S. 282; 5 Jur. N. S. 619; 7 W. R. 522; 65 E. R. 818.

3103. — Duplicate tendered for resealing.—The exors. of a Scottish will, having sent the original confirmation granted by the commissary ct. to the Colony of Victoria, obtained a duplicate confirmation from the ct. & applied under sect. 12 of Confirmation & Probate Act, 1858 (c. 56), to have the seal of the Probate Ct. affixed to it. The ct. ordered the seal to be affixed on ground that it was bound to give faith to the commissary's certificate & could not take into consideration the fact that the confirmation was a duplicate.—*In the Goods of WEBSTER* (1859), Sea. & Sm. 22; 29 L. J. P. M. & A. 66; 5 Jur. N. S. 1270.

3104. — Executor incompetent by English law—Corporation.—Under sect. 12 of Confirmation & Probate Act, 1858 (c. 56), the sealing by the Probate Ct. in England of a confirmation of exors., granted in Scotland to the exor. of testator who died domiciled in Scotland but possessed of personal estate in England & Scotland, is a purely ministerial act as to which the Probate Ct. can exercise no discretion. The Probate Ct. is, therefore, bound in such a case to seal a confirmation of exors. produced to them for this purpose, notwithstanding that the exor. appointed is a corpn. aggregate, which, according to English law, is not itself a competent person to take a grant of probate, but must appoint a syndic for that purpose.—*In the Estate of RANKINE*, [1918] P. 134; 87 L. J. P. 114; 118 L. T. 670; 34 T. L. R. 294; 62 Sol. Jo. 382, C. A.

Annotation.—*Reid. Re McLaughlin*, [1922] P. 235.

See, now, Administration of Justice Act, 1920 (c. 81), s. 17; Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 161; CORPORATIONS, Vol. XIII., pp. 353, 354.

3105. — Additional confirmation or eik—No English property included in original inventory.—*In the Goods of GORDON*, No. 3100, *ante*.

3106. — — — — ——Where an inventory has been recorded in a commissary ct. of Scotland of the personal estate of a person who died domiciled in Scotland, & confirmation has been granted in respect of the same, & afterwards an additional inventory has been recorded of personal estate belonging to deceased in England, & an eik, or additional confirmation, has been granted in respect of the same, the Ct. of Probate will not seal such eik, or additional confirmation.—*In the Goods of WINGATE* (1861), 2 Sw. & Tr. 625; 8 Jur. N. S. 142; 164 E. R. 1140.

Annotation.—*Distd. In the Goods of Ryde* (1870), L. R. 2 P. & D. 86.

3107. — — — — — Part of English property included in original inventory.—The seal of the ct. will not be affixed to an eik, or additional confirmation.

Where the original confirmation obtained in a commissary ct. of Scotland is incomplete, it is requisite, for the purpose of obtaining the seal of the Ct. of Probate, that there should be a new confirmation, including the whole of the personal estate in England & Scotland.—*In the Goods of HUTCHESON* (1863), 3 Sw. & Tr. 165; 32 L. J. P. M. & A. 167; 11 W. R. 772; 164 E. R. 1230.

Annotation.—*Distd. In the Goods of Ryde* (1870), L. R. 2 P. & D. 86.

3108. — — — — — English & Scottish property distinguished.—Deceased died domiciled in Scotland, & a confirmation issued from the proper officer to the widow, as extrix. dative *quid* relict of the defunct, on her filing an inventory of the property of deceased, distinguishing which portion thereof was situated in Scotland, & which in England. This confirmation was sealed in the registry of the Ct. of Probate in England. Subsequently it was discovered that deceased had left other property in this country, & on an additional inventory of such property being filed, an eik, or additional confirmation, was granted in Scotland to the widow. The ct. ordered the seal of the Ct. of Probate to be attached to such additional confirmation.—*In the Goods of RYDE* (1870), L. R. 2 P. & D. 86; 39 L. J. P. & M. 49; 23 L. T. 166; 34 J. P. 567; 18 W. R. 902.

3109. Form of Scottish confirmation.—Sched. (E) of Confirmation & Probate Act, 1858 (c. 56) being the form of confirmation of an exor. nominate, runs, "An inventory of the personal estate & effects of the said C. at the time of his death, situated, etc.": *Held*: the words "at the time of his death" are, since 23 & 24 Vict. c. 80, s. 5, properly omitted in Scotch confirmations, & directed such a confirmation to be sealed.—*In the Goods of HAY* (1863), 3 Sw. & Tr. 273; 33 L. J. P. M. & A. 25; 9 L. T. 454; 28 J. P. 9; 10 Jur. N. S. 136; 164 E. R. 1279.

3110. Effect of resealing—On powers of executors—Power to sue in England—Whether pendency of proceedings in Scotland a bar.—Plffs., who were nominated exors. in a Scottish will, obtained *ex p.*, in Scotland, a confirmation of the nomination, & afterwards procured, as of course, the seal of the Probate Ct. in England thereto. They then sued some debtors of testator in this ct.:—*Held*: the pendency of proceedings in Scotland for a reduction of the confirmation was no defence, & debts were ordered to pay to plffs. the amount due to testator's estate.—*CUMMING v. FRASER* (1860), 28 Benv. 614; 54 E. R. 502.

3111. — — — — — All powers under English law—Sale of leaseholds.—Where confirmation of the exor. of a person who has died domiciled in Scotland has been sealed with the seal of the Ct. of Probate, in manner provided by Confirmation & Probate Act, 1858 (c. 56), the exor. has all the powers of an ordinary English exor., & may sell & dispose of leaseholds in England, although they are specifically bequeathed, & although by the law of Scotland an exor. cannot deal with leasehold property in that country.—*HOOD v. BARRINGTON (LORD)* (1868), L. R. 6 Eq. 218.

Annotations.—*Reid. Popin v. Bruyere*, [1902] 1 Ch. 24. *Mentd. Sale v. Lambert* (1874), L. R. 18 Eq. 1; *Reer v. London & Paris Hotel Co.* (1875), 32 L. T. 715; *Thomas v. Brown* (1876), 45 L. J. Q. B. 811; *Towle v. Topham* (1877), 37 L. T. 308.

3112. — — — — — On rights of action against executors.—A Scotsman having died intestate in Bolivia, his sisters, who were resident & domiciled in Scotland, obtained there a finding that he was domiciled in Scotland, & were decessed extrices. dative of his personal estate, & afterwards obtained an order from the Probate Div. of the High Ct.

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sealing the Scottish confirmation. Pltf. being domiciled & resident in Bolivia, & alleging herself to be the widow of the intestate, brought this action against the extrices, dative, & G. & Sons, who held in their hands the greater part of intestate's personal estate. Pltf. claimed by her writ, (a) a declaration that deceased died domiciled in Bolivia, & that pltf. was entitled to the whole of his personal estate; (b) administration by the ct.; (c) an injunction restraining G. & Sons from paying over to the extrices, the funds in their hands, & an injunction against the extrices, from taking proceedings to recover, & from receiving the intestate's personal estate; & (d) a receiver. Defts., G. & Sons, were friendly to pltf. An order having been obtained on behalf of pltf. for service of the writ on the extrices, in Scotland, & the extrices, having moved to set aside such service as not being within R. S. C., Ord. 11:—*Held*: (1) the relief asked for by the writ, if limited to an injunction restraining the extrices, from suing G. & Sons within the jurisdiction, was such as would in a proper case justify the ct. in allowing service of the writ out of the jurisdiction under Ord. 11, r. 1 (f); (2) although pltf. was not precluded by the sealing of the confirmation from suing here, yet, having regard to the circumstances generally, & especially to the fact that it had appeared that pltf. intended to take proceedings in Scotland for the revocation of the Scottish confirmation, & in any view the case must have recourse to the ct. in Scotland to establish her claim to the movables there, the ct., in the exercise of its discretion under Ord. 11, r. 2, ought not to allow the service out of the jurisdiction, as it was more convenient that proceedings should be taken in Scotland.—*Re DE PENNY, DE PENNY v. CHRISTIE*, [1891] 2 Ch. 63; 60 L. J. Ch. 518; 64 L. T. 521; 39 W. R. 571.

SUB-SECT. 3.—COLONIAL GRANTS.

See, generally, Colonial Probates Act, 1892 (c. 6), s. 2.

3113. Jurisdiction to reseat—Colonial intestate

PART II. SECT. 18, SUB-SECT. 3.

1. *Jurisdiction to reseat.—Grant issued in another province.*—A will devising lands in Upper Canada having been made in Lower Canada, where testatrix lived, & being duly proved & enrolled among the records of K. B. Div. there, & copies thereof directed to be made & given to the parties legally entitled:—*Held*: an office copy duly certified, was equivalent to probate in Upper Canada.—*PATULO v. BOYINGTON* (1852), 4 C. P. 125.—CAN.

m. —.—.—An application for resealing of probate issued in another province may be made to the Surrogate Ct. judge of a judicial district other than that in which deceased's property is situate.—*Re JOHNSON, Re SURROGATE COURTS ACT*, [1921] 2 W. W. R. 843.—CAN.

n. —.—.—*Re MOFFAT*, [1924] 3 W. W. R. 272.—CAN.

o. *Effect of reseat.—Title of original administrator.*—The reseat by the Supreme Ct. of Queensland under British Probates Act, 1898, of administration to real estate granted in another part of H.M.'s dominions, does not confer on the administrator any title to real estate situated in Queensland.—*Re HEATHCOTE*, [1903] S. R. Q. 57.—AUS.

p. —.—.—*No devolution of office.*—The words executor therein named in

Administration & Probate Act, 1915, s. 51, are limited to the exor. actually named in the foreign probate, & do not, where such exor. has died before fully administering the estate of testator extend to the exor. of such exor.—*Re HILL*, [1921] V. L. R. 140.—AUS.

PART II. SECT. 19.

q. *Jurisdiction to grant.*—Probate granted to a foreign co. by a foreign ct. can be resealed by the ct. of this State.—*Re THORNLEY'S WILL* (1903), 4 S. R. N. S. W. 246; 20 N. S. W. W. N. 223.—AUS.

r. —.—.—Probate of A. who had real estate in South Australia, was granted by the High Ct. of Justice in England to his exor. B. B. having died, probate of his will was granted by the same ct. to his exor. C., & was sealed by the Supreme Ct. of South Australia:—*Held*: C. was entitled as of right to have the probate of A. sealed by the Supreme Ct. of South Australia.—*DRUMMOND v. PROBATES REGISTRAR* (1918), 25 C. L. R. 318.—AUS.

s. —.—.—Colonial Probates Act & the procedure therein indicated, viz. to send an exemplification of the probate granted in any part of the United Kingdom to be re-sealed by the ct. to which it is sent, has not been

without property in England—*Legacy in English will to "personal representatives" of colonial intestate.*—Where the exors. of a will, under which a legacy of £250 was payable to the "personal representatives" of testator's brother, who died intestate domiciled in one of the Australian colonies leaving no estate in this country, insisted on the resealing here of a grant of letters of administration which the brother's widow had obtained in the colony, the ct. allowed the grant to be resealed.—*In the Goods of SANDERS*, [1900] P. 292; 69 L. J. P. 121; 83 L. T. 716.

3114. —.— *Limited grant.*—A colonial grant, though limited, may be resealed in the United Kingdom, provided that the proper conditions prescribed by Colonial Probates Act, 1892 (c. 6), have been complied with.—*In the Goods of SMITH*, [1904] P. 114; 73 L. J. P. 28; 90 L. T. 169; 20 T. L. R. 119.

3115. —.— *Executor incompetent by English law—Corporation having principal place of business in colony.*—Although the power given to the High Ct. by the Administration of Justice Act, 1920 (c. 81), to grant probate to a corpn. named as exor. of a will applied only to a corpn. which has its principal place of business in the United Kingdom, the ct. will, in exercise of the discretion given to it by Colonial Probates Act, 1892 (c. 6), s. 2, reseat a grant of probate made by a colonial ct., having jurisdiction, to a corpn. having its principal place in a colony.—*Re McLAUGHLIN, McLAUGHLIN v. McLAUGHLIN*, [1922] P. 235; 91 L. J. P. 205; 127 L. T. 527; 38 T. L. R. 622; 66 Sol. Jo. 578.

See, generally, CORPORATIONS, Vol. XIII., pp. 353, 354.

SECT. 19.—RESEALING ENGLISH GRANTS IN IRELAND, SCOTLAND AND THE COLONIES.

3116. *Certificate under Court of Probate (Ireland) Act, 1859 (c. 31), s. 25—How obtained.*—A party, having obtained letters of administration of the effects of a deceased in this country, & given security to cover the property in England only, may subsequently give additional security to include property in Ireland, in order to apply for

extended to British India, where the practice is to require administration with will annexed to the estate of deceased British subject leaving property there.—*In the Goods of KENNIE* (1912), 1 L. R. 40 Calc. 74.—IND.

t. —.—.—The mother of an intestate Englishman, being his next of kin by the law of that country, & having obtained administration there as such, is entitled to be confirmed in Scotland as extrix, dative.—*HASTINGS (MARCIIONESS) v. HASTINGS (MARQUIS)* EXECUTORS (1852), 14 Duml. (Ct. of Sess.) 489; 24 Sc. Jur. 231; 1 Stuart, 405.—SCOT.

a. *How obtained.*—An exemplification of probate under the seal of the English ct., need not embody a copy of the English probate as well as a copy of the will, & is sufficient if it contains a recital that probate has been granted by the English ct.—*Re DONKIN*, [1921] V. L. R. 520.—AUS.

b. —.—.—Upon an application that probate of a will granted in England be sealed by the Supreme Ct. of Victoria, the exemplification should, in general, contain a certified copy of the will. Where an exemplification produced did not contain the contents of the will, but a certified copy of the original will deposited in the Probate Registry in England had, in prior proceedings, been lodged with the

the certificate of the registrar in England, without which, under above sect., such letters cannot be resealed in Ireland.—*In the Goods of PORTS* (1860), 2 Sw. & Tr. 5; 2 L. T. 255; 6 Jur. N. S. 486; 8 W. R. 454; 164 E. R. 891.

SECT. 20.—COSTS OF PROBATE ACTIONS.

SUB-SECT. 1.—JURISDICTION OF COURT.

3117. Over party not entering appearance.]—FOSTER v. FOSTER (1823), 1 Add. 462; 162 E. R. 163.

*Annotations:—*Folld. *King v. Gillard* (1867), L. R. 1 P. & D. 539. *Mentd. Wharram v. Wharram* (1864), 3 Sw. & Tr. 301.

3118. —[—](1) The ct. has power to condemn a party who has been cited but has not appeared, in the costs of a testamentary suit.

(2) On decreeing probate of the contents of a destroyed will, the ct. condemned in costs deft. who had destroyed the will.—*KING v. GILLARD* (1867), L. R. 1 P. & D. 539; 37 L. J. P. & M. 4; 17 L. T. 297; 31 J. P. 825.

3119. Over executor unsuccessfully propounding will—Though not guilty of breach of duty.]—Where an exor. propounds as the will of testator a document which is not genuine & which he fails to establish, the ct. has jurisdiction to order him to pay the costs of the action even if he has not been guilty of any breach of duty.—*Re JEFFRIES, HILL v. JEFFRIES* (1916), 33 T. L. R. 80, C. A.

*Annotation:—*Consd. *In the Estate of Barlow, Haydon v. Pring*, [1919] P. 14.

3120. Jurisdiction of High Court—Cause transferred to county court.]—MACLEUR v. MACLEUR, No. 699, *ante*.

SUB-SECT. 2.—GENERAL PRINCIPLES GOVERNING AWARD.

A. Costs Follow Event.

See Jud. Act, 1890 (c. 44), s. 5; R. S. C., Ord. 65, r. 1; & generally, PRACTICE.

3121. General rule.]—(1) Testator, who had been in confinement as a lunatic between the years 1815 & 1817, executed his will in 1820. He was again placed in confinement in 1822. In Nov. 1828, a commission in the nature of a writ *de lunatico inquirendo* was issued, & testator was found in Jan. 1839, a lunatic without any lucid interval from Aug. 1, 1815. Will pronounced for.

(2) As a general rule, I think, costs ought to follow the judgment (Dr. LUSHINGTON).—*BANNATYNE & BANNATYNE v. BANNATYNE* (1852), 2 Rob. Eccl. 472; 16 Jur. 864; 163 E. R. 1383.

3122. —[—]CROSS v. CROSS, No. 1191, *ante*.

3123. —[—]As a general rule the parties un-

successfully disputing a will in a probate action on the ground, amongst others, of undue influence, will be condemned in costs. In a case where a will was disputed on the ground of testator's sanity, & also on the ground of undue influence:—*Held*: (1) considering that testator had by his own conduct given rise to considerable doubt as to his sanity, & thereby directly caused the litigation, & also having regard to the fact that the plea of undue influence had never been unduly pressed in taking the evidence of several witnesses on commission, & had also been freely abandoned at the trial, defts. would be given the costs of all the issues out of the estate, notwithstanding the plea of undue influence; (2) considering that defts. had by being separately represented incurred unnecessary expense, one set of costs only, namely, those of the exors. of a former will which defts. set up, should be allowed out of the estate.—*BROWN v. MOSTYN* (1897), 66 L. J. P. 37; 13 T. L. R. 184.

3124. —[—]TWIST v. TYE, No. 1161, *ante*.

3125. —[—]Where exors. have had an ample opportunity of examining into the state of mind of testator or testatrix & of getting a clear knowledge of the whole state of affairs, & yet take upon themselves the responsibility of propounding a will, they do so at their own risk, & if they are defeated on the trial of the action the ct. will not, except in special circumstances, interfere with the general rule that costs should follow the event.—*PAGE v. WILLIAMSON* (1902), 87 L. T. 146; 18 T. L. R. 770.

3126. —[—]In a probate action the ordinary rule that costs follow the event is departed from on two grounds. The first is where testator or those interested in the residue have been responsible for the litigation, & in such a case the costs will be ordered to be paid out of the estate. The second is where the circumstances are such as to lead a reasonably minded person to demand an investigation in regard to the testamentary dispositions of a deceased person, & in this latter case no order will be made as to the costs. Neither of these grounds can justify a plea of undue influence, & if such a plea is put forward unsuccessfully & unreasonably, the party who fails must be condemned in the costs of the proceedings.—*SPIERS v. ENGLISH*, [1907] P. 122; 76 L. J. P. 28; 96 L. T. 582.

*Annotation:—*Apld. *Oldcorn v. Tennilwood* (1909), 52 T. L. R. 825.

3127. —[—]In an action in the Probate Div. two co-pltfs. propounded a will & codicil of testatrix of which they were exors. The execution of the will & codicil was found to have been obtained by the undue influence of one of pltfs. & a nurse, who both benefited largely under the will, the other pltf. being exonerated from all blame. The

registrar in Victoria, the ct. ordered that the certified copy to be annexed to the exemplification, & probate be sealed in that manner.—*Re WARE*, [1923] V. L. R. 573.—AUS.

PART II. SECT. 20, SUB-SECT. 1.

c. *Judge of probate—Limit of power as to costs.*—A judge of probate has no power to decree the payment of costs out of the estate, & can only award them to be paid by the party against whom his decision is made, but a ct. of review can direct what costs should be allowed, & from what fund.—*Re SIMPSON'S ESTATE* (1878), 12 N. S. R. (3 R. & C.) 357.—CAN.

d. —[—]—*Re HEFFERMAN'S ESTATE* (1879), 12 N. S. R. (3 R. & C.) 486.—CAN.

e. —[—]—Where the person named as an exor. in a written instrument failed to establish it as the last will of testator, & the ct. of last resort refused to order his costs incurred therein should be paid out of the estate:—*Held*: the ct. of first instance could not make an order for payment, out of moneys paid into that ct. by the administrators *pendente lite*, because they were refused by the only tribunal which had jurisdiction to award them, nor as costs & expenses properly incurred by the applicant in the performance of his duties as exor., because he never was an exor.—*PURCELL v. BERGIN* (1894), 16 P. R. 301.—CAN.

PART II. SECT. 20, SUB-SECT. 2.—A.

3121 i. General rule.]—The general

rule as to costs in probate litigation is that costs should follow the event.—*PERPETUAL TRUSTEE CO. v. WATSON, COOKE & WATSON* (1902), 2 S. R. N. S. W. 36.—AUS.

3121 ii. —[—]A trustee co., without any request by deceased, made a will on the instructions of her son, & appointed itself exor. The co. propounded the will for proof in solemn form, knowing there were grounds for contesting testator's capacity. Testator was found not to have testamentary capacity, & the will pronounced against:—*Held*: there were no facts to warrant a departure from the ordinary rule, & costs must follow the event.—*EXECUTOR TRUSTEE & AGENCY CO. OF SOUTH AUSTRALIA, LTD. v. BLECHMORE*, [1920] S. A. L. R. 353.—AUS.

Sect. 20.—Costs of probate actions: Sub-sect. 2, A., B. & C.]

ct. pronounced against the will & codicil & declared in favour of an earlier will propounded by deft., & ordered that the costs of the innocent pltf. should be paid out of testatrix's estate, & that the other pltf. should pay to deft. the costs of the action including the costs to be paid to the innocent pltf. out of testatrix's estate which deft. represented. On appeal by pltf. on the merits:—*Held*: the appeal must be dismissed, but the order as to costs in the ct. below was wrong & ought not to have been made; as co-pltfs. had failed in their action the proper course was to dismiss it with costs.—*In the Estate of BARLOW, HAYDON v. PRING*, [1919] P. 131; 88 L. J. P. 82; 120 L. T. 645; 35 T. L. R. 326, C. A.

3128. — In jury cases—Effect of R. S. C., Ord. 21, r. 18.]—The general rule, that in cases tried with a jury costs follow the event, as, also, the exception engrafted on this rule by the Probate rule protecting deft. from being ordered to pay costs where he has duly delivered a notice of his intention to call no witnesses, & merely requiring the will to be proved in solemn form, have been superseded by above rule, as now amended. The effect of that rule as amended is that, whether he has asked for a jury or not, deft. who duly gives notice under the rule is not to be liable to pay the costs of the other side, unless the judge shall be of opinion that there was no reasonable ground for opposing the will.—*DAVIES v. JONES*, [1899] P. 161; 68 L. J. P. 69; 80 L. T. 631.

3129. When general rule departed from.]—*PAGE v. WILLIAMSON*, No. 3125, *ante*.

3130. — Not when plaintiff disentitled by own conduct.]—*CROSS v. CROSS*, No. 1191, *ante*.

Costs given out of estate.]—*See* Sub-sect. 3, *post*.

No order made as to costs.]—*See* Sub-sect. 4, A., *post*.

B. One Set of Costs Allowed.

See Jud. Act, 1890 (c. 44), s. 5; R. S. C., Ord. 65, r. 1; & generally, PRACTICE.

3131. General rule.]—Where an intervener in a probate suit had been cited to appear by defts., the unsuccessful parties, & had been charged by them with procuring the will by undue influence, the ct., in pronouncing for the will, departed from the usual practice of allowing only one set of costs, & condemned the defts. in the costs of the intervener as well as of the exors.—*TENNANT v. CROSS* (1880), 12 P. D. 4; 56 L. J. P. 74; 57 L. T. 372.

3132. Application of rule—Intervener unsuccessfully charged with undue influence.]—*TENNANT v. CROSS*, No. 3131, *ante*.

3133. — Parties with divergent interests—Next of kin & heir-at-law—Before 1898.]—Where the litigation was caused by the act of testatrix & the state in which she left her papers, the ct. allowed costs out of the estate to the heir-at-law as well as the next of kin, their interests being different, & the heir-at-law, who appeared on citation, having in no way embarrassed the

contest.—*SMYTH v. WILSON* (1866), 36 L. J. P. & M. 82; 15 L. T. 446.

See, now, Land Transfer Act, 1897 (c. 65), s. 2 (4) (repealed by Law of Property Act, 1922 (c. 16), s. 15 (11)); Administration of Estates Act, 1925 (c. 23), s. 2 (1); & No. 1164, *ante*.

3134. — Interests under different wills.]—An action to establish the third, & alternatively, the second, will of testator, was separately defended by the exors. of the first will & two legatees thereunder. The legatees were interested in upsetting both the second & third wills, but the exors. were only substantially interested in upsetting the third. The jury found that the execution of the last two wills was obtained by undue influence, & the judge pronounced against them & for the first will:—*Held*: there was a sufficient divergence of interest between defts. to justify the legatees in appearing by separate counsel, & consequently, there was no good cause for depriving them of the costs of their separate appearance.—*BAGSHAW v. PIMM*, [1900] P. 148; 69 L. J. P. 45; 82 L. T. 175; 48 W. R. 422; 44 Sol. Jo. 313, C. A.

3135. — Parties with practically identical interest—Next of kin & heir-at-law—Since 1897.]—*TWIST v. TYE*, No. 1164, *ante*.

C. Party causing Unnecessary Costs Liable.

3136. General rule.]—The heir-at-law of a testator brought an action against the devisee in trust to try the validity of the will, & failed. In a suit to establish the will the heir contested its validity, alleging the incompetency of testator & undue influence on the part of the devisee, & entered into evidence upon these allegations. At the hearing of the cause issues were directed to try the validity of the will. At the trial of these issues deft. examined no witnesses, & the issues were found in favour of the devisee. On the cause coming on for further directions the ct. established the will, but gave no costs, except that the heir should pay to the devisee the costs occasioned by the heir's raising the issue of undue influence.

Where a pltf., a devisee, for his own benefit came to this ct. to have a will established against the heir, the effect of the decree was to bind the heir. The heir-at-law was entitled to put the devisee to proof of his title, & in an ordinary case the heir-at-law had his costs of such a proceeding. On the other hand, the heir-at-law must be considered in the light of any other person if he had brought before the ct. any matter improperly; he must suffer the consequence of vexatious & improper conduct (*PAKER, V.-C.*).—*GROVE v. YOUNG* (1851), 5 De G. & Sm. 38; 21 L. J. Ch. 95; 18 L. T. O. S. 118; 15 Jur. 1099; 64 E. R. 1008.

Annotations:—Consd. Roberts v. Kerslake (1855), 1 K. & J. 751. *Reid. Boyse v. Rossborough* (1854), 3 De G. M. & G. 577.

3137. —.]—*SMYTH v. WILSON*, No. 3133, *ante*.

3138. Application of rule—Party withholding will—Costs of recovery.]—Disputed wills ought to be lodged in the registry of the ct. for safe custody.

PART II. SECT. 20, SUB-SECT. 2.—B.

3131 i. General rule.]—On application for probate two persons appeared separately, & unsuccessfully opposed the granting of probate on several grounds. The litigation had been brought about by the conduct of pltf., the sole beneficiary, & testator:—*Held*: the rule as to costs should not be extended as to allow two sets of

defts.' costs, & one set only should be paid out of the estate.—*NYE v. SEWELL* (1894), 15 N. S. W. L. R. (B.) 18.—**AUS.**

i. Application of rule — Parties with practically identical interest—Residuary legatees.]—In a suit by a residuary legatee for the administration of an estate, pltf. represents all

the residuary legatees; & the other residuary legatees are not entitled to charge the general estate with the costs of appearing by another solr. in the master's office. To entitle them to such costs some sufficient reason must be shown for their being represented by a separate solr.—*GORHAM v. GORHAM* (1870), 17 Gr. 386.—**CAN.**

Practitioners have no right to keep wills in their possession. I have, in several instances, stated that the expense necessary to get a will out of the hands of a party must fall upon those who withhold it. The proper way is for the will to be brought into the registry for safe custody. Wherever a compulsory process is necessary for this purpose, the expense shall fall on the party occasioning it (*per Cur.*).—CUNNINGHAM v. SEYMOUR (1815), 2 Phillim. 250; 161 E. R. 1134.

3139. — Party denying jurisdiction—Suppression of assets.—A creditor cited an exor. to accept or refuse probate, etc. The exor., *sub modo*, denied the jurisdiction of the ct., as not having any knowledge of assets. The creditor then, in order to found the jurisdiction, was compelled to disclose assets; whereupon the exor. retracted his qualified denial of the ct.'s jurisdiction, & prayed probate:—*Held*: probate would be decreed to the exor., with costs, as incurred solely by reason of the creditor's undue suppression of the fact of there being assets.—LYON & WEIR v. BALFOUR (1825), 2 Add. 501; 162 E. R. 378.

3140. — Party causing delay—Failure to produce evidence—Costs of adjournment.—*Seemle*: a debt., failing to establish an objection for want of parties, taken in the answer, by proper evidence at the hearing, must pay the costs of the day, if the cause is to stand over for the purpose of its production.—BARKER v. RAILTON (1812), 11 L. J. Ch. 372; 6 Jur. 519.

3141. — Party concealing will—Letters of administration revoked.—A suit was instituted for the administration of the estate of A., who was supposed to have died intestate. Letters of administration had been granted to J., one of the next of kin. Subsequent to the decree being made & the accounts taken a letter of which probate was afterwards granted was produced by G., another of the next of kin & in whose favour the will was made. By the production of the will the proceedings in the suit were rendered useless, the former letters of administration revoked, & letters of administration granted with the will annexed:—*Held*: the costs incurred in the suit must be borne by the party interested under the will who had the possession thereof, & had, by delaying to assert his right, occasioned the litigation.—MIREHORSE v. HERBERT (1857), 3 Jur. N. S. 1238; 5 W. R. 583.

3142. — Party guilty of misconduct—Party destroying will.—A will & codicil torn into pieces by testator's eldest son after the death of testator, the pieces saved however; by which & by oral evidence the ct., arriving at the substance of these instruments, in effect pronounced for them, & condemned the spoliator though proceeded against *in poenam* merely, in costs.—FOSTER v. FOSTER (1823), 1 Add. 162; 162 E. R. 163.

Annotations: FOLLD. King v. Gillard (1867), L. R. 1 P. & D. 539. *Reid*. Wharram v. Wharram (1861), 3 Sw. & Tr. 301.

3143. — Though costs not increased.—Heir-at-law of testator obtained pos-

session of the will by force & tore it up. The pieces were, however, collected & put together & proved. The will contained no devise of the real estate, & a claim was filed against the heir to enforce a sale. On the heir's request, the ct. directed an issue *deviseavit vel non* when the will was established:—*Held*: the heir had so misconducted himself that, although his misconduct had not increased the costs of the issue, he must pay the costs of it.—MIDDLETON v. MIDDLETON (1852), 5 De G. & Sm. 656; 19 L. T. O. S. 323; 61 E. R. 1280.

3144. — — — — ——KING v. GILLARD, No. 3118, *ante*.

3145. — Party cited as heir—Existence of true heir concealed.—In a suit to establish a will the bill stated that A., one of defts., was testator's heir. A. admitted it, & disputed the validity of the will; upon which an issue was directed. The verdict was in favour of the will. Pltf. then discovered that A.'s elder brother had died, leaving two daughters, who were still living, as A. well knew. The ct. refused to give A. his costs, either at law or in equity.—ROBERTS v. SCOONES (1835), 7 Sim. 418; 58 E. R. 807.

3146. — Will lost by negligence.—Where the substance of a will had been propounded, & in most particulars established by an extrix, through whose negligence the original will had been lost, the ct. condemned the extrix, in the costs of defts., & allowed her only such costs as she would have incurred in proving the original will in solemn form.—BURKS v. BURKS (1868), L. R. 1 P. & D. 472; 36 L. J. P. & M. 125; 16 L. T. 677; 15 W. R. 1090.

3147. — Improper practice by proctor.—A proctor condemned in costs for improper practices in the conduct of a suit.—PRENTICE v. PRENTICE (1820), 3 Phillim. 311; 161 E. R. 1335.

3148. — Vexatious or unnecessary proceedings—Insufficient grounds of action.—Probate in common form of certain "instructions" as containing the last will of deceased, granted, on a special affidavit that probate called in, eight years after, & the exors. put on proof of the will in solemn form of law. This step held to have been taken by the next of kin upon insufficient grounds, the instructions pronounced for & the next of kin condemned in costs from the time of giving in their allegation.—EVANS v. KNIGHT & MOORE (1822), 1 Add. 229; 162 E. R. 80.

Annotations:—FOLLD. Beale v. Beale (1874), L. R. 3 P. & D. 179. *Consd*. Leigh v. Green, [1892] P. 17. *Reid*. Trevanion v. Trevanion (1837), 1 Curt. 486.

3149. — — — — ——COPPIN v. DILLON, No. 3217, *post*.

3150. — Taken by next of kin.—A legatee under a former will who after long acquiescence called in probate of & contested a latter will setting up incapacity & undue influence which is disproved condemned in costs.

Seemle: a next of kin, *a fortiori* a legatee under a former will, contesting a will, under circumstances manifestly vexatious, may be condemned

PART II. SECT. 20, SUB-SECT. 2.—C.

3148 i. Application of rule—Vexatious or unnecessary proceedings.—*Insufficient grounds for action.*—Exors. refrained from realising the assets of an estate for more than a year. On being pressed by beneficiaries for a settlement of their claims, the exors. brought an administration action against a beneficiary who could have no interest in the estate, & sought to have priority declared in respect of legacies left to themselves. This litigation was not in any way for the

benefit of the estate:—*Held*: the exors. must abide their own costs, except the costs of passing their accounts in the office.—SKRIMSHIRE v. MELBOURNE BENEVOLENT ASYLUM (1894), 20 V. L. R. 13.—AUS.

3148 ii. — — — — ——An exor. obtained the usual order for the administration of estate, & on the hearing for further directions no reason was shown for invoking the aid of the ct., & the guardian for the infants did not object in any way to the course taken by the exor.:—*Held*: both

parties refused their costs.—SPRINGGER v. CLARKE (1869), 15 Gr. 684.—CAN.

3148 iii. — — — — ——The Judge of probate for the county of H. revoked letters testamentary granted by him to C. on the ground that it had been made to appear that deceased last dwelt in the county of C. & not in the county of H.:—*Held*: the exor., who appealed, should pay the costs personally, it appearing that the appeal was unnecessary.—*Re FRASER'S ESTATE* (1897), 30 N. S. R. (18 R. & G.) 272.—CAN.

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in the whole costs.—*GREEN v. PROCTOR & NEWBY* (1828), 1 Hag. Ecc. 337; 162 H. R. 605.

Annotations:—Consd. Brown v. Brown (1850), 2 Rob. Eccl. 302. *Folld. Beale v. Beale* (1874), L. R. 3 P. & D. 179. *Consd. Leigh v. Green*, [1892] P. 17.

3151. — Unnecessary evidence.]—Where unnecessary evidence to a great amount is procured, no order made as to costs, though it might be necessary to prove the will in solemn form.—*STULTZ v. SCHOEFFLE* (1852), 20 L. T. O. S. 183; 16 Jur. 909.

3152. — Action without reasonable foundation.]—Where a suit is instituted merely for the protection of the assets pending a litigation for probate in the Ecclesiastical Ct., the practice of the ct. is, upon the grant of probate, to discharge the receiver, stay all proceedings in the suit, & dispose of the costs. In such a suit, for which there was not a reasonable foundation, the ct. ordered plffs. to pay all the costs, though a receiver had been appointed.—*BARTON v. ROCK* (No. 2) (1850), 22 Beav. 370; 52 E. R. 1153; *previous proceedings*, 22 Beav. 81.

Annotation:—Reid. Grimston v. Timms (1870), 22 L. T. 646.

Unsuccessful plea of undue execution, incapacity, or undue influence.]—*See* *NOTES* 3241, 3246, 3247, 3258, 3259, 3262, 3263, *post*.

3153. — Statement of witness unfairly obtained.]—(1) If a party opposing a will does not deliver the notice of his intention not to call witnesses until after he has delivered his plea, he loses the protection against condemnation in costs given by Contentious Rule 41, & the question of costs is left to the discretion of the ct.

(2) An attesting witness to a codicil signed a written statement to the effect that it was not duly executed; & it was opposed upon that statement. The ct. being of opinion that the statement had been unfairly obtained from the witness by the party opposing the codicil condemned her in the costs.—*BONE v. WHITTE* (1860), L. R. 1 P. & D. 249; 36 L. J. P. & M. 15; 15 L. T. 330.

3154. — Declaration delivered by executors.—To caveat entered by heir-at-law though not cited.]—The exors. of a will affecting realty cannot be prevented from obtaining probate in common form by a caveat entered by the heir-at-law if he has not been cited. If the heir-at-law enters such a caveat, it is not necessary for the exors. to deliver a declaration; & if they do so, & the heir-at-law does not plead to it, he will not be condemned in the costs incurred in delivering it.—*YOUNG v. FERRE* (1859), Sea. & Sm. 38; 4 Sw. & Tr. 210; 29 L. J. P. M. & A. 69; 24 J. P. 25; 5 Jur. N. S. 1318; 164 E. R. 1497.

See, now, Land Transfer Act, 1897 (c. 65), s. 2 (4) (repealed by Law of Property Act, 1922 (c. 16), s. 156 (11)); Administration of Estates Act, 1925 (c. 23), s. 2 (1).

3155. — Caveat entered after validity of will established.]—*RATCLIFFE v. BARNES*, No. 1154, *ante*.

3156. — Delay in taking proceedings.]—*GREEN v. PROCTOR & NEWBY*, No. 3150, *ante*.

3152 i. — Action without reasonable foundation.]—Where a guardian *ad litem* of an infant had been guilty of gross misconduct in putting exors. to proof of a will which he wished to upset for his own private purposes, & which, the evidence shows, was to his knowledge duly executed by the testatrix in sound state of mind:—*Held*: he was liable for the costs of the suit.—*GOOLAM HOOSKIN NOOR*

MAHOMED v. FATMABAI (1884), L. L. R. 8 Bom. 391.—*IND.*

3152 ii. — — — — —.]—Although an unsuccessful pltf. may be justified

will be ordered to pay costs.—*KERR v. KEDDIE* (1891), 10 N. Z. L. R. 558.—*N.Z.*

3157. — — — — —.]—A next of kin who unsuccessfully applied for revocation of the probate of a will was condemned in costs, although there was strong evidence of the incapacity of testator, on the ground that he had allowed an unreasonable time to elapse between the death of testator & the institution of the suit, & had charged the widow of testator & the drawer of the will with conspiring to obtain the will when testator was incompetent.—*CLAYTON v. DAVIS*, *In the Goods of HAWKINS* (1803), 3 Sw. & Tr. 290; 33 L. J. P. M. & A. 28; 10 L. T. 71; 28 J. P. 201; 164 E. R. 1286.

3158. — Amendment of pleadings—Opposition withdrawn—Question of fact raised as well as question of law.]—The next of kin opposed a will executed in the Mysore territory in the East Indies, on the ground that testator was a domiciled Scotsman, & that the execution was invalid by the law of Scotland. Pending the suit, a ct. of appeal in Scotland, in another case, determined that the will of a domiciled Scotsman as to personality was good if executed according to the *lex loci actus*. The next of kin gave notice to plffs. that they no longer intended to dispute probate; & when the cause came on for hearing asked for their costs out of the estate; but the ct. refused to make any order for costs, on the ground that they had raised an issue of fact as to domicile likely to put plffs. to great expense, as well as the issue at law.—*ONSLOW & ALLARDICE v. CANNON* (1861), 2 Sw. & Tr. 136; 30 L. J. P. M. & A. 165; 4 L. T. 217; 25 J. P. 472; 164 E. R. 945.

3159. — Double amendment—Reversion to original case.]—A pltf. propounded a will in a declaration in the ordinary form, to which deft. pleaded. Pltf. then filed a second declaration in a special form, propounding the will as an American will. To this declaration deft. pleaded, & evidence was taken on the questions raised by the pleadings under a requisition & commissions in America. Before the case came on for trial, pltf. amended his declaration by reverting to the case which he had originally set up, whereupon deft. abandoned his opposition & consented to probate. The ct. condemned deft. in the costs of proving the will in solemn form, as if the suit had proceeded upon the original declaration, & made no order as to the costs caused by the filing of the second declaration.—*ARCHER v. BURKE* (1868), L. R. 1 P. & D. 558; 37 L. J. P. & M. 30; 32 J. P. 295.

3160. — Non-joinder of party.]—Pltf., with full knowledge of all the testamentary papers of deceased, issued a writ, making one person only deft. After the deft. had appeared & filed his statement of defence, setting up a later will of deceased, pltf. took out a summons for leave to amend the writ by adding as a deft. the surviving attesting witness of the will which he had propounded by his statement of claim. The proposed second deft. was the solr. who had prepared the last will propounded in the statement of defence, & also an exor. thereunder. The registrar refused the application, holding that it was misconceived, & dismissed the summons with costs. Upon appeal to the judge, in chambers, the proposed amendment was allowed, but the pltf. was ordered

g. — Caveat entered & withdrawn.]—*THOMPSON v. TODD* (1858), 33 L. T. O. S. 198.—*IR.*

h. — — — — —.]—An exor. put to proof of a will in solemn form, & deft. pleads undue influence, but subsequently withdraws plea & submits to judgment, & there is nothing in the circumstances to raise a presumption against the will which the person

to pay the costs of deft. which had been thrown away by reason of the non-joinder of the second deft. in the first instance. Pltf. was also ordered to pay deft.'s costs on the appeal.—*COKE v. FRENCH* (1896), 76 L. T. 163.

3161. — Defendants pleading separately—Apportionment of costs.—When understanding sufficient to comprehend the act, & an intention to exclude the next of kin, & to give the property to a stranger in blood were proved, & an attempt to show that the intention to exclude the former was produced in the mind of deceased by the fraud & contrivance of the latter, failed, the ct. pronounced for the will, condemned the next of kin, who appeared by separate proctors, the one, who did not appear by counsel at the hearing, in the costs of, & consequent upon, an allegation given by him, & charging fraud & incapacity; & the other in the costs of separate interrogatories to the witnesses on the responsive allegation; of two allegations tendered by him; & of the final hearing; but gave no costs as to the interrogatories addressed to the witnesses on the *condidit*.—*GRINDALL v. GRINDALL* (1831), 4 Hag. Ecc. 10; 162 E. R. 1349.

Annotation:—*Reid*. *Allen v. McPherson* (1847), 1 H. L. Cas. 191.

3162. Parties separately represented.—*BROWNING v. MOSTYN*, No. 3123, *ante*.

SUB-SECT. 3.—COSTS OUT OF ESTATE.

A. Whether Allowed.

(a) Circumstances justifying Inquiry.

3163. General rule.—Pltf., a niece of testator, propounded a will & two codicils. Deft., a natural daughter of testator, propounded a later will as to which pltf. pleaded, *inter alia*, that it had been obtained by the undue influence of deft. & her husband. The jury found in favour of the will propounded by deft. on all the issues:—*Held*: the circumstances attending the inception & execution of the will propounded by deft. were such as to justify & require the investigation made by pltf., & therefore, the costs of both parties should come out of the estate, except the costs of the plea of undue influence, which failed, which should be paid by pltf. to the deft. — *LEVY v. LEO* (1909), 25 T. L. R. 717.

3164. ——[In a probate action, the ct. being of opinion that there were reasonable grounds for an inquiry:—*Held*: deft. was entitled to his general costs out of the estate, but that, having pleaded undue influence without any justification & failed, he must pay the costs of that part of the case.—*OLDCORN v. TENNISWOOD* (1909), 25 T. L. R. 825.

3165. What circumstances justify inquiry—Will made in articulo mortis.—(1) If no suspicion of fraud exists, a will consistent with previous affection, & declarations, & supported by recognitions, & circumstances showing volition & capacity, is valid, though made in *extremis*, & though the instructions were conveyed through the party benefited.

(2) As to the next of kin being allowed their

costs out of the estate, they were certainly justified in entering into the investigation, considering the will was made in *articulo mortis*, & my only doubt arises from the smallness of the property, but, on the whole, I think they are entitled to their costs (*SIR JOHN NICHOLL*).—*ROSS v. CHESTER* (1828), 1 Hag. Ecc. 227; 162 E. R. 506.

Annotation:—*Reid*. *Davies v. Gregory* (1873), L. R. 3 P. & D. 28.

3166. — Subsequent Insanity.—Testatrix executed a will, & thereupon destroyed a former will, & subsequently executed two other wills. The last will was propounded, but abandoned. A decree then issued calling on all parties interested to show cause why probate of the instructions for the first will should not be granted; & the ct., on proof *per testes* that the instructions were of the same effects as the first will, that that will was executed when deceased was sane, but destroyed & the other wills executed when insane, pronounced for the instructions, & refused costs out of the estate to persons in distribution who by interrogatories set up insanity when the first will was executed.—*In the Goods of BRAND* (1831), 3 Hag. Ecc. 754; 162 E. R. 1333.

3167. ——[When testator has been found to be of unsound mind under a commission of lunacy, which commission has not been superseded, the legal presumption is against the validity of any testamentary instrument, & the *onus* of proving the soundness of mind of testator is imposed upon the party setting up the instrument.

(2) Under such circumstances it is competent to the party setting up a testamentary instrument to maintain either that testator was always of sound mind; or, that though he may have been formerly of unsound mind, he had completely recovered; or, that the will was made during a lucid interval.

(3) In such a case, where unsoundness of mind has been before proved, though previous circumstances are entitled to some weight, the true inquiry is, whether deceased testator had entirely recovered, or was of sound mind at the time of giving instructions for & the execution of the instrument in question.

(4) A will & codicil made & executed in such circumstances, when it was clearly proved that at the time of their execution the insane delusions of testator which existed at the time the commission of lunacy was issued still continued to exist, were held invalid. The circumstances of the case being deemed to be such as to make it essential to the purposes of justice that the validity of the testamentary instruments should be submitted to judicial decision, applts., the exor. & the parties interested under the will, were allowed one set of costs between them out of the estate, including the costs of the appeal.—*PRINSEP & EAST INDIA CO. v. DYCE SOMMER* (1856), 10 Moo. P. C. C. 232; 14 E. R. 480; *sub nom.* *DYCE SOMMER v. THROUP, Dea. & Sw.* 22; *sub nom.* *EAST INDIA CO. & PRINSEP v. DYCE SOMMER*, 4 W. R. 714, P. C.

Annotations:—*As to* (4) *Consd.* *Swinfen v. Swinfen* (1859), 1 Sw. & Tr. 283. *Generally, Mentd.* *Hampson v. Guy* (1891), 64 L. T. 778; *In the Goods of Crippen* (1911), 80 L. J. P. 47; *Bird v. Keep*, [1918] 2 K. B. 692.

propounding the will was bound to rebut:—*Held*: pltf. entitled to costs against deft.—*PUBLIC TRUSTEE v. ARCHISON* (1910), 29 N. Z. L. R. 431.—N. Z.

k. ——[A next of kin who enters a caveat & merely cross-examines the witness on the other side, is entitled to an indemnity against costs; but if he or she goes into a separate case, & makes charges against the opposite party & fails to establish

those charges, it is at the peril of costs.—*KENNY v. KENNY* (1858), 31 L. T. O. S. 239.—IR.

PART II. SECT. 20, SUB-SECT. 3.—A. (a).

3168. General rule.—An unsuccessful claimant in an inquiry as to the next of kin of an intestate will not be allowed his costs of the inquiry, except where the investigation of his claim has resulted in a benefit to the

estate.—*SHELL v. DONKLEY* (1903), 38 R. N. S. W. 60; 20 N. S. W. W. N. 21.—AUS.

3169 li. ——[The next of kin of deceased, although unsuccessful in disputing his will, may obtain their costs out of the estate if the judge be of opinion that they were justified in disputing it by reason of circumstances of a suspicious character appearing in the case.—*CARHERY v. HEALY* (1859), 31 L. T. O. S. 22.—IR.

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3168. — Doubtful question of law.]—The will of a married woman being propounded by her exors., it was opposed by her husband, & a question of domicile was raised upon the pleadings. That question was decided in favour of the exors., & the decision was affirmed, upon appeal, by the House of Lords, without costs. The costs of the litigation in this ct. were allowed out of the estate, on the ground that the question raised by the party opposing was so doubtful that he was entitled to have it decided by a competent tribunal. —**ROBINS & PAXTON v. DOLPHIN** (1860), 1 Sw. & Tr. 518; Sea. & Sm. 159; 29 L. J. P. M. & A. 138; 1 L. T. 306; 24 J. P. 87; 8 W. R. 177; 164 E. R. 840.

3169. — Whether document testamentary.]—**THORNCROFT & CLARKE v. LASHMAR**, No. 1054, *ante*.

3170. — Person entitled to administration with will.]—*In the Estate of POOLE*, **POOLE v. POOLE**, No. 904, *ante*.

3171. — Domicil of testator doubtful.]—(1) R., a Scotsman by birth, resided in Jersey for twenty-four years preceding his decease. He took occasional excursions to his native place in Scotland & elsewhere. Two of his children had died in France, & he caused their remains to be disinterred & buried in Jersey. It was proved that he contemplated being buried there himself. He had been in India in early life in the service of the late East India Co. He went to Scotland a short time previously to his death, but there was no proof of any intention to return & reside there:—*Held*: in the circumstances, & particularly as to the length of his residence in Jersey previously to his death, he had obtained a domicile in Jersey.

(2) Costs of the inquiry were ordered to be paid out of the general estate.—**HALDANE v. ECKFORD** (1869), 1 L. R. 8 Eq. 631; 21 L. T. 87; 17 W. R. 1059.

Annotations:—As to (1) Refd. Douglas v. Douglas, Douglas v. Webster (1871), 1 L. R. 12 Eq. 617; *Doucet v. Georgehan* (1878), 9 Ch. D. 441; *Winans v. A.-G.* [1904] A. C. 287.

Suspicious conduct of testator.]—*See* Sub-sect. 3, A. (b), *post*.

Suspicious conduct of other parties.]—*See* Sub-sect. 3, A. (c), *post*.

—See, also, Sub-sect. 4, A., post.

3172. Where court pronounces against will.—Proceedings by next of kin.—Though not entitled to administration.]—The widow of deceased propounded a will, by which she was appointed sole extrix. & universal legatee. One of the next of kin opposed on the ground of incapacity, & upon that issue the ct. pronounced against the will, but, in the special circumstances of the case, declined to condemn the widow in costs:—*Held*: the next of kin, although not entitled to adminis-

tration, was entitled to his costs out of the estate.—**CRITCHELL v. CRITCHELL** (1863), 3 Sw. & Tr. 41; 32 L. J. P. M. & A. 108; 8 L. T. 173; 11 W. R. 401; 164 E. R. 1187.

—See, also, Nos. 3110–3113, 3115, ante.

3173. Exceptions to rule.—Costs of unsuccessful ones excluded.]—**LEVY v. LEO**, No. 3163, *ante*.

3174. — If pleaded without justification.]—**OLDCORN v. TENNISWOOD**, No. 3164, *ante*.

(b) *Litigation caused by Testator.*

3175. General rule.]—In considering the question of costs in probate causes, the ct. will be guided by the two following rules: (a) if the cause of litigation takes its origin in the fault of testator, or of those interested in the residue, the costs may properly be paid out of the estate; (b) if there be a sufficient & reasonable ground, looking to the knowledge & means of knowledge of the opposing party, to question either the execution of the will or the capacity of testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent.

In the present case, the ct. holding that the misconduct of the residuary legatee gave the next of kin a reasonable ground for litigation, ordered their costs to be paid out of the estate, though they had failed to prove, *inter alia*, a plea of undue influence.—**MITCHELL & MITCHELL v. GARD & KINGWELL** (1863), 3 Sw. & Tr. 275; 33 L. J. P. M. & A. 7; 9 L. T. 491; 28 J. P. 104; 10 Jur. N. S. 51; 12 W. R. 255; 164 E. R. 1280.

Annotations:—Refd. Davis v. Gregory (1873), 28 L. T. 239; *In the Estate of Osment, Child & Jarvis v. Osment*, [1914] P. 129.

3176. ——**HOOTON v. DENNET**, No. 1211, *ante*.

3177. — Pleas for which no evidence offered excepted.]—Testator before the execution of his last will & testament, made another will, the existence of which was not so favourable to his wife, but concealed the fact from her. Probate of his last will was opposed unsuccessfully by his next of kin, but the ct. held that testator's conduct had conducted to the litigation, & granted them costs out of the estate. Deft. pleaded fraud & undue influence, but offered no evidence in support of the pleas. The ct., to mark its sense of this impropriety, ordered that defts. should pay whatever costs pltf. had incurred in meeting these pleas.—**DU BOISON v. MAXWELL** (1873), 28 L. T. 369; 37 J. P. 328; 21 W. R. 575.

3178. ——**SPIERS v. ENGLISH**, No. 3126, *ante*.

3179. Will to be kept secret.—During existence of life estate.]—Testator desired that his will should not be produced until after the death of his mother, who had a life interest in the estate of which it disposed. Nine years after his death the

3169 i. What circumstances justify inquiry.—Doubtful question of law.—Whether document testamentary.]—Where an action is brought to test the validity of a will in which all the heirs of an estate are interested, the costs of such action should not be borne solely by the losing party in the suit, but the costs of both parties should be a charge on the estate.—**ZINK v. ZINK** (1866), 6 N. S. R. (2 Old.) 175.—**CAN.**

3169 ii. ——In an action against exors. involving the construction of a will, where pltf. succeeded as to part of her claim & failed as to another part, the costs of both parties were ordered to be paid out of the estate.—**WILLIAMS v. THURSTON** (1889), 21 N. S. R. (9 R. & G.) 357.—**CAN.**

PART II. SECT. 20, SUB-SECT. 3.—A. (b).

3175 i. General rule.]—Where a contest over a will is caused by some act of testator, costs will be allowed to all parties out of the corpus of the estate.—*Re KIRKBY'S WILL* (1895), 33 N. B. R. 9.—**CAN.**

3175 ii. ——Where the circumstances of the case make it one of those in which the conscience of the ct. cannot be satisfied as to the validity of the will until all available evidence, material to the issues between the parties, have been adduced & pltf.'s claim is well proved:—*Held*: deft.'s costs of litigation & appeal should be paid out of the estate of testator.—

NEWCOMBE v. EVANS (1918), 43 O. L. R. 1.—**CAN.**

3175 iii. ——In a suit between claimants under a will & an inconsistent deed executed by testator:—*Held*: costs were not to be paid out of the assets, on the ground that the difficulty was created by testator, but were subject to the ordinary rule in adverse suits.—**IRWIN v. ROGERS** (1848), 12 L. Eq. R. 159.—**IR.**

i. State in which papers left by testator.—Irregular attestation.—Technical irregularity.]—Where an exor. propounds a will *bona fide*, which is defeated by a technical inaccuracy as to execution, not apparent on the face of it, he will be entitled to costs

exor. produced it in order to prevent the property from being sold, & prayed for probate. The next of kin opposed it unsuccessfully, & the ct. refused to condemn the next of kin in the costs of the opposition on the ground that the conduct of testator in desiring that it should be concealed had given a reasonable ground for suspicion of its validity.—*EMBERLEY v. TREVANION* (1860), 29 L. J. P. M. & A. 143; 24 J. P. 631.

3180. State in which papers left by testator.]—*SMYTH v. WILSON*, No. 3133, *ante*.

3181. — Will torn by testator—No intention to revoke.]—Testator, after having signed a testamentary paper as his will, directed a previous will to be brought to him, & after reading it over said "it's no use keeping this now I have another," & tore it in pieces & burnt it. Probate of the latter testamentary paper was opposed, a suit was instituted, & after a trial the ct. pronounced against it. A draft of the destroyed will was then propounded, & probate was opposed on the ground that the will had been revoked in the manner prescribed by Wills Act, 1837 (c. 26), s. 20. No allegation was contained in the pleading, & no evidence was laid before the ct. as to the ground of the decision in the previous suit:—*Held*: as the act of destruction was done by deceased, not with the intention of accomplishing the revocation, but because he imagined it had already been accomplished, it did not revoke the will. The ct. decreed probate of the draft. Under the very peculiar circumstances of the case the costs of all parties were allowed out of the estate. *CLARKSON v. CLARKSON* (1862), 2 Sw. & Tr. 497; 31 L. J. P. M. & A. 113; 6 L. T. 506; 26 J. P. 631; 10 W. R. 781; 164 E. R. 1090.

*Annotation:—**Reid*, *Beardsley v. Lacey* (1897), 67 L. J. P. 30.

3182. — Irregular attestation—Signatures on separate piece of paper.]—Where the signature of testator & of the attesting witnesses was made not on the paper on which the will was written but on a piece of paper which had been attached to the paper on which the will was written:—*Held*: a good execution, within 15 & 16 Vict. c. 21, s. 1.

This is a case in which the costs of both parties must be paid out of the estate (*GRESWELL, J.*):—*COOK v. LAMBERT* (1863), 3 Sw. & Tr. 16; 32 L. J. P. M. & A. 93; 8 L. T. 211; 27 J. P. 376; 9 Jur. N. S. 258; 11 W. R. 401; 164 E. R. 1189.

*Annotation:—**Reid*, *In the Goods of West* (1863), 32 L. J. P. M. & A. 182.

3183. — Will ambiguous.]—*In the Goods of COLLETT* (1857), Dea. & Sw. 274; 28 L. T. O. S. 276; 3 Jur. N. S. 72; 5 W. R. 251; 161 E. R. 574.

*Annotation:—**Mentd.* *Re Punched* (1872), L. R. 2 P. & D. 369.

3184. — — — — —.]—If upon the face of a testamentary document & the facts known to testatrix at the time of its execution, it is doubtful whether testatrix intended altogether to revoke a former will, the ct. will admit parol evidence to ascertain the intention. In such a case the doubts having

been caused by the condition in which testatrix had left her testamentary papers, the ct. allowed the costs of all parties out of the estate, including, besides the costs of the exors. propounding the former will, the costs of legatees named in it.—*JENNER v. FINCH* (1879), 5 P. D. 106; 49 L. J. P. 25; 42 L. T. 327; 28 W. R. 520.

*Annotations:—**Mentd.* *Wainwright v. Wainwright* (1894), 71 L. T. 265; *Chichester v. Quatrefores*, [1895] P. 186; *Townsend v. Moore*, [1905] P. 66; *In the Estate of Bryan*, [1907] P. 125.

3185. — — — — —.]—(1) The ct. refused to revoke probate in common form of the last will of a testatrix for the purpose of incorporating in a new grant of probate a clause in an earlier will, being of opinion that there was no latent ambiguity in the language of the last will.

(2) The ct., being of opinion that the litigation had been brought about through testatrix herself, allowed the costs of all parties out of the estate.—*PARON v. ORMEROD*, [1892] P. 247; 61 L. J. P. 120; 66 L. T. 381.

3186. — — Will found crumpled Affidavits of attesting witnesses required—Will held invalid.]—

Testator died, leaving a holograph will, which contained a full attestation clause. After his death the registrar required, owing to the crumpled state of the document, that the attesting witnesses should make affidavits, & upon these being filed it appeared that, upon the day when the will was executed, testator produced the document to the first witness saying it was his will, & asking him to sign it as a witness. Testator said he had already signed it, & he pointed to the place, at the foot of the attestation clause, where witness was to write his name. The witness having done this, was asked by the testator where his son Charles was, & witness went to fetch the latter at testator's request. When Charles came upstairs testator requested him to witness his will, saying that his father & he himself had already signed it. Charles then affixed his name in the presence of his father & of testator:—*Held*: (1) the evidence of the two attesting witnesses was too clear for the presumption of law, *Omnia presumuntur rite esse acta*, to prevail, & the will must be pronounced against on the ground that it was not executed in accordance with the provisions of the Wills Act; (2) this was a case in which the costs of both parties should be ordered to be paid out of the estate. *WYATT v. BERRY*, [1893] P. 5; 62 L. J. P. 28; 68 L. T. 416; 9 T. L. R. 36; 1 R. 462.

*Annotations:—**As to* (1) *Mentd.* *Dayman v. Dayman* (1891), 71 L. T. 699; *Brown v. Skirrow*, [1902] P. 3; *Whiting v. Turner* (1903), 89 L. T. 71.

3187. Testamentary capacity of testator doubtful.]—A caveat having been entered, & a suit instituted in the Prerogative Ct., to oppose probate of a will, on the alleged ground of its having been obtained by fraud, & undue influence, when the testator was not of sufficient testamentary capacity, judgment was given in favour of the will, & the parties opposing it were condemned in

out of the estate.—*Re BATHWELL'S WILL* (1878), 4 V. L. R. 37.—*AUS.*

*m. — Later will subsequently found—Indemnity for former executor.]—*H. proved a will as exor., & a subsequent will was found dated about a time when testator was in a weak state of health both physical & mental. A suit was brought by S., exor. in the later will, against H. to set aside the first & establish the second will, which was successful, & in which H. was ordered to pay costs:—*Held*: that H., in an action for an account having a fair question for litigation in en-

deavouring to uphold the first will, was entitled to costs out of the estate.—*HILL v. HILL* (1884), 6 O. R. 211.—*CAN.*

3187 i. Testamentary capacity of testator doubtful.]—Testator died possessed of a large fortune, & by his will, executed in 1889, left his wife £2 a week & a house to be forfeited if she married again or took to live with her any relations or person other than her children & servants:—*Held*: this was sufficient to justify a suit to inquire into the testator's capacity, & deft. entitled to costs out of the estate.—

BROWN v. McENROE (1890), 11 N. S. W. Eq. 131.—*AUS.*

3187 ii. — — — — —.]—A caveat against a grant of probate of a testator who suffered at the time of execution from delusions not affecting his testamentary capacity, will not be allowed his costs of unsuccessfully opposing the grant where the ct. is not satisfied that the acts or conduct of testator led the caveator into at least an honest doubt whether testator was of sound & disposing mind. *CLARKE v. CLARKE* (1901), 1 S. R. N. S. W. 25.—*AUS.*

3187 iii. — — — — —.]—Upon proof in solemn

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costs:—Held: the judgment admitting the probate ought to be affirmed, but that, as the circumstances of the case warranted the caveat & proceedings taken, *plffs.* below ought not to have been condemned in costs, which were ordered to be paid out of the estate, but no order made respecting the costs of the appeal.—**ARMSTRONG v. HUDDLESTON** (1837), 1 Moo. P. C. C. 478; 12 E. R. 896.

Annotations:—Consd. Stultz v. Schoeffle (1853), 20 L. T. O. S. 183; *Swinfen v. Swinfen* (1859), 1 Sw. & Tr. 283.

3188. —.]—**BANNATYNE & BANNATYNE v. BANNATYNE**, No. 3121, *ante*.

3189. —.]—(1) The costs of an unsuccessful opposition to a will must be paid out of the estate in cases where testator, by his own conduct, & habits, & mode of life, has given the opponents of the will reasonable ground for questioning his testamentary capacity.

(2) In cases where neither testator by his own conduct, nor the exors. or persons interested under the will by their conduct, have brought about the litigation as to its validity, but the opponents of the will, after due inquiry into the facts, entertained a *bond fide* belief in the existence of a state of things which, if it did exist, would justify the litigation, & the opposition is unsuccessful, each party must pay his own costs.—**DAVIES v. GREGORY** (1873), 1 L. R. 3 P. & D. 28; 42 L. J. P. & M. 33; 28 L. T. 239; 37 J. P. 279; 21 W. R. 462.

Annotations:—As to (1) Foll. Itce v. Nix, [1893] P. 55; *Brown v. Penn* (1895), 12 T. L. R. 46. *As to (2) Foll. Richardson v. Wood* (1901), 45 Sol. Jo. 380. *Generally, Consd. Browning v. Mostyn*, *Plummer Intervening* (1897), 66 L. J. P. 37.

3190. —.]—In an action to obtain probate of the will of a lunatic so found by inquisition, two of her next of kin opposed probate on the ground of her insanity at the date of the will.

The jury having found for the will, probate of it was granted & the ct., on the authority of *Davies v. Gregory*, No. 3189, *ante*, allowed the costs of all parties out of the estate.—**ROE v. NIX**, [1893] P. 55; 62 L. J. P. 36; 68 L. T. 26; 1 R. 472.

Annotation:—Refd. Brown v. Penn (1895), 12 T. L. R. 46.

3191. —.]—It was the conduct of testator himself which had been the cause of this litigation, & under the circumstances of testator's mental condition, it became necessary to take the opinion of the ct. on the will (**GORELL BARNES, J.**).—**BROWN v. PENN** (1895), 12 T. L. R. 46.

3192. —.]—**BROWNING v. MOSTYN**, No. 3123, *ante*.

3193. Conduct of testator pointing to undue influence—Will in favour of strangers—Next of kin denied access.]—Testatrix during her last illness made a will in favour of two persons who were strangers in blood. The will was in accordance with her previously expressed intentions, but the instructions for it were given to the persons interested under it when no one else was present, & it was not read over to her, & its contents were not distinctly explained to her before or at the time of the execution. Her next of kin were denied access to her during her illness:—**Held:** there was evidence that testatrix knew & approved of the contents of the will, & it was pronounced for, but the costs of the unsuccessful opposition of the next of kin were allowed out of the estate.—(**GOODACHE v. SMITH** (1867), 1 L. R. 1 P. & D. 359; 30 L. J. P. & M. 43; 15 L. T. 511; 31 J. P. 152; 15 W. R. 561.

3194. —.]—The ct. allowed costs out of the estate to the unsuccessful opponent of a will, although he had pleaded undue influence & fraud, being of opinion that the mode in which testator had executed the will & the conduct of the persons beneficially interested under it had reasonably excited doubt & suspicion, & justified those pleas.—**ORTON v. SMITH** (1873), 1 L. R. 3 P. & D. 23; 42 L. J. P. & M. 50; 28 L. T. 712; 37 J. P. 503.

Annotations:—Appld. Shortman v. Shortman (1892), 67 L. T. 717. *Foll. Wilson v. Bassil*, [1903] P. 239. *Refd. Spiers v. English*, [1907] P. 122.

3195. —.]—(1) In a case where a will was opposed upon various grounds but mainly upon an allegation of undue influence, the ct. found that the defence had not succeeded, & pronounced for the will, but finding, also, as a fact, that testator's duplicity had led to the litigation, the ct. gave the costs of all parties out of the estate.

(2) *Plffs.*, as exors., propounded a will, probate of which was opposed upon various grounds, the principal of which was undue influence. A large body of evidence was called on behalf of *deft.* to prove that testator, within a few days of the making of the will, had repeatedly expressed unhappiness at having made the will, & giving as his reason for having done so, that he had been forced to do it. At a subsequent period, when taxed with having made such statements, testator said that he was continually being bothered about having made the will, & that he said what he did at those times for peace & quietness. The ct. found as a fact that testator's duplicity had led to the litigation, & that the statements of dissatisfaction on his part, spoken to by the witnesses for the *defts.*, had, in fact, been made by him. The ct. came to the conclusion that the plea of undue influence was not established, & that *plffs.* were entitled to probate of the last will of deceased propounded by them, but as testator's own conduct had mainly brought about this litigation, *deft.* was entitled to his costs out of the estate.—**COUSINS v. TUBB** (1891), 65 L. T. 716.

3196. —.]—The widow of testator propounded his last will which was disputed, upon the ground of testamentary incapacity, by *deft.*, his brother, who also pleaded that it was obtained by the undue influence of the widow, & counterclaimed probate of the earlier will. The ct. found for *plff.*, the widow, upon both issues, & pronounced for the last will, but being of opinion that there were reasonable grounds for the litigation, & there being evidence of certain expressions used by the widow just prior to the making of the will, upon which the plea of undue influence appeared to have been founded, the ct., upon the authority of *Orton v. Smith*, No. 3194, *ante*, allowed costs of both parties out of the estate.—**SHORTMAN v. SHORTMAN** (1892), 67 L. T. 717; 1 R. 465.

3197. —.]—If the mode in which testator has executed his will raises in the minds of those who are interested in contesting it reasonable grounds for suspicion, & really give rise to litigation ensuing thereon, the ct. is justified in the exercise of its discretion, in ordering the costs of both *plff.* & *deft.* to be paid out of the estate, notwithstanding the fact that undue influence has been pleaded, but not proved.—**WILLIAMS v. COKER** (1892), 67 L. T. 626.

3198. —.]—**WILSON v. BASSIL**, No. 3248, *post*.

form of the due execution of a will & the mental competence of testator, the will was admitted to probate:—

Held: *deft.* not liable for costs, the trial judge considering there were grounds for opposing the will.—

FORREST v. SPEARS (1910), 13 W. L. R. 45.—**CAN.**

(c) *Litigation caused by Executor or Parties interested under Will.*

3199. Delay in proving will—Delay by executor—Costs of next of kin.]—Where the exor. & general residuary legatee allowed the mother & next of kin of testatrix, who had a jointure out of the lands, to enjoy the whole profits thereof for her life, & did not prove the will, & the mother took out letters of administration to her daughter as to an intestate—in a suit to prove that will after the death of the mother:—*Held*: the next of kin of testatrix were entitled to their costs of seeing it formally proved.—*GILES v. DICKENSON* (1861), 4 L. T. 840.

3200. — Will not produced by residuary legatee—Until after administration granted—Costs of next of kin.]—After a next of kin had taken out administration, a will was propounded by one of the residuary legatees. The ct. pronounced for the will, but allowed the costs of the next of kin in obtaining administration, & in putting the residuary legatee upon proof in solemn form, out of the estate, as the residuary legatee did not produce the will until after administration had been taken out, & several months after testator's death.—*SMITH v. SMITH* (1865), 4 Sw. & Tr. 3; 34 L. J. P. M. & A. 57; 20 J. P. 119; 11 Jur. N. S. 143; 13 W. R. 504; 104 E. R. 1415.

3201. Misconduct of parties setting up the will—Costs of unsuccessful opponents.]—The costs of an unsuccessful opposition of a will were allowed out of the estate, on the ground that the misconduct of those interested in setting up the will had given reasonable ground for the litigation.—*WILLIAMS v. HENERY* (1861), 3 Sw. & Tr. 471; 33 L. J. P. M. & A. 110; 28 J. P. 507; 12 W. R. 1015; 104 E. R. 1358.

3202. Litigation initiated by residuary legatees.]—*MITCHELL & MITCHELL v. GARD & KINGWELL*, No. 3175, *ante*.

3203. —]—*SPIERS v. ENGLISH*, No. 3126, *ante*.

3204. Party alleging undue execution, incapacity, fraud or undue influence—Will upheld.]—*GROVE v. YOUNG*, No. 3136, *ante*.

3205. —]—The will of an aged & infirm woman was drawn up by her nephew, her medical attendant. By it he took the whole of her property, save £100 given to his sister. He alone deposed to deceased's knowledge of the contents of the will. The will was, however, signed by deceased in the presence of witnesses:—*Held*: such will was entitled to probate, & the party opposing it was not entitled to her costs.

Semble: if a case is argued, it may induce the

ct. to refuse costs out of the estate.—*REECE v. PRESSEY* (1856), 2 Jur. N. S. 380.

3206. — — — — — Allegations unjustified.]—*BROADBENT v. HUGHES*, No. 3247, *post*.

3207. — — — — — Allegation justified—Conduct of parties.]—*HOOTON v. DENNET*, No. 1211, *ante*.

3208. — — — — —]—*ORTON v. SMITH*, No. 3194, *ante*.

3209. — — — — — Conduct of testator.]—*ORTON v. SMITH*, No. 3194, *ante*.

3210. — — — — —]—*COUSINS v. TUBB*, No. 3195, *ante*.

3211. — — — — —]—*SHORTMAN v. SHORTMAN*, No. 3190, *ante*.

3212. — — — — —]—*WILLIAMS v. COKER*, No. 3197, *ante*.

3213. — — — — — Circumstances giving rise to suspicion.]—*WILSON v. BASSIL*, No. 3248, *post*. What are circumstances giving rise to suspicion, see Sect. 9, sub-sect. 7, *ante*.

3214. — — — — — Circumstances justifying proof in solemn form—Unknown to party opposing will—Failure to make inquiries.]—*SEATON v. STURCH*, No. 3240, *post*.

3215. — — — — — Costs of pleas on which unsuccessful.]—*LEVY v. LEO*, No. 3163, *ante*.

3216. — — — — —]—*OLDICORN v. TENNISWOOD*, No. 3164, *ante*.

See, generally, Sect. 9, sub-sects. 5 & 6, *ante*.

(d) *Other Cases.*

3217. Conduct of action—Unfounded charges—Unnecessary interrogatories.]—(1) Deceased executed a will & codicil in 1820 & another will & codicil in 1830 & a settlement in 1831. The first will was destroyed, the later will & codicil were not forthcoming & the ct. held that they must be presumed to have been destroyed & that the settlement was intended as a substitution for this codicil & pronounced for an intestacy.

(2) Hostility in conducting a suit unfounded charges & unnecessary interrogatories, are a ground for refusing costs out of the estate, especially where those costs would in effect fall upon minors no parties to the expense.

(3) The ct. never forces a joint administration.

(4) As between sisters the elder *inter se paribus* has a slight preference.

(5) On the application of a next of kin the sureties will be required to justify in respect of the share of the party excluded from the administration.—*COPPIN v. DILON* (1832), 4 Hag. Ecc. 361; 102 E. R. 1478.

3218. — — — — — Unfounded opposition.]—In deciding whether the costs of the unsuccessful party should

PART II. SECT. 20, SUB-SECT. 3.—A. (c).

3206 i. Party alleging undue execution, incapacity, fraud or undue influence—Will upheld—Allegations unjustified.]—As pltf. knew of his wife's intention to leave him little or nothing, & had attacked the will & made cruel & baseless accusations, he should not be allowed his costs out of the estate; but the exors. should have their costs as between solicitor & client out of the estate.—*MOORCROFT v. SIMPSON* (1921), 64 D. L. R. 231; 50 O. L. R. 148.—CAN.

3206 ii. — — — — —]—Where the estate is small, & fraud & undue influence have been pleaded in opposition to a will, which is established on the evidence of the party supporting it, though parts of the case were suspicious:—*Held*: the party failing was excused from paying costs, but did not get costs out of the estate.—*FINN v. GORMAN* (1861), 11 L. T. 148.—IR.

PART II. SECT. 20, SUB-SECT. 3.—A. (d).

n. Conduct of action—Against interest.]—Where pltf. claiming under a will, insisted on a construction which was decided against her, whereby her claim was considerably reduced, she was, nevertheless, in the circumstances of the case:—*Held*: entitled to costs.—*GOLDSMITH v. GOLDSMITH* (1870), 17 Gr. 213.—CAN.

o. Inability of unsuccessful party to pay.]—Costs of opposing an unsuccessful appeal from a judgment establishing a will & codicil were ordered to be paid to resp., who were the exors., & certain legatees, out of the estate in the event of their not being able to make them out of asset.—*Re CASSIE*, *TORONTO GENERAL TRUSTS Co. v. ALLEN* (1897), 17 P. R. 402.—CAN.

p. — — — — —]—Where pltf. had not good grounds for bringing an action on the ground of testator's testa-

mentary incapacity, he was not allowed his costs out of the estate & the costs of deft., awarded against pltf. were ordered to be paid out of the estate, upon its being shown on a subsequent application that pltf. was unable to pay them.—*EDWARDS v. EDWARDS* (1896), 14 N. Z. L. R. 561.—N.Z.

q. Costs of appeal—Where will set aside.]—On appeal from decree of probate court setting aside will, costs were directed to be paid out of estate.—*Re FINE'S ESTATE* (1878), 12 N. S. R. (3 L. & C.) 307.—CAN.

r. — — — — — One party acting for all creditors.]—The resp. to appeal, being the parties having the carriage of the proceedings in the master's office & supporting the judgment of the master for the general benefit of the creditors, of whom they were one, should be reimbursed the costs of the application out of the estate, but not so as to prejudice the rights of the applt.—

Sect. 20.—Costs of probate actions: Sub-sect. 3, A. (d), & B.; sub-sect. 4, A.]

be paid out of the estate or not, the ct. will be guided by the opinion of the judge before whom the issues were tried. When the opposition is groundless, the unsuccessful opponent of a will, who has pleaded the incapacity of testator, will be condemned in costs, although he may have acted *bonâ fide*.—*WEST v. GOODRICK* (1861), 31 L. J. P. M. & A. 39; 26 J. P. 57.

3219. — Omission from affidavit of scripts.—The omission to annex to, or mention in the affidavit of scripts, the instruments for a will, is no ground for allowing out of the estate the costs of an unsuccessful opposition to the will, if such opposition is not founded on the absence of instructions.—*FOXWELL v. POOLE* (1862), 3 Sw. & Tr. 5; 32 L. J. P. M. & A. 8; 7 L. T. 757; 27 J. P. 57; 11 W. R. 32; 164 E. R. 1172.

3220. Appeal abandoned—Death of appellant.—Where a will is pronounced for, & the party opposing appeals, but afterwards the appeal is abandoned, & the cause is remitted, the ct. to which it is remitted cannot, at prayer of the representative of applt., who had died, decree his costs out of the estate, not prayed before the appeal was asserted. The party opposing the will being dead, the ct. cannot decree his costs out of the estate.—*HORTON v. WILMOT* (1842), 3 Curt. 52; 1 Notes of Cases, 311; 163 E. R. 652.
Annotation:—Reid. Major v. Knight (1846), 4 Notes of Cases, 661.

3221. Inability of unsuccessful party to pay—Suit for revocation of probate.—*CROSS v. CROSS*, No. 1191, *ante*.

3222. After estate distributed—Share of unpaid residuary legatees paid into court.—Where exors. paid residue into the bank to the credit of infants, & subsequently incurred costs in the Probate Ct., repayment was allowed to them on petition out of the fund so paid in.—*Re BLIGHT* (1873), 21 W. R. 573.

3223. Costs of appeal.—*ARMSTRONG v. HUDDESTON*, No. 3187, *ante*.

B. Form and Effect of Order.

See R. S. C., Ord. 65, r. 14D.

3224. Whether real estate liable—Testator dying before 1898.—*YOUNG v. DENDY* (1867), L. R. 1 P. & D. 344; *CHARTER v. CHARTER* (1876), 3 Ch. D. 218; *Re PRICE, WILLIAMS v. JENKINS* (1880), 31 Ch. D. 485; *Re MORGAN, HILL v. WILLIAMS*, [1890] W. N. 125; *Re PRINCE, GODWIN v. PRINCE*, [1898] 2 Ch. 225.

3225. — Jurisdiction of Court of Chancery.—*Re SHAW, BRIDGES v. SHAW*, [1894] 3 Ch. 615; 64 L. J. Ch. 47; 71 L. T. 515; 43 W. R. 159; 8 R. 555.

Annotation:—Consd. *Re Vickerstaff, Vickerstaff v. Chadwick*, [1906] 1 Ch. 762.

3226. — Realty charged with testamentary expenses—Probate action compromised—Construction of will.—*BROWN v. BURDETT*

Re HAGUE, TRADERS' BANK v. MURRAY (1887), 14 O. R. 660.—*CAN.*

a. Will unsuccessfully propounded & no representative appointed.—The ct. cannot order that the costs of a suit, in which a will is unsuccessfully propounded should be paid out of the estate, where all persons claiming an interest have not been made parties, & the judgment does not finally dispose of the matter, & where no representative has been appointed.—*MACBOY v. MADDEN* (1868), 5 W. W. & A. B. 38.—*AUS.*

t. Next of kin — Caveators —

Appearing but not pleading.—Next of kin, caveators, who appeared but did not plead, are not liable to costs, at suit of an exor. propounding a will, & moving to dismiss the suit, for want of a plea.—*CLIFF v. JONES* (1861), 4 L. T. 686.—*IR.*

PART II. SECT. 20, SUB-SECT. 3.—B.

a. Jurisdiction of court to order payment out of part of estate—Realty.—Where the personality of intestate would be exhausted by their debts, the ct. granted administration & directed that

(No. 2) (1883), 53 L. J. Ch. 56; 48 L. T. 753; 31 W. R. 854.

See, now, Land Transfer Act, 1897 (c. 65), s. 2 (3); *Law of Property Act, 1922* (c. 16), s. 156 (11); *Administration of Estates Act, 1925* (c. 23), ss. 2 (1), 34.

3227. — Testator dying after 1897.—By the judgment in a probate action pronouncing against the validity of the will of deceased, who died since the commencement of Land Transfer Act, 1897 (c. 65), the costs of plffs. propounding the will were ordered to be paid "out of the estate." The personal estate of deceased proving insufficient:—*Held*: by Part I. of the Act, the word "estate" now meant the real as well as the personal estate of a person dying since the commencement of the Act, & under sect. 2 (3) the real estate of deceased was subject to the same liability as his personal estate for the costs in question, & must bear those costs.

It is open to the ct. under Ord. 65, r. 14D, to distinguish between various portions of the estate, for instance between realty & personality, & to impose costs accordingly. If the ct. makes no such distinction, the costs are payable out of the entirety of the estate in due order of administration.—*Re VICKERSTAFF, VICKERSTAFF v. CHADWICK*, [1906] 1 Ch. 762; 75 L. J. Ch. 419; 94 L. T. 463; 54 W. R. 414; 50 Sol. Jo. 360.

3228. Jurisdiction of court to order payment out of part of estate—Realty & personality.—*Re VICKERSTAFF, VICKERSTAFF v. CHADWICK*, No. 3227, *ante*.

3229. — Appointed property & property undisposed of.—Testatrix married in 1867. She died on Sept. 13, 1887, leaving her husband & three children surviving. By her will, dated Sept. 7, 1887, she exercised a general power of appointment given her by the will of her mother, & appointed exors., but she made no further disposition of any property belonging to her. Probate of the will was granted to the exors. in the ordinary form, without any limitation, in accordance with Probate Rules, 1887, rr. 15, 18.

Testatrix at her death was entitled to some separate personal estate:—*Held*: such part of the probate duty & expenses of proving the will as was attributable to the specifically appointed property must be borne by that property, & such part as was attributable to the undisposed-of property by that property.—*Re LAMBERT'S ESTATE, STANTON v. LAMBERT* (1888), 39 Ch. D. 626; 57 L. J. Ch. 927; 59 L. T. 429.

Annotation:—Mentd. *Surman v. Wharton*, [1891] 1 Q. B. 491.

3230. — Corpus of real estate devised to successive life tenants.—Under the additional rule, Ord. 65, r. 14D, the ct. ordered the costs of both plff. & deft. to be charged on & paid out of the corpus of certain real estate devised by the will to successive life tenants.—*DEAN v. BULMER*, [1905] P. 1; 74 L. J. P. 12; 92 L. T. 426.

Annotation:—Reid. *Re Vickerstaff, Vickerstaff v. Chadwick*, [1906] 1 Ch. 762.

costs be paid out of the estate & be chargeable on the realty.—*D'ARCY v. MORAN* (1890), 11 N. S. W. Eq. 120; 6 N. S. W. W. N. 152.—*AUS.*

b. — Residue.—In a suit to obtain probate of a will which was prepared by an estate agent & a solr., who were resp. & under which both received large benefits:—*Held*: in view of the suspicious circumstances, the resp. had established that testator knew & approved of the contents of the will, but as suspicion was largely due to the conduct of the resp. in not seeing

3231. — Residuary shares of legatees causing litigation.—*HARRINGTON v. BUTT*, [1905] P. 3, n.; 74 L. J. P. 13, n.

3232. — Legacy to person who prepared the will—Though conduct unsuccessfully impeached.—*In the Estate of OSMENT, CHILD & JARVIS v. OSMENT*, No. 1320, *ante*.

3233. Where no order made.—*Re VICKERSTAFF, VICKERSTAFF v. CHADWICK*, No. 3227, *ante*.

3234. Estate of married woman—Subject to power of appointment—Fund settled by appointee before action.—(1) A., under a settlement made upon her marriage, had a power of appointment over a certain fund. B., her husband, in her lifetime, obtained possession of the fund, & after her death transferred it to the trustees of a settlement made in contemplation of the marriage of C., his adopted daughter. Neither C., her husband, nor the trustees, had notice of the trusts of the original settlement. In a suit instituted after B.'s death, the will of A., appointing the fund in favour of B., was pronounced for, & the costs of the opponents of the will were ordered to be paid out of A.'s estate:—*Held*: the trustees of the settlement made on the marriage of C. were innocent purchasers for valuable consideration of the fund, & it therefore ceased in their hands to be part of A.'s estate, or to be chargeable with costs.

(2) *Scemle*: where a married woman exercises by will a power of appointment over her separate personal estate, although the estate may be liable to the payment of her debts in the hands of the appointee, it would not be liable to the payment of the costs of a suit touching the validity of her will ordered to be paid out of her estate. —*ADAMSON v. HAMMOND* (1873), L. R. 3 P. & D. 141; 43 L. J. P. & M. 17; 29 L. T. 700; 38 J. P. 89.

3235. Exercise of general power of appointment by will - Will revoked as to general estate.—*In the Estate of POOLE, POOLE v. POOLE*, No. 904, *ante*.

3236. Priority—To executor—Whether granted.—In pronouncing for a will, the proof of which had been disputed, the ct. allowed the costs of all parties out of the estate, & made it part of the order that the exor., who was also universal devisee, should have the preference. The personality turned out to be under £150 in value, while the realty amounted to £10,000. The unsuccessful party applied to the ct. to make the costs a charge on the realty. The ct. refused to do this, but rescinded that part of the order which gave a preference to the exor. —*DAVIES v. REYNOLDS* (1873), L. R. 3 P. & D. 90; 28 L. T. 605; 37 J. P. 520.

3237. — Between costs of probate action—& costs of administration action.—Costs of litigation in the Ecclesiastical Ct. for determining which is testator's will, although ordered by the Ecclesiastical Ct. to be paid out of the estate, are postponed to the costs of administration in this ct. —*MAJOR v. MAJOR* (1854), 2 Drew. 281; 2 Eq. Rep. 1155; 23 L. J. Ch. 718; 23 L. T. O. S. 340; 2 W. R. 382; 61 E. R. 727.

Annotations:—*Apld. Re Mayhew, Rowles v. Mayhew* (1877), 46 L. J. Ch. 552. *Reid. Re Pearce, McLean v. Smith* (1887), 56 L. T. 228; *Brown v. Burdett* (1888), 40 Ch. D. 214.

3238. — — — — —.—After an order had

been made in the Ch. Div. for the administration of the estate of a testator, an order was made in the Probate Div. that the costs of pltf. in a suit there should be paid out of the estate " & have priority over all other claims on the estate ":—*Held*: these costs were to be postponed to the costs of administration in the Ch. Div.—*Re MAYHEW, ROWLES v. MAYHEW* (1877), 5 Ch. D. 596; 46 L. J. Ch. 552; 37 L. T. 48; 25 W. R. 521, C. A.

Reid. Brown v. Burdett (1888), 40 Ch. D. 214; *Re Prince, Godwin v. Prince*, [1898] 2 Ch. 225.

SUB-SECT. 4.—WHEN EACH PARTY BEARS OWN COSTS.

A. In

3239. Reasonable grounds for investigation.—*SPIERS v. ENGLISH*, No. 3126, *ante*.

3240. — Though unknown to party opposing will Failure to make inquiries.—Probate of a will was opposed by the next of kin, who was also the exor. of a previous will. He made no inquiry into the circumstances under which the later will was executed, though he was aware of its execution, & knew the name of the attorney who had prepared it. He pleaded undue execution, incapacity, & that the will was not the last will of deceased, but gave notice, before the hearing, that he did not intend to produce evidence. On cross-examination of a witness, called in support of the will, certain facts were elicited which, in the opinion of the ct., would have justified the next of kin in calling for proof of the will, in solemn form, if they had been known to him. But as they were not known to him, until stated by the witness in ct., & he had made no previous inquiry as to the circumstances attending the execution, the ct. refused to allow his costs out of the estate, although it did not condemn him in costs. —*SEATON v. STURCH* (1860), 29 L. J. P. M. & A. 195; 24 J. P. 631.

3241. — — — — — Plea of undue execution & incapacity.—A next of kin who pleads undue execution & incapacity in opposition to a will, & who calls witnesses in support of those pleas, will not be condemned in costs upon the will being pronounced for, if the ct. is satisfied that there was fair & reasonable ground for the opposition. Where a next of kin pleads undue influence or fraud, he will generally be condemned in costs, if those pleas are not established. —*SUMMERELL v. CLEMENTS* (1862), 3 Sw. & Tr. 35; 32 L. J. P. M. & A. 33; 8 L. T. 172; 27 J. P. 41; 11 W. R. 153; 164 E. R. 1184.

Annotations:—*Reid. Mitchell & Mitchell v. Gard & Kingwell* (1863), 3 Sw. & Tr. 275; *Leigh v. Green*, [1892] P. 17.

3242. — Will not upheld.—*CRITCHELL v. CRITCHELL*, No. 3172, *ante*.

3243. — Looking to party's means of knowledge—Misconduct of residuary legatee.—*MITCHELL & MITCHELL v. GARD & KINGWELL*, No. 3175, *ante*.

3244. — — — — — Bonâ fide belief after due inquiry.—*DAVIES v. GREGORY*, No. 3180, *ante*.

that testator had independent advice, applt. should have the costs of her unsuccessful opposition out of the residue in which resp. alone were interested. —*NOCK v. ALSTIN* (1918), 25 C. L. R. 519.—AUS.

— *Re sealed foreign grant*
Costs based on value of property in jurisdiction.]—Where probate or ad-

ministration granted by the ct. of another country are sealed by the District Ct. in Alberta, the applt. are entitled only to costs based upon the value of the property devolving which is situated within the province.—*Re DOBSON ESTATE & EMERY, NEWELL, FORD, BOLTON & MOUNT* (1916), 34 W. L. R. 665; 10 W. W. R. 694.—CAN.

PART II. SECT. 20. SUB-SECT. 4. —A.

3239. Reasonable grounds for
restitution.] Where a legatee makes
an inquiry into the claim, & the
involves difficulty owing to conflicting
decisions or the acts of testator, or if
the legatee has a fair ground for making
the claim, each party bears his own
costs. *Re JOSE ESTATE, CROWE v.*
BELL (1897), 40 N. S. R. 41, 121.—CAN.

Sect. 20.—Costs of probate actions: Sub-sect. 4, A. & B.]

3245. ————.]—*RICHARDSON v. WOOD* (1901), 45 Sol. Jo. 380.

3246. ———— *Plea of undue influence.*—It is not an invariable rule that the unsuccessful opponent of a will who has pleaded undue influence will be condemned in costs. The ct. refused to condemn a next of kin in costs, although he had pleaded undue influence, being of opinion that, under the circumstances of the case, the plea was not an unreasonable one.—*SMITH v. SMITH* (1860), L. R. 1 P. & D. 239; 36 L. J. P. & M. 13; 15 L. T. 192; 31 J. P. 9; 15 W. R. 230.

3247. *What are reasonable grounds—Suspicious conduct of propounders.*—Issues of undue execution, incapacity & undue influence raised by the next of kin in opposition to a will were found against him. The ct., however, refused to condemn him in costs, because it was of opinion that the parties propounding the will, & in whose favour it was made, had acted so as to excite the suspicion of the next of kin, but refused to allow his costs out of the estate, because he had not sufficient grounds for the pleas he had filed.—*BROADBENT v. HUGHES* (1860), 29 L. J. P. M. & A. 134; 24 J. P. 246.

Annotation:—Refd. Mitchell & Mitchell v. Gard & Kingwell (1863), 3 Sw. & Tr. 275.

3248. ———— *Circumstances throwing onus of proof on propounders.*—Where the facts surrounding the making of a will impose upon the party propounding the will, not merely the *onus* of proving due execution & testamentary capacity but the additional burden of removing the suspicion attaching to the making of the will, a person opposing it is *prima facie* justified in pleading undue influence & fraud, & though unsuccessful, ought not to be condemned in costs unless the circumstances of the case be such as to render it unreasonable for him to raise such issues.

Where deft. put forward those pleas & failed, the ct., following *Orton v. Smith*, No. 3194, *ante*, ordered that the costs of deft., as between party & party, be allowed out of the estate, after pltf., who succeeded in discharging the additional *onus* of proof cast upon her in the case, should have first taken her costs, as between solr. & client, out of the estate.—*WILSON v. BASSIL*, [1903] P. 239; 72 L. J. P. 89; 89 L. T. 586; 52 W. R. 271.

Annotations:—Dtd. Spiers v. English, [1907] P. 122. *Refd. Oldeorn v. Tenniswood* (1909), 25 T. L. R. 825.

See, generally, Sect. 9, sub-sect. 7, ante.

3249. ———— *Undue execution—Conflict of evidence.*—Pltf., exor., propounded a will, to which deft., next of kin, pleaded undue execution, but gave no notice of merely cross-examining pltf.'s witnesses. At the trial pltf. examined one attesting witness, who proved due execution. Deft. called the other attesting witness, who negatived due execution, & the jury found a verdict establishing the will. The ct. made no order as to costs.—*FERREY v. KING* (1861), 3 Sw. & Tr. 51; 31 L. J. P. M. & A. 120; 7 L. T. 219; 26 J. P. 88; 164 E. R. 1191.

Annotation:—Refd. Bone v. Whittle (1866), L. R. 1 P. & D. 249.

3250. ———— *Evidence inconclusive.*—Where the judge of assize was satisfied with a verdict for pltf. establishing a will, but would not have been dissatisfied with a contrary verdict, the ct. refused to condemn deft. in costs.—*BRAMLEY v. BRAMLEY* (1864), 3 Sw. & Tr. 430; 33 L. J. P. M. & A. 111, n.; 12 W. R. 992; 164 E. R. 1342.

3251. ———— *Statement of sole witness—*

Witness prima facie untrustworthy.—In a suit for revocation of probate, a next of kin called in probate, & was unsuccessful. The sole evidence on which he opposed the will was that of a witness, which, to his knowledge, was open to grave suspicion, being that of a witness who had previously made an affidavit of due execution:—*Held*: such evidence, though *prima facie* untrustworthy, justified the next of kin in requiring proof of the will in solemn form, & he was not condemned in costs.—*SHEFFIELD v. SHEFFIELD* (1874), 43 L. J. P. & M. 72; 31 L. T. 455; 38 J. P. 745.

3252. ———— *Testamentary capacity—Testator's intellect not strong.*—*ROBINSON v. PALLISTER* (1864), 33 L. J. P. M. & A. 111, n.

3253. ———— *Evidence of doctor.*—The ct. refused to condemn in costs a next of kin who had unsuccessfully opposed a will upon information given to him by one of the attesting witnesses, testator's medical attendant, to the effect that when the will was read over testator signified his approval of it by gesture only, & that he could not swear that testator was of sound mind.—*TIPPETT v. TIPPETT* (1865), L. R. 1 P. & D. 54; 35 L. J. P. & M. 41.

3254. ———— *Instructions for will given through person interested.*—Where a codicil had been prepared from verbal instructions conveyed by a person who was largely interested in the change made in the will to the solr., the ct., while admitting it to probate, declined to condemn in costs the party who opposed it, although he had pleaded undue influence.—*MILVAIN v. HAWTHORN* (1877), 41 J. P. 168.

3255. ————.]—Where a principal beneficiary takes instructions himself & causes a will to be prepared by a solr. upon those instructions, but the solr. does not see testator, the circumstances so far invite inquiry as to justify the ct. in refusing to condemn in costs a party opposing probate of the will.—*AYLWIN v. AYLWIN*, [1902] P. 203; 71 L. J. P. 130; 87 L. T. 142.

3256. ———— *Bodily weakness of testator.*—Testatrix, who was incapable of speaking or writing owing to an apoplectic stroke, only assented by nods of her head & several pressures of her hand in answer to questions put to her by the person drawing her will. She made a mark with a pen in lieu of a signature:—*Held*: (1) if the jury believed the document was in accordance with the wishes of testatrix they could find in favour of it; (2) while the opposing parties were entitled to have the will proved in solemn form, nevertheless they were not justified in fully contesting & must bear their own costs of the action.—*In the Estate of HOLTAM, GILLET v. ROGERS* (1913), 108 L. T. 732.

3257. *Unsuccessful plea of undue influence or fraud.*—*SUMNERELL v. CLEMENTS*, No. 3241, *ante*.

3258. ————.]—One of the next of kin opposed a will, but did not plead in the principal cause. He administered to the drawer of the will long interrogatories, imputing fraud to him & the exor. propounding the will, & gave in an exceptive allegation pleading various alterations & tamperings with the draft of a will of previous date to that propounded. This allegation was not sustained by the evidence produced upon it. The will was admitted to probate, & the next of kin condemned in the whole of the costs.—*PATCH v. HORLOCK* (1847), 11 Jur. 637.

3259. ————.]—A next of kin who opposed a will on the grounds of undue execution, incapacity, & undue influence, was condemned in costs.—*BARNARD v. BURROUGHS* (1862), 11 W. R. 241.

3260. — Reasonable grounds for investigation.]—BROADBENT *v.* HUGHES, No. 3247, *ante*.

3261. — — — — —.]—SMITH *v.* SMITH, No. 3246, *ante*.

3262. — Capacity of widow to marry testator.]—In a probate suit *pltf.* obtained a decree of intestacy, & *deft.* set up a will which had been duly executed by deceased in her favour, & of which she was sole *extrix*. The only issue was one of fraud, which had been pleaded by *pltf.*, the alleged fraud being that *deft.* had led testator to believe that she was capable of contracting, & that she had contracted, a valid marriage with him, whereas in fact her real husband was then & still alive. *Pltf.* opened the case, & the *ct.* found that the plea of fraud had failed, & pronounced for the will in *deft.*'s favour, but left each party to pay their own costs.—TATE *v.* TATE (1890), 63 L. T. 112.

3263. Unsuccessful plea of incapacity or want of due execution.]—A next of kin was condemned in costs for having pleaded insanity in testator, & having failed to establish it.—STRATTON *v.* FORD (1755), 2 Lee, 216; 161 E. R. 318.

3264. — — — — —.]—BARNARD *v.* BURROUGHS, No. 3259, *ante*.

3265. — — — — — Reasonable grounds for investigation.]—BROADBENT *v.* HUGHES, No. 3247, *ante*.

3266. — — — — —.]—SUMMERELL *v.* CLEMENTS, No. 3241, *ante*.

See, also, Nos. 3121, 3187, 3189, *ante*.

3267. Opposition withdrawn—Allegation of attempt at subornation.]—(1) A next of kin declaring "he proceeds no further" in contesting a will; the *ct.* will dismiss, & not condemn, him in costs, because it is pleaded "that he attempted to suborn an attesting witness"; nor allow affidavits in proof of the attempt.

(2) A married woman, living apart from her husband, being joined in the probate of a will, authorising her "to act as *extrix*," in all respects, without her husband" but not having inter-meddled, the *ct.*, on the bank refusing to transfer stock without the husband, will revoke such probate, & grant it to the remaining exors. — MEEK & DONALD *v.* CURTIS (1827), 1 Hag. Ecc. 127; 162 E. R. 530.

3268. Delay in claiming costs.]—In the Goods of ELMSLEY, DYKE *v.* WILLIAMS, No. 3326, *post*.

3269. Bankrupt defendant not represented by assignee.]—In the Goods of ELMSLEY, DYKE *v.* WILLIAMS, No. 3321

3270. Interested parties not before the court.]—In the Goods of ELMSLEY, DYKE *v.* WILLIAMS, No. 3326, *post*.

B. On Exercise of Right to Proof in Solemn Form.

See, now, R. S. C., Ord. 21, r. 18, replacing Probate Rules, 1862 (Contentious business), r. 41.

3271. Former rule—Effect of R. S. C., Ord. 21, r. 18.]—DAVIES *v.* JONES, No. 3128, *ante*.

3272. — — — — — How far former ecclesiastical or probate practice considered.]—TOMALIN *v.* SMART, No. 1198, *ante*.

3273. Who is entitled—Former chancery practice—Held—Where proceedings not vexatious.]—BERNEY *v.* EYRE (1746), 3 Atk. 387; 26 E. R. 1023.

*Annotations:—*Consd. Boyse *v.* Rosborough (1854), 3 M. & G. 817; Roberts *v.* Kerslake (1855), 1 K. & J. 751.

3274. — — — — —.]—FEAST (1751), 1 Dick. 153; 21 E. R. 227, L. C.

*Annotations:—*Consd. Roberts *v.* Kerslake (1855), 1 K. & J. 751. *Refd.* Gough *v.* Botwell (1767), 1 Dick. 396.

3275. — — — — — Former ecclesiastical or probate

practice—Executor of a former will.]—The exor. of a latter will put upon proof by the exor. of a former will. Latter will established, no costs.—LOVETT *v.* HARKNESS (1753), 1 Lee, 332; 161 E. R. 122.

3276. — — — — —.]—The exor. under a former will, has a right to put the exor. of a latter will upon solemn proof of that instrument, & to interrogate his witnesses; but if he goes beyond this without being able to prove his case, he becomes liable to costs.—MANSFIELD *v.* SHAW (1818), 3 Phillim. 22; 161 E. R. 1246.

*Annotation:—*Refd. Boston *v.* Fox (1860), Sea. & Sm. 137.

3277. — — — — —.]—An exor. of a former will has same right as a next of kin to put an exor. of a subsequent will upon proof in solemn form, & to interrogate his witnesses without being liable for costs.—BOSTON *v.* FOX (1860), 4 Sw. & Tr. Supp. 190; Sea. & Sm. 137; 20 L. J. P. M. & A. 68; 24 J. P. 87; 164 E. R. 1493.

See, also, No. 3281, *post*.

3278. — — — — — Next of kin.]—Where a next of kin calls for proof *per testes* of a will, & merely interrogates the witnesses produced in support of it, he is not liable to costs for this; at least, in ordinary circumstances. *Aliter*, in the case of a mere legatee, under a former will, whom the *ct.*, as it may, is at all times disposed to condemn in costs, wholly, or in part; where in putting the exors. of a latter will on proof *per testes* of such latter will, he so interrogates, although he merely interrogates, the witnesses in support of it, as to manifest any spirit of vexatious or undue litigation on his part.—URQUHART & WATERMAN *v.* FRICKER (1826), 3 Add. 56; 162 E. R. 401.

*Annotation:—*Refd. Leigh *v.* Green, [1892] P. 17.

3279. — — — — —.]—The next of kin may generally put an exor. on the proof of a will & cross-examine the witnesses without making himself liable for costs; but if he pleads or takes any further step, he does so at his own risk.—FARLAR *v.* FARLAR (1858), 1 Sw. & Tr. 124; 27 L. J. P. & M. 103; 31 L. T. O. S. 122; 164 E. R. 658.

c, also, No. 3277, *ante*; No. 3281, *post*.

3280. — — — — — Legatee.]—URQUHART & WATERMAN *v.* FRICKER, No. 3278, *ante*.

3281. — — — — —.]—A legatee under a former will has not same right as a next of kin or exor. of a former will to put an exor. of a subsequent will upon proof in solemn form, & therefore he cannot protect himself against liability to be condemned in costs by giving notice under rule 41 that he only intends to cross-examine the witnesses produced in support of the will.—HOCKLEY *v.* WYATT (1882), 7 P. D. 239; 51 L. J. P. 92; 47 L. T. 354; 46 J. P. 792; 31 W. R. 292.

3282. Application of rule—Right to cross-examine propounder's witnesses.]—MANSFIELD *v.* SHAW, No. 3276, *ante*.

3283. — — — — —.]—Where the party opposing a will has given notice under Contentious Business Rules, 1862, r. 41, that he merely insists on the will being proved in solemn form & only intends to cross-examine the witnesses, the *ct.* has no jurisdiction to condemn him in costs, such power only existing where the party giving the notice has taken proceedings to call in the probate.—LEIGH *v.* GREEN, [1892] P. 17; 61 L. J. P. 66, D. C.

3284. — — — — — As to testator's knowledge & approval.]—That testator knew & approved of the contents of a will propounded in part of the burden of proof assumed by the person who propounds it & consequently, the next of kin who oppose a will may cross-examine the witnesses

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produced in its support on that matter, as well as upon the capacity of testator, or the execution of the will, without exposing themselves to costs, provided they give the notice required by the rules.—*CLEARE v. CLEARE* (1869), L. R. 1 P. & D. 655; 38 L. J. P. & M. 81; 20 L. T. 497; *sub nom. CLEARE v. FOWLER & CLEARE*, 17 W. R. 687.

Annotations:—Consd. Harrington v. Bowyer (1871), 41 L. J. P. & M. 17. *Refd. Leigh v. Green*, [1892] P. 17.

3285. — Whether available—On plea of undue influence or fraud.]—Contentious Business Rules, r. 41, which protects a person opposing a will against condemnation in costs, if he gives notice with his pleas that he merely insists upon the will being proved in solemn form, & only intends to cross-examine the witness produced in support of it, does not apply to a case in which undue influence, or any plea other than a traverse of the declaration, is pleaded.—*IRELAND v. RENDALL* (1866), L. R. 1 P. & D. 194; 35 L. J. P. & M. 79; 14 L. T. 574; 30 J. P. 647.

Annotation:—Folld. Harrington v. Bowyer (1871), L. R. 2 P. & D. 261.

3286. — — — — —.]—If the next of kin or others having a right to put exors. upon proof of a will in solemn form of law, plead undue influence or fraud, they will be liable for costs, although they may have given a notice under rule 41 that they only intend to cross-examine the witnesses produced in support of the will.—*HARRINGTON v. BOWYER* (1871), L. R. 2 P. & D. 264; 41 L. J. P. & M. 17; 25 L. T. 385; 36 J. P. 184; 19 W. R. 982.

3287. — — — — — Will opposed without reasonable ground.]—The judge, being of opinion that defts. in a probate action had opposed the will without reasonable ground, ordered them to pay the costs of the other side, under Ord. 21, r. 18, as amended by R. S. C., July, 1898.—*Re SPICER, SPICER v. SPICER*, [1899] P. 38; 68 L. J. P. 19; 79 L. T. 707; 47 W. R. 271; 15 T. L. R. 40.

3288. — — — — — In suit for revocation of probate.]—Probate of a will had been taken out by the exor., & two years after the next of kin instituted a suit for the revocation of probate. The sole surviving attesting witness was brought over from Canada to give evidence, & after hearing him the ct. pronounced for the will. The heir-at-law had given notice, under rule 90, that he only intended to cross-examine witnesses, but the ct. condemned him in the costs of the suit.—*BEALE v. BEALE* (1874), L. R. 3 P. & D. 179; 43 L. J. P. & M. 70; 30 L. T. 770; 38 J. P. 711; 22 W. R. 712.

Annotations:—Distd. Leigh v. Green, [1892] P. 17. *Consd. Tomalin v. Smart*, [1904] P. 141.

3289. — — — — —.]—Defts., as exors., obtained probate of a will in common form. Pltf., after having made inquiries & received full information from defts., issued a writ against them, claiming revocation of the probate. Defts. set up the will, & counterclaimed that the probate should be delivered out to them. Pltf., in his reply, set out the grounds upon which he impeached the will, & gave notice, under R. S. C., Ord. 21, r. 18, that he did not intend to call witnesses, but merely insisted upon proof in solemn form:—*Held*: upon the wording of the rule & the facts of this case, pltf. was not protected by the notice from being condemned in the costs.—*TAPPENDEN v. LUCAS* (1891), 65 L. T. 684.

3290. — — — — —.]—*TOMALIN v. SMART*, No. 1198, *ante*.

3291. — Matters affecting exercise of court's discretion—Defendant a trustee.]—Where deft. in a probate action has given notice that he desires only to cross-examine the witnesses to a will, the ct. will, in deciding the question of costs if it pronounces for the will, give weight in case of doubt to the fact that deft. is a trustee & protecting the interests of the *cestuis que trust*.—*PERRY v. DIXON* (1899), 80 L. T. 297.

3292. The notice—Time for delivery.]—*BONE v. WHITTLE*, No. 3153, *ante*.

3293. — Whether conditional notice allowed.]—A conditional notice that if both the attesting witnesses to a will are produced the parties opposing it only intend to cross-examine the witnesses is a sufficient notice to protect them against condemnation in costs under Contentious Business Rules, r. 41.—*LEEMAN v. GEORGE* (1868), L. R. 1 P. & D. 542; 37 L. J. P. & M. 13; 17 L. T. 518; 32 J. P. 135.

Annotation:—Consd. Leigh v. Green, [1892] P. 17.

3294. — Whether revocable.]—*EDMONDS v. LEWER*, No. 3302, *post*.

SUB-SECT. 5.—AS REGARDS PARTICULAR PARTIES.

A. Executor.

3295. Executor unsuccessfully propounding will.]—*SAPH v. ATKINSON & WESTCOTT* (1822), 1 Add. 162; 162 E. R. 57.

Annotations:—Mentd. Russell v. Marriott (1835), 1 Curt. 9; *Wood v. Goodlake* (1839), 2 Curt. 82; *Mackenzie v. Yeo* (1842), 1 Notes of Cases, 516; *Borlase v. Borlase* (1845), 4 Notes of Cases, 106.

3296. — Will in favour of executor—Instructions given by executor.]—The asserted will of a person of fluctuating capacity, totally abandoning the principles of a former disposition, made before deceased's faculties were impaired, & long adhered to, pronounced against; & the exor., the person principally benefited, who, among other things indicative of fraud, had himself given the instructions, & whose son, a minor, alone spoke to the execution, condemned in costs.—*DODGE v. MEECH* (1828), 1 Hag. Ecc. 612; 162 E. R. 694.

3297. — Will procured by executor—Husband of testatrix.]—A *feme covert* having, under certain powers, made a will & codicil in Feb. 1818, eight months after marriage, by which, after making provision for her husband & leaving sundry legacies, she bequeathed the bulk of her fortune to, & appointed exors., strangers in blood; such disposition, except the provision for the husband, being similar to a will in 1816; made a will on Mar. 9, 1827, & a codicil thereto on Apr. 21, she dying on May 8, 1827, which papers, except legacies to three servants & rings to three friends, left all her property to her husband, & appointed exors., him & a total stranger; the ct., holding that the latter papers were obtained by the husband's undue influence, when her faculties were much impaired, pronounced for the will & codicil of 1818, & condemned the husband, who though he denied the validity of the powers & nominally prayed an intestacy, was the real party setting up the latter papers, in the costs of the exors. of the will of 1818.—*MARSH v. TYRRELL & HARDING* (1828), 2 Hag. Ecc. 84; 162 E. R. 793; *on appeal* (1832), 3 Hag. Ecc. 471.

Annotation:—Refd. Goldie v. Murray (1842), 6 Jur. 608.

PART II. SECT. 20, SUB-SECT. 5.—A.

d. *Executor of insolvent—Whether entitled.*—It is a settled rule that exors. of an insolvent shall not have costs; they need not have administered.—*ADAIR v. SHAW* (1803), 1 Sch. & Lef. 243.—*IR.*

3298. — — — **Suspicious circumstances.**—An exor. propounded a will made in his own favour, & under other circumstances giving rise to suspicion. The property was small, the proceedings very long. The will was pronounced against on failure of proof, & the exor. was condemned in costs.—**BENNETT v. FREE** (1849), 13 Jur. 769.

3299. — — — **Knowledge that will not duly executed.**—A testamentary suit having been instituted against a married woman without making her husband a party to it, she propounded a will knowing that it had not been duly executed. The ct. pronounced against the will, & condemned her in costs.—**CLARKSON v. WATERHOUSE** (1860), 2 Sw. & Tr. 378; 29 L. J. P. M. & A. 136; 1 L. T. 415; 24 J. P. 198; 6 Jur. N. S. 326; 164 E. R. 1042.

Annotation.—**Consd. Morris v. Freeman** (1878), 3 P. D. 65.

3300. — — — **Undue influence exercised by executor—On behalf of residuary legatee.**—Where a next of kin deft. successfully opposed, on the ground of undue influence exercised by the exor., & by the residuary legatee, a will propounded by the exor., the ct. condemned the exor. plff. in costs. Plff. was also exor. under an earlier will, which appointed the same residuary legatee, under which the exor. took nothing, & the ct. refused to make an order securing out of the estate to deft. such costs as he might not be able to recover from plff.—**NASH v. YELLOLY** (1862), 3 Sw. & Tr. 59; 1 New Rep. 69; 8 L. T. 290; 11 W. R. 541; 164 E. R. 1194.

3301. — — — **On own behalf.**—An extrix. having propounded a will in solemn form, the residuary clause, which was in her favour, was opposed, & the ct. pronounced for the will, excluding the residuary clause from the probate on the ground that it had been obtained by her undue influence. The ct. condemned her in the costs of the suit, with the exception of the costs of proving the will in solemn form, which she was allowed to take out of the estate.—**SMITH v. ATKINS** (1870), L. R. 2 P. & D. 169; 39 L. J. P. & M. 78; 22 L. T. 247; 34 J. P. 312.

3302. — — — **Circumstances *prima facie* suspicious.**—Where a party opposing a will has given notice that he merely insists upon the will being proved in solemn form of law, & only intends to cross-examine the witnesses produced in support of it, he may on the eve of the trial recall such notice, & substitute another expressive of his intention to produce, if necessary, witnesses on the trial of the cause. But, in such event, the hearing will be adjourned if the party propounding the will desire it.

Testatrix & attesting witnesses were all three marks-people, & the will of the exor. was handed by testatrix to plff. who retained the custody of it; he was exor. & principal legatee, & he propounded the will three years after her death. The ct. not being satisfied with the proof, refused probate, but declined to condemn plff. in costs, notwithstanding grave circumstances of suspicion with which the case was surrounded.—**EDMONDS v. LEWER** (1865), 13 L. T. 248; 11 Jur. N. S. 911.

3303. — — — **Will *prima facie* invalid—Executor not interested.**—The ct. will not relieve an exor. from the usual penalty of costs, where the will or codicil propounded by him is not sustained, on the ground that as exor. he took no interest under it. In a case of doubt the exor. should cite the party benefited by the instrument, or obtain security for costs from him before propounding it.—**RENNIE v. MASSIE** (1866), L. R. 1 P. & D.

118; 35 L. J. P. & M. 124; 14 L. T. 188; 14 W. R. 516.

Annotation.—**Folld. Roberts v. Cowmeadow** (1869), 21 L. T. 367.

3304. — — — — — **]**—A nude exor. who propounds a testamentary paper, of the validity of which there is no reasonable *prima facie* probability, cannot escape from the liability of being condemned in costs by the fact that he takes no interest under the paper.—**ROBERTS v. COWMEADOW** (1869), 21 L. T. 367; 33 J. P. 792.

3305. — — — — — **Refusal of information by plaintiff.**—Where the will of a deceased lunatic showed signs of insanity on the face of it, the exors. propounding the will were condemned in costs, although they called evidence to show that they were unaware of the condition of deceased, although plff. & her advisers, when applied to, had refused to give them any information as to the facts of her case.—**ROGERS v. LE COQ** (1866), 65 L. J. P. 68; 12 T. L. R. 209.

3306. — — — **Actual opponents without interest.**—The exor. propounded the will. It was opposed on behalf of the Crown by the solr. for the Duchy of Lancaster, who alleged that deceased had died intestate, leaving no next of kin, & also by persons claiming to be next of kin. The Crown & the other defts., whose interest was accepted by plff., pleaded the same pleas. All parties were represented by counsel at the trial, & the will was upset. The Crown did not ask for costs, & it ultimately turned out that the other defts. were not next of kin. The ct., notwithstanding, condemned the exors. in the costs incurred by them in the suit.

Plff. . . . chose to propound, & failed to support it. Under those circumstances the ct. always condemns the exor. in costs (**LORD PENZANCE**).—**Goss v. HILL** (1871), 40 L. J. P. & M. 39; 25 L. T. 133; 35 J. P. 617; 19 W. R. 878.

3307. — — — **Neglect to obtain information as to testator's capacity.**—**PAGE v. WILLIAMSON**, No. 3125, *ante*.

3308. — — — **Though not guilty of breach of duty.**—**JEFFRIES, HILL v. JEFFRIES**, No. 3119, *ante*.

3309. — — — **Will obtained by undue influence of co-executor.**—**In the Estate of BARLOW**, v. PRING, No. 3127, *ante*.

3310. — — — **Where action justifiable.**—Where the exors. of an earlier will, being disinterested persons, opposed on reasonable grounds a will of later date, & the verdict of the jury established the later will the exors. of the earlier will were held to be entitled to their costs out of the estate of deceased.—**FOALE v. TRUTHWAY & BROWN** (1863), 4 Sw. & Tr. 201; 9 L. T. 87; 161 E. R. 1493.

3311. — — — — — **Will not duly executed Knowledge of executor.**—An exor. propounded a will in the interest of infant children, & did not become aware, until after the suit was instituted, that it had not been duly executed.—*Held*: under the circumstances the exor. was entitled to his costs out of the estate.—**DAVIES v. REES** (1865), 13 L. T. 609.

3312. — — — — — **Testator incapable—Knowledge of executor.**—Testator was of eccentric habits, but had always managed his own affairs. The exors. propounded his will, but failed to support it, the evidence showing that at the time it was executed he was not of sound mind. The ct., being of opinion that the exors. had acted in the *bona fide* belief of testator's capacity, & that they could have had no knowledge of his true life & character until it was disclosed on the trial, allowed their costs out of the estate. **BORRORON**

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v. KNIGHT (1873), L. R. 3 P. & D. 64; 42 L. J. P. & M. 41; 29 L. T. 43; 37 J. P. 647.

Annotations:—Distd. Twist v. Tye, [1902] P. 92. *Mentd. Jenkins v. Morris* (1880), 14 Ch. D. 674; *Birkin v. Wing* (1890), 63 L. T. 80; *Roe v. Nix* (1892), 9 T. L. R. 128.

3313. ——— *Exors. allowed in an administration suit the costs incurred by them in respect of litigation concerning the probate of testator's will, there being no ground for impeaching their conduct.—Re HARRISON, FULTON v. ANDREW* (1876), 46 L. J. Ch. 131; 24 W. R. 979; *prior proceedings, sub nom. FULTON v. ANDREW* (1875), L. R. 7 H. L. 448, H. L.

3314. ——— *Allowance for expenses.]—DEAN v. DAVIDSON* (1831), 3 Hag. Ecc. 554; 162 E. R. 1261.

Annotation:—Reid. Horton v. Willmot (1842), 3 Curt. 52.

3315. Executor unsuccessfully opposing codicil—Insufficient grounds.]—The exors. to a will & two codicils, having obtained probate in common form, refused the request of the principal beneficiary that they should obtain probate of a third codicil, which had subsequently come to light. In their defence to an action for supplemental probate of the codicil in question the exors. alleged "want of knowledge & approval," on the part of testator. The ct. being satisfied that the codicil had been duly executed, & that the plea of the exors. was without foundation, condemned them personally in costs.—*In the Estate of SPEKE, SPEKE v. DEAKIN* (1913), 109 L. T. 719; 30 T. L. R. 73; 58 Sol. Jo. 99.

3316. Executor also residuary legatee—Position not changed.]—TWIST v. TYE, No. 1164, *ante*.

3317. ——— Residuary clause only rejected—General costs allowed.]—SMITH v. ATKINS, No. 3301, *ante*.

3318. Proceedings abandoned—By executor.]—JENKINS v. BAYLEY (1754), 1 Lee, 568; 161 E. R. 209.

3319. ——— Suspicious circumstances of will.]—An attorney propounded, as exor., a will, which purported to be attested by two of his clerks. The next of kin pleaded in opposition to the will, issue was joined, & the case came on for trial before a jury. On the morning of the trial the counsel for the exor. stated that the exor. would consent to a verdict for deff. In the absence of a satisfactory explanation by plff. of the circumstances under which the will had been propounded & withdrawn, the ct. condemned him in the costs of the suit.—*RICHARDS v. HUMPHREYS* (1860), 29 L. J. P. M. & A. 137; 24 J. P. 408.

3320. ——— By opponents—After will upheld & order for new trial.]—After a verdict had been found establishing a will, & a rule nisi had been granted for a new trial, the next of kin opposing it abandoned his opposition. Two other next of kin, who had appeared in the suit, but had not pleaded, were allowed to plead & adopt the proceedings up to the time of the order, in order to carry on the opposition. Upon a verdict establishing the will being set aside on the ground that it was against evidence, & a new trial granted, the exors. who had obtained the verdict were allowed to take their costs out of the estate up to the time of the rule for a new trial being made absolute.—*BOULTON v. BOULTON* (1867), L. R. 1 P. & D. 456; 37 L. J. P. & M. 19; 17 L. T. 415; 32 J. P. 104.

3321. ——— On plaintiff propounding later will.]—Deft., widow of deceased, twelve months after the death of her husband, who died in Canada, took probate of a will in which she was named extrix. A month afterwards, a citation was

extracted by plff., calling upon deff. to bring such probate into the Registry, which she did. Plff. then propounded a later will, & after a short delay deff. withdrew from the suit. The ct. declined to condemn her in the costs.—*SMITH v. FLETCHER* (1869), L. R. 2 P. & D. 20; 21 L. T. 646; 34 J. P. 56.

B. Beneficiary Propounding Will loco executoris.

3322. General rule.]—A legatee entitled to have his expenses paid, when he establishes a paper.—*SUTTON v. DRAX* (1815), 2 Phillim. 323; 151 E. R. 1158.

Annotation:—Consd. Wilkinson v. Corfield (1881), 6 P. D. 27.

3323. ———.]—Costs are peculiarly in the discretion of the ct., & though the general rule is that a legatee *loco executoris* propounding & establishing a paper is entitled to his costs out of the estate, his unwise delay in producing the paper & thus occasioning the suit, is a ground for refusing them.—*HEADINGTON v. HOLLOWAY* (1830), 3 Hag. Ecc. 280; 162 E. R. 1158.

Annotations:—Consd. Burls v. Burls (1868), L. R. 1 P. & D. 472. *Mentd. Wellesley v. Vere* (1841), 1 Notes of Cases, 240.

3324. Who entitled under rule—Legatee acting in own interest—& interest of infant.]—B., acting really in the interest of an infant residuary legatee, succeeded in establishing a will, under which she herself took only a trifling legacy; the exor. having refused to propound the will.

The ct. held that the circumstances of the case were such as to warrant the opposition to the will, & at first refused to make any order as to costs; but, on the representation that B. was not primarily entitled to the grant with the will annexed, & so might never be in a position to repay herself the expenses of the suit, it ordered her costs to be paid out of the estate.—*BEWSHER v. WILLIAMS & BALL* (1861), 3 Sw. & Tr. 62; 8 L. T. 290; 11 W. R. 541, n.; 164 E. R. 1195.

Annotation:—Distd. Nash v. Yellooly (1862), 3 Sw. & Tr. 59.

3325. ——— Whether intervener.]—A., B., & C., three legatees named in a codicil, sought probate of it in solemn form against the exors. named in the will. Subsequently to their having propounded the codicil, D., another legatee, intervened. The exors. by their replication, which was given in after D. had intervened, admitted part of the alleged codicil, including the legacy to D.:—*Held: D.* was not entitled to have his costs out of the estate.—*SHAW & DICKENS v. MARSHALL* (1858), 1 Sw. & Tr. 129; 164 E. R. 660.

3326. ——— Person believing himself next of kin—Though not in fact entitled—Estate protected against Crown.]—(1) On the death of A., intestate, the Crown claimed the property, on the ground of her illegitimacy. B., one of the alleged next of kin, disputed the claim, & obtained a verdict in his favour. At the trial in 1862 no application was made on his behalf for an order for his costs, & no order on the subject was made by the ct. Shortly afterwards letters of administration of the personal estate & effects of A. were granted to him as next of kin, but in subsequent proceedings in the Ct. of Ch. it was found that he was no relation whatever of deceased. He now applied for an order for payment of his costs in the original suit in the Ct. of Probate out of the personal estate of A. The ct., looking to the time that had elapsed since the suit, to the fact that the parties interested in the estate of A. had received no notice of the application, that B. was a bkpt., & that no claim was made either by his assignee or his attorney, refused to make the order.

(2) *Seemle: if a person, believing himself to*

be next of kin of deceased, should dispute the claim of the Crown to the property & succeed in the suit, thereby protecting the property for those who have a right to it, he would be entitled to have his costs out of the estate, even though it should turn out that he was no relation whatever of the intestate.—*In the Goods of ELSLEY, DYKE v. WILLIAMS* (1871), L. R. 2 P. & D. 239; 40 L. J. P. & M. 33; 24 L. T. 805; 35 J. P. 744; 19 W. R. 784.

3327. To what costs entitled.—A legatee who has propounded a codicil & succeeded is entitled to same costs as an exor. in similar circumstances. *Deft.*, the exor. of the will of R., had proved the will only. *Pltfs.* propounded a codicil. The ct. having pronounced for the codicil, condemned *deft.* in costs, & gave *pltfs.* also out of the estate such sum *nomine expensarum* as would cover the additional expenses.—*WILKINSON v. CORFIELD* (1881), 6 P. D. 27; 50 L. J. P. 44; 45 J. P. 440; 29 W. R. 613.

3328. Exceptions to general rule—Costs unnecessarily increased.—*HEADINGTON v. HOLLOWAY*, No. 3323, *ante*.

3329. ———.—*RUSSELL v. MARRIOTT* (1835), 1 Curt. 9; 183 E. R. 4.

Annotations:—*Mentd.* Wood v. Goodlake, *Helps v. HITCHINGS* (1839), 2 Curt. 82; *Wellesley v. Vere* (1841), 1 Notes of Cases, 240.

See, generally, Sub-sect. 2, C., *ante*.

3330. ——— Lapse of time—Bankruptcy of party claiming as next of kin.—*In the Goods of ELSLEY, DYKE v. WILLIAMS*, No. 3326, *ante*.

C. Heir-at-Law.

See, now, Land Transfer Act, 1897 (c. 65), s. 2 (2), repealed by Law of Property Act, 1922 (c. 10), s. 156 (11); Administration of Estates Act, 1925 (c. 23), s. 2 (1).

3331. Before Land Transfer Act, 1897 (c. 65)—Whether liable in costs.—If an heir-at-law bring a bill to dispute a will, & the will is established, he shall pay costs at law & in equity; otherwise if he be a *deft.*—*GOUGH v. BOTEVEL* (1767), 1 Dick. 396; 21 E. R. 323, L. C.

3332. ———.—An heir-at-law is usually entitled to an issue of *devisavit vel non*, & is not liable to pay costs, notwithstanding the issue be found against him, & the will consequently be established.—*TUCKER v. SANGER* (1825), *McCle. & Yo.* 425; 148 E. R. 479.

3333. ———.—Where the heir-at-law of a testator filed a bill against the devisee & exor. impeaching the validity of the will, & an issue was directed which resulted in the validity of the will being established:—*Held*: the bill must be dismissed without costs as regarded the devisee, & *pltf.* must pay the costs of the exor.—*BANKS v. GOODFELLOW* (1871), L. R. 11 Eq. 472; 40 L. J. Ch. 511.

3334. ——— Heir cited under Court of Probate Act, 1857 (c. 77), s. 61.—A., B., & C., exors., propounded a will & two codicils. D., an exor. under the will, opposed the second codicil, pleading undue influence & fraud, & that testator was ignorant of the contents. E., testator's heiress-at-law, being cited to see proceedings entered an appearance. By an order made in chambers at the instance of the exors., she was required to plead or to be barred from ever disputing the will, & thereupon pleaded unsoundness of mind & undue influence as regarded the will & first codicil, as well as to the second codicil. The jury found a verdict for *pltfs.* on all the issues, & the ct. condemned *deft.*, generally, in the costs. On motion, on behalf of the heiress-at-law, to review the decree as to

costs:—*Held*: the position of an heir-at-law, cited under above Act, was similar to that of the next of kin when cited to see proceedings in the Prerogative Ct., & E., having placed the above pleas on the record, & having totally failed in proof of them, was liable to costs.—*FYSON v. WESTROPE & CUTTING* (1859), 1 Sw. & Tr. 279; 29 L. J. P. M. & A. 139; 32 L. T. O. S. 285; 5 Jur. N. S. 250; 104 E. R. 728; *sub nom.* *TYSON v. WESTROPE & CUTTING*, 7 W. R. 347.

3335. ——— Misconduct.—If an heir-at-law, alleging insanity in a devisee, file his bill against the devisee, & he fail in the issue *devisavit vel non*, he shall pay the costs of the issue, but not the costs of the suit, unless he might have asserted his claim by ejectment, & then his suit will be deemed vexatious, & he will be ordered to pay the costs of it.—*SCAIFE v. SCAIFE* (1828), 4 Russ. 309; 38 E. R. 822.

Annotation:—*Reid*. *Tatham v. Wright* (1831), 2 Russ. & M. 1.

3336. ———.—[Heir-at-law being also the devisee in trust, misconducting his defence, ordered to pay all the costs of the suit.—*MAN v. RICKETTS* (1844), 7 Beav. 93; 13 L. J. Ch. 194; 2 L. T. O. S. 456; 8 Jur. 159; 49 E. R. 998; *on appeal, sub nom.* *RICKETTS v. TURQUAND* (1848), 1 H. L. Cas. 472, H. L.]

Annotations:—*Mentd.* *Boysse v. Colclough*, *Boysse v. Rossborough* (1854), 1 K. & J. 124; *Andrew v. Andrew* (1855), 25 L. T. O. S. 30; *Evans v. Angell* (1858), 26 Beav. 202; *Josh v. Josh* (1858), 5 C. B. N. S. 451; *Orange v. Hekford* (1858), 4 Jur. N. S. 649; *Stacey v. Spratley* (1858), 2 De G. & J. 94.

3337. ———.—*GROVE v. YOUNG*, No.

3338. ——— Will previously established as to personalty.—A will executed under very suspicious circumstances by a testator whose testamentary capacity there was reasonable ground for disputing, was established as regarded personal estate by proceedings in the Ecclesiastical Ct. & before the judicial committee, to which H. was a party, as one of the next of kin. After this, at the hearing of a suit instituted by the devisee, H., who was also the heiress-at-law, asked for an issue *devisavit vel non*, which was granted. Further evidence was adduced on both sides, & the jury found in favour of the will:—*Held*: under the circumstances, the asking for an issue was not such vexatious & unreasonable conduct as to make H. liable to pay costs, but as she had asked for it with full knowledge of the former proceedings, the result of which made it very improbable that she could succeed on the trial, she ought not to receive costs.—*STACEY v. SPRATLEY* (1859), 4 De G. & J. 199; 28 L. J. Ch. 563; 33 L. T. O. S. 194; 5 Jur. N. S. 593; 7 W. R. 485; 45 E. R. 77, L. J.

Annotation:—*Reid*. *Re Somers, Somers v. Roxburgh* (1900), 44 Sol. Jo. 551.

3339. ——— Plea of Incapacity.—(1) Where an heir-at-law will bring a bill to set aside a will for insanity instead of an ejectment, he shall pay costs, if he fails.

(2) Where an heir is brought before the ct. as a *deft.*, & issue is directed to try the fraud or insanity of testator, though he fails in overturning the will, the ct. will not give costs against him.—*WEBB v. CLAVERDEN* (1742), 2 Atk. 424; 26 E. R. 656, L. C.

Annotations:—*As to* (1) *Consd.* *Scalfe v. Scalfe* (1828), 4 Russ. 309. *Generally, Mentd.* *Middleton v. Shorburne* (1841), 4 Y. & C. Ex. 358; *Allen v. M'Therson* (1847), 1 H. L. Cas. 191; *Boysse v. Rossborough* (1853), Kay, 71; *Jones v. Gregory* (1863), 2 De G. J. & Sm. 83.

3340. ———.—*SCAIFE v. SCAIFE*, No. 3335, *ante*.

Sect. 20.—Costs of probate actions: Sub-sect. 5, C., D., E., F., G. & H.; sub-sect. 6.]

3341. ————. *—[An heir-at-law, questioning the sanity of his ancestor, is entitled to an issue *devisavit vel non*, & if he fails in the issue, will not be compelled to pay costs, if the circumstances justified him in trying the issue; but costs will not be allowed to him.—SMITH v. DEARMER (1829), 3 Y. & J. 278; 148 E. R. 1184.]*

3342. ————. *Will previously established as to personalty.*—*STACEY v. SPRATLEY*, No. 3338, *ante*.

3343. ————. *Whether allowed costs—Right to put devisee to proof.*—*GROVE v. YOUNG*, No. 3136, *ante*.

3344. ————. *—[The exors. propounded a will which was opposed by the next of kin, who pleaded incapacity, that testator did not know & approve of the contents, undue influence, & fraud. The heir-at-law, an infant, obtained leave to intervene, though the exors. opposed it. The jury found against the exors. on the two first issues, but for them on the two last. The ct., on the ground that the evidence was not separable, condemned the exors. in the costs of all the issues, & also in the costs of the intervener.—RAYSON v. PARTON (1869), L. R. 2 P. & D. 38; 39 L. J. P. & M. 20; 21 L. T. 647; 34 J. P. 104; 18 W. R. 232.]*

Annotation:—Consd. Twist v. Tye, [1902] P. 92.

3345. ————. *Misconduct—Action brought for improper purpose.*—*A.*, a party entitled in distribution, & who was also heir-at-law, filed a bill in equity against *B.*, the extrix. of a will; & an issue, *devisavit vel non*, was directed to be tried, which ultimately ended in a verdict for the extrix. Immediately after filing the bill, *A.* cited *B.* in the Prerogative Ct. of Canterbury to bring in the probate of the will which had been granted to her in common form. *B.* propounded the will & examined three witnesses, to whom *A.* administered unobjectionable interrogatories. The evidence was published on the prayer of *A.* just before the first trial of the issue at common law, & no further step was taken in the cause till the ultimate decision as to the real estate in favour of the extrix., when *A.* consented to probate being taken by *B.* On a question as to *A.*'s costs:—*Held*: though, under the circumstances of the will, *A.* would have been entitled to his costs out of the estate, if the suit in the Prerogative Ct. had been brought with the simple object of taking the opinion of that Ct. on the will, yet as it appeared that the suit was brought with the view of eliciting facts & evidence to be used at the trial of the issue, *A.* ought not to be allowed his costs out of the estate.—*SWINFEN v. SWINFEN* (1859), 1 Sw. & Tr. 283; 29 L. J. P. M. & A. 153; 33 L. T. O. S. 77; 23 J. P. 231; 7 W. R. 461; 164 E. R. 730; *previous proceedings*, 27 Beav. 148.

3346. ————. *Plea of incapacity.*—*SMITH v. DEARMER*, No. 3341, *ante*.

3347. ————. *—[Heir-at-law disputing the will of a testator on the ground of insanity, though failing, allowed the costs of the issue at law, as it was not shown that he had raised the issue improperly or dishonestly.—WATERS v. WATERS (1854), 23 L. T. O. S. 242; 2 W. R. 642.]*

Annotation:—Consd. Roberts v. Kerslake (1855), 1 K. & J. 751.

3348. ————. *—[Heir-at-law, deft. in a suit to establish a will, disputing the will on the ground of insanity, does not as of course lose his*

*costs of the trial of an issue *devisavit vel non*, although he has gone into evidence to prove insanity, & failed; but the question of costs is in the discretion of the ct.—ROBERTS v. KERSLAKE (1855), 1 K. & J. 751; 25 L. T. O. S. 279; 3 W. R. 616; 69 E. R. 663.]*

3349. ————. *Will previously established as to personalty.*—*STACEY v. SPRATLEY*, No. 3338, *ante*.

3350. *Since Land Transfer Act, 1897 (c. 65).*—*TWIST v. TYE*, No. 1164, *ante*.

D. Married Women.

3351. *Liability to be condemned in costs.*—*CLARKSON v. WATERHOUSE*, No. 3299, *ante*.

3352. ————. *Married woman with separate estate.*—*In an action for probate which was tried by a jury, & in which the verdict was for pltf.:—Held*: the Probate Div. has power to condemn in costs deft., a married woman having general separate estate.—*MORRIS v. FREEMAN* (1878), 3 P. D. 65; 47 L. J. P. 79; 39 L. T. 125; 43 J. P. 7; 27 W. R. 62.

3353. *Whether proceedings “instituted” by married woman—Within Married Women’s Property Act, 1893 (c. 63), s. 2—Entry of caveat.*—*An exor.’s probate action, brought in consequence of a caveat entered by a married woman who was made a deft. to the action, resulted in a verdict for pltf. with costs against deft. Upon an application by pltf. under above sect., for an order for payment of the costs out of property to which deft. was entitled subject to a restraint on anticipation:—Held*: the proceedings in the probate action were “instituted” within the meaning of the Act of 1893 by the issue of the writ by pltf. & not by the entry of the caveat, or the appearance of the caveator in answer to the warning; & accordingly the order applied for could not be made.—*MORAN v. PLACE*, [1896] P. 214; 65 L. J. P. 83; 74 L. T. 661; 44 W. R. 593; 12 T. L. R. 407; 40 Sol. Jo. 514, C. A.

Annotations:—Distd. Nunn v. Tyson, [1901] 2 K. B. 487. Consd. Crickitt v. Crickitt, [1902] P. 177. Rejd. Re Emery, Emery v. Emery, [1923] P. 184. Mentd. Salter v. Salter (1896), 65 L. J. P. 117.

3354. ————. *Application for leave to intervene.*—*A summons by a married woman under R. S. C., Ord. 12, r. 23, & Probate Ct. Rules, 1862, r. 6, for leave to intervene in a pending probate action for the purpose of asserting her independent interest in the subject-matter, is a “proceeding instituted” by her within above sect., & therefore the ct. has jurisdiction to order, if it thinks fit, the costs of the action, as from the date of the summons to intervene, to be paid out of her separate property, including property which is subject to a restraint on anticipation. The fact that the married woman may have obtained an order giving her leave to intervene in the action “as a pltf.” followed by a delivery to the deft., of a pleading whereby she “adopts the pleadings of the pltf.” does not the less render her intervention a “proceeding instituted” by her within the section.—*CRICKITT v. CRICKITT*, [1902] P. 177; 71 L. J. P. 65; 86 L. T. 635; 18 T. L. R. 584, C. A.*

See, generally, HUSBAND & WIFE.

3355. *Whether ordered to give security—Husband not joined as co-plaintiff.*—*In the Goods of WILSON, THRELFALL v. WILSON*, No. 1187, *ante*.

E. Infants.

3356. *Unsuccessful infant defendant—Appearing by guardian ad litem.*—*The widow, extrix. of*

deceased, propounded his will. Defts. were a sister of deceased, who was one of the next of kin entitled in distribution in case of an intestacy; the husband of the before-named deft.; & an infant niece of deceased, who would also have been entitled to a share in the event of an intestacy. The infant appeared by her mother, who had been appointed her guardian *ad litem*. The first-named deft. appeared to the citation, but did not plead; her husband neither appeared or pleaded; but, on behalf of the minor, a statement of defence was put in, alleging that testator's marriage with plff. was null & void by reason of testator's insanity at the time; that the will was not duly executed; that testator did not know & approve of the contents; that he was not of sound mind at the time he executed it; & that the will was procured by means of the undue influence of plff. The trial lasted five days; the jury found for plff. upon every issue; & the ct. pronounced for the will, with costs to be taxed upon the higher scale. After completion of the taxation, the registrar refused to order payment thereof against any but the guardians *ad litem* of the minor, upon the ground that costs had never been ordered against an infant deft. in a probate suit, & because the first-named infant had not filed any defence. Upon appeal the ct. ordered payment of plff.'s taxed costs against the first-named deft., & against the minor, as well as against the guardians of the latter. — *VIVIAN v. KENNELLY* (1890), 63 L. T. 778.

See, generally, INFANTS.

F. Creditors.

3357. Creditor suppressing information—Liable for costs so caused.—*LYON & WERRINGTON v. BALFOUR*, No. 3139, *ante*.

3358. Creditor citing next of kin to take or refuse grant—Delay by next of kin.—*In the Goods of MILLAR* (1811), 6 Jur. 156.

3359. — Next of kin appearing & taking administration.—*In the Goods of SETTY* (1852), 18 L. T. O. S. 351; 16 Jur. 92.
Annotation: *Reid*. *Fairland v. Percy* (1875), L. R. 3 P. & D. 217.

G. The Crown.

3360. Whether general rule applies.—A. died, intestate & was presumed to have died without next of kin. Letters of administration of his estate were granted to B., the Solr. for the Treasury, on behalf of the Crown. These letters were afterwards revoked, & administration was granted to C., one of the next of kin of A. In a suit by C. against B. for payment over of the sums received by him:—*Held*: B. was not entitled to retain his costs.

Although it is a rule at law that the Crown neither pays nor receives costs, no such rule exists in this ct.—*KANE v. REYNOLDS* (1851), 4 De G. M. & G. 565; 21 L. J. Ch. 321; 24 L. T. O. S. 137; 1 Jur. N. S. 148; 43 E. R. 628; *sub nom.* *KANE v. MAULE*, *KANE v. REYNOLDS*, 3 Eq. Rep. 101; 3 W. R. 85, L. C.

Annotations:—*Mentd.* *A. G. v. Hammer* (1858), 27 L. J. Ch. 837; *Edgar v. Reynolds* (1858), 4 Jur. N. S. 399; *The Leda* (1863), Brown, & Lush. 19.

See CONSTITUTIONAL LAW, Vol. XI., pp. 530 *et seq.*

3361. Whether entitled to costs—Unsuccessful opposition to will.—The will, dated & executed on Nov. 15, 1839, of a testator who was labouring under certain delusions on the three previous days to its execution, & who destroyed himself on the day following, Nov. 16, while under temporary

insanity, pronounced for, & the costs of the Queen's Proctor, who opposed the will on behalf of the Crown, refused.—*CHAMBERS & YATMAN v. QUEEN'S PROCTOR* (1840), 2 Curt. 415; 163 E. R. 457.

Annotations:—*Mentd.* *Young & Smith v. Richards* (1840), 2 Curt. 371; *Mudway v. Croft* (1843), 2 Notes of Cases, 438.

3362. — Letters of administration revoked.—*KANE v. REYNOLDS*, No. 3360, *ante*.

3363. Whether liable for costs—Unsuccessful opposition to will.—The nominee of the Crown contesting the validity of a will of a bastard, a widower, & without issue, on the ground of testamentary incapacity at the time of execution, condemned in costs by the appellate ct., under Crown Suits Act, 1855 (c. 90), s. 2, upon an unsuccessful appeal from a sentence of the Prerogative Ct., establishing the will.—*DYKE v. BARTON* (1856), 10 Moo. P. C. C. 458; 14 E. R. 564, P. C.

Annotation:—*Mentd.* *The Leda* (1863), Brown, & Lush. 19.
3364. — — — — ——The Queen's Proctor unsuccessfully contested the validity of a will, & the parties moved to condemn him in costs:—*Held*: the ct. had no power to condemn the Crown in costs. *ATKINSON v. QUEEN'S PROCTOR* (1871), L. R. 2 P. & D. 255; 10 L. J. P. & M. 49; 25 L. T. 161; 35 J. P. 600; 19 W. R. 786.

H. Poor Persons.

See R. S. C. Ord. 16, rr. 29, 31A.

3365. Allowance nomine expensarum—Reduction where proceedings vexatious.—£5 only decreed on account of the poverty of the party *nomine expensarum* by way of stigmatising an unjust & vexatious suit. *BREWSTER v. CALEMBERG* (1757), 2 Lec. 368; 161 E. R. 372.

3366. Whether liable for costs.—W. obtained probate in common form of a paper professing to be the will of A. Such probate, at the suit of the next of kin of deceased, was revoked, the ct. holding that the paper in question was not the will of deceased, & that W. had been guilty of fraud in obtaining probate of it, & in contesting the suit. W., though suing in *forma pauperis*, was condemned in the costs of the suit.—*CARLESS v. THOMPSON* (1858), 1 Sw. & Tr. 21; 164 E. R. 611.

3367. — — — — ——*LEHMANN v. BONSALL* (1823), 1 Add. 389; 162 E. R. 137.

Annotation:—*Reid*. *Rind v. Davies* (1833), 4 Hag. Ecc. 394.

3368. — — — Taxation suspended—Enforcement subject to succession to property.—Where capacity & volition are established, a party suing in *forma pauperis* who after a long acquiescence calls in probate of a will, on a suggestion of incapacity, fraud, & circumvention, may be condemned in costs, & the taxation suspended.—*WAGNER v. MEARS* (1829), 2 Hag. Ecc. 524; 162 E. R. 944.

Annotation:—*Reid*. *Rind v. Davies* (1833), 4 Hag. Ecc. 394.

3369. — — — Discretion of court.—

RIND v. DAVIES, No. 1188, *ante*.

3370. Whether allowed costs—Costs of producing witnesses.—A pauper opposed a will which was pronounced against on the grounds of incapacity & undue influence:—*Held*: the pauper was entitled to the costs incurred in producing his witness.—*POWELL v. SCANTLEBURY* (1855), 1 Jur. N. S. 95.

SUB-SECT. 6.—SECURITY FOR COSTS.

See, now, R. S. C. Ord. 65, rr. 6, 6A, 7, & generally, PRACTICE.

3371. Who may be ordered to give security—

with or without an order that they be recovered over against the administrator.—*HOLDEN v. BLACK* (1905), 2 C. L. R. 768.—*AUS.*

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PART II. SECT. 20, SUB-SECT. 6.

f. Who may be ordered to give security—Party residing out of juris-

diction (claiming as creditor).—Parties residing out of the jurisdiction who come into the master's office in an administration action pursuant to a

Sect. 20.—Costs of probate actions: Sub-sects. 6 & 7.
Sect. 21: Sub-sects. 1 & 2.]

Bankrupt.]—A party propounding a will having become bkpt., directed to give security for costs.—*GOLDIE v. MURRAY* (1841), 2 Curt. 797; 1 Notes of Cases, 35; 6 Jur. 608; 103 E. R. 588.

3372. — Whether bankruptcy alone sufficient ground.]—(1) A person who has lodged a caveat against probate of a will is not, though his action compels the exors. to take proceedings, so much the actor in the proceedings as to be liable to give security for costs.

(2) The bkpcy. or insolvency of a deft. is not *per se* ground for ordering him to give security for costs.—*Re EMERY, EMERY v. EMERY*, [1923] P. 184; 92 L. J. P. 138; 130 L. T. 127; 39 T. L. R. 713.

3373. — Defendant residing abroad—If substantially plaintiff.]—As a general rule a deft. residing abroad will not be required to give security for costs. *Semble*: however, when deft. on the record is substantially pltf., he may if resident abroad be required to give security for costs. After letters of administration of the effects of A. on the presumption of his death had been decreed, but before the grant had been sealed, a person of same name as A., & resident abroad, entered a caveat, & in the subsequent contentious proceedings in which he was made deft., opposed the application for administration on the ground that he was the alleged deceased, the ct. refused to order him to give security for costs.—*ROBSON v. ROBSON* (1864), 3 Sw. & Tr. 568; 34 L. J. P. M. & A. 6; 11 L. T. 459; 10 Jur. N. S. 1243; 164 E. R. 1306.

Annotation:—Consd. Re Emery, Emery v. Emery, [1923] P. 184.

3374. — Married woman—Action brought after Married Women's Property Act, 1882 (c. 75).]—*In the Goods of WILSON, THIRLFAIR v. WILSON*, No. 1187, *ante*.

See, generally, HUSBAND & WIFE.

3375. — Caveator.]—*Re EMERY, EMERY v. EMERY*, No. 3372, *ante*.

SUB-SECT. 7. — TAXATION AND PAYMENT.

See, generally, PRACTICE.

3376. Taxation—Who may tax—Executor's costs.]—A residuary legatee cannot have the bill of an attorney employed by the exor. taxed.—*DOE d. SELWOOD v. BARNES* (1838), 1 Will. Woll. & II. 52; 2 Jur. 374.

3377. — On what scale.]—When the costs of a party opposing a will are directed to be paid out

of the estate of the party deceased, such costs are taxed not as between proctor & client, although more liberally than between party & party.—*EDMUNDS v. UNWIN* (1840), 2 Curt. 641; 103 E. R. 535.

3378. ——When the costs of the unsuccessful party to a testamentary suit are directed to be paid out of the estate, they are not taxed on so liberal a scale as between proctor & client.—*JEFFREY v. JEFFREY* (1859), 28 L. J. P. & M. 43.

3379. — What costs allowed—Charges of administrator pending suit.]—In a testamentary suit, condemnation in costs includes all the charges of an administrator pending suit.—*FISHER v. FISHER* (1878), 4 P. D. 231; 48 L. J. P. 69.

3380. — Decision by taxing registrar—Whether court will interfere.]—As a general rule the ct. will not interfere with the decision of the taxing registrar upon a mere question of quantum.

—*In the Estate of OGILVIE, OGILVIE v. MASSEY*, [1910] P. 243; 79 L. J. P. 113; 103 L. T. 154, C. A. *Annotations:—Apld. Bruty v. Edmundson*, [1917] 2 Ch. 285. *Consd. Slingsby v. A.-G.*, [1918] P. 236.

See, now, R. S. C., Ord. 65, r. 27 (37).

3381. Payment—How enforced—Charging order—Control taken out of solicitor's hands.]—*HEAP v. JACKSON*, [1886] W. N. 192.

3382. — Solicitor acting for executor successfully upholding will—Property preserved through his instrumentality.]—A testator by his will, after bequeathing his household furniture & effects to his wife, devised & bequeathed the residue of his real & personal estate to his wife for life, & after her decease, to his two daughters, of whom one was his legitimate daughter by a former wife & the other was illegitimate, in equal shares. Probate of the will being opposed by testator's daughters, the exor. brought a probate action against them to establish its validity, with the result that probate of the will was decreed. The bulk of the estate was realty:—*Held*: the solr. who acted for the exor. was entitled under Solicitors Act, 1860 (c. 127), s. 28, to a charge for his costs in the action upon the property devised & bequeathed by the will as property preserved through his instrumentality.—*Ex p. TWEED*, [1899] 2 Q. B. 167; 68 L. J. Q. B. 794; 81 L. T. 1; 48 W. R. 5, C. A.

See, generally, SOLICITORS.

3383. — Stay of subsequent proceedings—Until costs of former proceedings paid.]—The next of kin of a testator instituted a suit for administration with a will annexed bearing date 1808, of which the sole exor. & universal legatee was testator's wife, who predeceased him. In opposition parties claiming to be legatees set up the contents of a later will alleged to have been

notice to creditors, & claim to be creditors of an estate administered there, will be required to give security for costs.—*Re REES, URQUHART v. TORONTO TRUSTS CO.* (1884), 10 P. R. 425.—*CAN.*

g. — Matter for discretion of court.]—The making of an order that a pltf. resident out of the jurisdiction shall give security for costs rests solely in the discretion of the ct.—*M'NEANY v. MAGUIRE*, [1923] 2 I. R. 43.—*IR.*

h. — Consenting to charge his interest with costs.]—Where pltf. who was applying for an administration order had an interest in the estate in respect of which he applied, he was absolved from giving security for costs, although his residence was out of the jurisdiction, upon his consenting that his whole interest should be subject to a first charge in respect of any costs which he might be lawfully ordered to pay.—*Re ARMSTRONG, ARMSTRONG*

v. ARMSTRONG (1898), 18 P. R. 55.—*CAN.*

k. — Creditor.]—Security for costs not ordered in probate proceedings by a creditor, as it might stay proceedings of every one & tie up settlement of estate for months.—*Re PUGH'S ESTATE* (1908), 6 R. L. R. 342; 43 N. S. R. 230.—*CAN.*

l. — Caveator—Next of kin outside jurisdiction.]—A next of kin, a caveator, who merely requires to cross-examine the attesting witnesses to the will relied on by pltf., is not liable to give security for costs by reason of his being abroad.—*STEWART v. STEWART* (1861), 4 L. T. 685.—*IR.*

m. — Uncertified bankrupt.]—Deft., a caveator, being an uncertified bankrupt, ordered to give security for costs.—*LAMBERT v. BASSETT* (1877), 11 I. R. Eq. 291.—*IR.*

n. ——*See, generally, HARKLY*

v. RUSSELL, [1916] 50 I. L. T. 104.—*IR.*

PART II. SECT. 20, SUB-SECT. 7.

3377 i. Taxation—On what scale.]—Where a suit in the surrogate ct. is by order removed into Ch., & that ct. directs any of the parties to receive their costs, the costs to which they are entitled are those allowed by the Ct. of Ch. tariff, & not the costs of the Probate Ct. in England, or of the county cts. here, no tariff of costs for contentious cases in the surrogate cts. here having yet been established.—*Re HARRIS, HARRIS v. HARRIS* (1877), 24 Gr. 459.—*CAN.*

o. — Stenographer's fee.]—The settlement of an estate in the Probate Ct. was a protracted one, & the services of a stenographer were secured. Probate Act made no provision for the employment of a stenographer, but in case of a contest allowed

executed in 1877 or 1878, but which could not be found. The Ct. of Appeal, reversing the judgment of the Probate Div., decided that there was not sufficient evidence of the contents of the second will, & their decision was affirmed in the House of Lords. A fresh suit for probate of the second will was then commenced by the exor. of testator & residuary legatee of the will of 1877-78, who had been the confidential solr. of deceased, & who had acted as solr. for the legatees all through the litigation. This suit was founded upon fresh evidence of the contents & execution of the second will:—*Held*: although pltf. had been privy to the prior action, an application to stay the proceedings generally could not be granted, but that the proceedings ought to be stayed until the costs of pltf. in the prior action had been paid.—*PETERS v. TILLY* (1886), 11 P. D. 145; 55 L. J. P. 75; 35 W. R. 183.

— *By attachment & committal.*—*See, generally, CONTEMPT OF COURT*, Vol. XVI., pp. 46 et seq.

3384. Agreement for payment out of estate—Whether legal.—Pltf. in a probate action sought to establish the validity of a will as residuary legatee, & H., one of defts. as an exor. & the trustee of an infant beneficiary under a will of testator earlier in date, sought to establish the validity of that will. During the course of the proceedings in the action a contract was made between the pltf. of the one part & H. & the infant, who was also a deft., of the other part, whereby it was agreed that, whichever of the two wills was upheld by the ct., the costs of pltf. & of deft. H. & the infant should be paid out of the estate whether the ct. so ordered or not. The ct. pronounced in favour of the earlier will, & on application made refused to sanction the contract on behalf of the infant, & directed that pltf. should pay the costs of H. & the infant in the probate action. In an action by pltf. to recover his costs against deft. H. under the contract:—*Held*: the contract was not illegal & deft. was personally liable upon it.—*PRINCE v. HAWORTH*, [1905] 2 K. B. 768; 75 L. J. K. B. 92; 92 L. T. 773; 51 W. R. 249; 21 T. L. R. 402.

3385. Liability of executor under.—*PRINCE v. HAWORTH*, No. 3384, *ante*.

SECT. 21.—PRACTICE OF THE PROBATE DIVISION.

SUB-SECT. 1.—IN GENERAL.

3386. Former practice—Whether binding.—*In the Goods of GUNN*, No. 878, *ante*.

3387. ——*I said that by the Probate Act of 1857 (c. 77), s. 29, the practice of the Probate Ct., where not altered by that Act or by the rules made under it, was, so far as the circumstances of the case would admit, to be according to the practice of the Prerogative Ct., & that by the Jud. Act, 1875 (c. 66), s. 18, the rules & orders of ct. in force in the Ct. of Probate were to remain in force, unless or until they were altered by the rules in the 1st schedule to that Act or by future rules or orders, & that no rule or order having been made under either of the Acts altering the practice in such a case as the present one, the practice of the Prerogative Ct. would apply (Dr. TRISTRAM).—*DRUCE v. YOUNG*, [1899] P. 84.*

a fee to the Judge for taking down the evidence in writing:—*Held*: the fee for taking the evidence should be taxed to the Judge & paid over by him to the stenographer, & only one fee should be allowed.—*Re LOWMEYER ESTATE* (1920), 52 N. S. R. 499.—*CAN.*

3388. — Effect of subsequent rules of supreme court—Not expressly referring to probate division.—*Re HAILSTONE, HOPKINSON v. CARTER*, No 3431, *post*.

3389. Application of rules of common law courts—Under Court of Probate Act, 1857 (c. 77), s. 38—Time for application of costs of special jury.—The Ct. of Probate is bound to exercise the powers belonging to the common law cts. conferred on it by above sect. with regard to trials by jury in the same manner & subject to the same rules as the common law cts.; & therefore refused an application for a certificate for the costs of a special jury, because it was not made until several weeks after the trial of the cause.—*SKIPPER v. BODKIN* (1860), 2 Sw. & Tr. 1; 2 L. T. 636; 24 J. P. 344; 8 W. R. 589; 161 E. R. 890; *sub nom.* *SKIPPER v. SKIPPER*, 29 L. J. P. M. & A. 133.

3390. Application of Rules of Supreme Court—Non-contentious business.—*In the Goods of CASPARI*, No. 827, *ante*.

3391. — R. S. C., Ord. 6, r. 2—Service out of the jurisdiction.—Where one of defts. in a probate action was a foreign subject residing out of the jurisdiction, the ct. ordered that he should receive notice in lieu of service of a writ of summons marked as a concurrent writ under above rule.—*BEDDINGTON v. BEDDINGTON* (1876), 1 P. D. 426; 45 L. J. P. 44; 34 L. T. 366; 40 J. P. 328; 21 W. R. 348; 2 Chas. Pr. Cas. 199.

3392. — R. S. C., Ord. 52, r. 5—Interval between service of motion & hearing.—*DONOVAN v. DONOVAN* (1891), 91 L. T. Jo. 56.

3393. — R. S. C., Ord. 54, r. 4E—Service of summons.—*Re HAILSTONE, HOPKINSON v. CARTER*, No. 3431, *post*.

3394. Discontinuance of contentious business—No revival in formâ pauperis.—On the death of testatrix, probate of her will was granted in common form to the exors. named therein. Subsequently pltf., as exor. of a will of later date, called in the probate in order that it might be revoked, but in consequence of non-prosecution, the suit was dismissed. The will of later date was filed in the registry. The ct. refused to allow pltf. to recommence in formâ pauperis the contentious proceedings.—*CATHRELL v. JEFFRIES* (1864), 33 L. J. P. M. & A. 178; 10 Jur. N. S. 445.

SUB-SECT. 2.—CAVEATS.

See Non-Contentious Probate Rules, 1925, rr. 62, 66 & District Registry Rules, rr. 72, 75.

3395. Entry—Party entering afterwards witness in support of will.—The ct. allowed a person who was an exor. & a contingent reversionary legatee, but who had renounced all interest under the will to be a witness in support of the will, though a caveat was originally entered in his name.—*WADE v. EWEN* (1740), 5 Notes of Cases, 89, n. *Annotation*:—*Reid. Sanders v. Wigston* (1846), 5 Notes of Cases, 78.

3396. — Administration decreed—Effect of second caveat.—An administration decreed to a widow under a caveat, not to be stopped from passing the seal by a second caveat.—*WINGFIELD v. WINGFIELD* (1753), 1 Lec. 340; 161 E. R. 125.

3397. — By alleged executor—Right to

(1892), 18 V. L. R. 759. *AUS.*

PART II. SECT. 21, SUB-SECT. 2.

p. Entry—After order for foreign probate.—A caveat sealing a foreign probate is too late when an order is made directing the seal to be affixed.—*Re BISHOP'S WILL*

—*Omitted from attesting witness made a will, which was attested by three witnesses, but without any attestation clause. At the left of the*

Sect. 21.—Practice of the probate division:
2 & 3, A. & B.]

affidavit of testamentary documents.]—A party entering a caveat & alleging himself to be an exor. in the last will of deceased, without inserting the date, has a right to call for an affidavit of scripts, without swearing as to his belief that he is an exor. in some paper left by deceased.—*ANTROBUS v. LEGGATT* (1831), 3 Hag. Ecc. 616; 162 E. R. 1284.

3398. — Who may enter—Person not a solicitor—Ministerial act.]—Lodging a caveat is a ministerial act; & a person, not being a solr., who performs this act on behalf of another, is not liable to attachment under Solicitors Act, 1860 (c. 127), s. 26.—*Re PANTON*, [1901] P. 239; 70 L. J. P. 95; 84 L. T. 725; 45 Sol. Jo. 523.

— Place of.]—See Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 154.

Notice of caveats.]—See, now, Administration of Justice Act, 1925 (c. 28), s. 18 (2), (3); Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), Sched. V., Part I., 1 (iv); Non-Contentious Probate Rules, 1925 (District Registry Rules), r. 74.

3399. Warning—When directed by court.]—Deceased, under the powers given to her by her marriage settlement, executed a will. Subsequently the marriage was dissolved by the Ct. for Divorce, & the will itself was destroyed by burning. Administration, having been taken by her next of kin, was called in by the residuary legatee named in the will, who propounded the same, & the next of kin made no defence. A caveat had been entered by the person interested under the settlement, in case deceased had not duly executed a will; but such caveat was not warned by the party propounding the will. The ct. directed that the caveat should be warned, in order that the party who had entered it might, if he thought proper, intervene in the suit.—*MING v. MING* (1867), 36 L. J. P. & M. 51; 16 L. T. 69; 15 W. R. 718.

3400. — Time for appearance—When extended.]—A caveat entered by a next of kin, having been warned by the exors., the next of kin applied to have the time for entering an appearance extended to six months in order that a communication might be made with another next of kin who was in Australia, the caveat purporting to have been entered also on his behalf. The ct. rejected the motion.—*In the Goods of CORCORAN* (1862), 1 New Rep. 132; 11 W. R. 241.

3401. Withdrawal—Effect of—Caveat to prior will—Right to propound later will.]—An exor. of a will entered a caveat to a will of earlier date, but withdrew the caveat before it was warned, & allowed letters of administration with the earlier

will annexed to be granted to one of the residuary legatees named therein:—*Held*: he was not estopped by the withdrawal of the caveat under the circumstances from calling in the letters of administration with the earlier will annexed & propounding the alleged later will.—*GODDARD v. SMITH* (1872), L. R. 3 P. & D. 7; 42 L. J. P. & M. 14; 28 L. T. 141; 37 J. P. 199; 21 W. R. 247.

SUB-SECT. 3.—CITATIONS.

A. In General.

See Probate Act, 1857, s. 61; Probate Act, 1858, s. 16; Administration of Estates Act, 1925 (c. 23), s. 5; Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 159; Non-Contentious Business Rules, 68–70; District Registry Rules, 79 & 80; Contentious Business Rules, 13–17; Non-Contentious Probate Rules, 1925, rr. 66, 76; R. S. C., Ord. 5, r. 15.

3402. Who may be cited—Whether heir-at-law—Under Court of Probate Act, 1857 (c. 77), s. 61—Before plea filed.]—A testamentary suit was commenced by caveat, & after warning of the caveat & entry of appearance by the next of kin, extrix. under an alleged will filed a declaration propounding the will:—*Held*: leave to cite the heir-at-law of testator under above Act, s. 61, could not be granted until a plea had been filed denying the validity of the will.—*COMLESTONE v. NICHOLAS* (1863), 33 L. J. P. M. & A. 57.

Annotations:—*Follid.* Moore & Barber v. Holgate (1866), L. R. 1 P. & D. 101. *Refd.* Peacock v. Lowe (1867), 15 W. R. 717; Moran v. Place, [1896] P. 214.

3403. — — — Before time for pleading expired.]—The ct. refused, as premature, an application for leave to cite the heir-at-law, the time for pleading to the declaration not having elapsed, & the next of kin not having been cited.—*MOORE & BARBER v. HOLGATE & WIFE* (1866), L. R. 1 P. & D. 101; 35 L. J. P. & M. 46; 14 L. T. 24; 14 W. R. 515.

Annotation:—*Expld.* Peacock v. Lowe (1867), L. R. 1 P. & D. 311.

3404. — Executor—Refusing to produce probate.]—Where an exor. had proved a will, power being reserved to his co-exors. to come in & prove it, upon his refusal to produce the probate & an account of the estate in respect of which it had been granted, so as to enable a co-exor. to prove the will without payment of probate duty, the ct. directed a citation to issue against him.—*In the Goods of TURRELL* (1862), 2 Sw. & Tr. 456; 31 L. J. P. M. & A. 170; 6 L. T. 162; 26 J. P. 695; 10 W. R. 430; 164 E. R. 1073.

Annotation:—*Refd.* Re Griffin (1910), 54 Sol. Jo. 378.

last witness's name appeared the name of a third person; the husband of one of the legatees. The legatee filed a caveat, accompanied by a memorandum, that she desired to have her husband's name excluded from probate:—*Held*: the proper course for the caveatrix to have adopted was not to have filed a caveat, but to have informed the exors. of the circumstances, in order that they might move for probate with the omission of the husband's name.—*Re FROST'S WILL* (1903), 4 S. R. N. S. W. 254; 20 N. S. W. W. N. 165.—*AUS.*

r. Registration—Probate not taken out—Until year after death of owner.]—56 Vt. c. 20 (U.), as to registration of cautions, apply to a case in which probate has not been taken out or letters of administration obtained till more than a year after the death of the owner.—*Re MARTIN* (1895), 26 O. R. 465.—*CAN.*

s. — After expiry of three years—Certificate of official guardian—Authorising registration.]—*Re BOWERMAN & HUNTER* (1909), 18 O. L. R. 122; 13 O. W. R. 891.—*CAN.*

t. Jurisdiction of Court of Probate to set aside.]—The Ct. of Probate has no jurisdiction to set aside a caveat on the ground that the party who has filed it has not filed a plea.—*ROONEY v. FEENEY* (1869), 17 W. R. 536.—*IR.*

u. Interest of caveator—Entitling him to oppose grant.]—A., a judgment-creeitor, attached certain property as belonging to B., his debtor. B. was the next of kin of C., deceased. The widow of C. applied for probate of an alleged will of her husband. On caveat entered by A.:—*Held*: he had such an interest as entitled him to oppose the grant.—*Re BHOROSOUNDERI DABEE, NOBEN CHUNDER SIL v. BHOROSOUNDERI DABEE* (1880), 1 L. R. 6 Calc. 460.—*IND.*

PART II. SECT. 21, SUB-SECT. 3.—A.

b. Who may be cited—Creditors—Next of kin.]—B. was removed from the office of administrator & another administrator appointed in his place, on an *ex p.* order made at a time when B. was absent from the province, & there was a balance in his favour. B. presented a petition to the Probate Ct. praying for a citation to all necessary parties, & the final settlement of the estate. The administrator having appeared the judge proceeded to settle the estate:—*Held*: a citation should have been issued on the part of the administrator calling upon the creditors, next of kin, etc., to come in & attend a settlement of accounts.—*Re McRAE'S ESTATE* (1895), 26 N. S. R. (16 R. & G.) 214.—*CAN.*

c. Duty of judge—On return to citation.]—Upon petitioners presenting evidence to prove a will in solemn form on the return of a citation therefor,

3405. Affidavit to lead citation—By whom made—Attorney of applicant abroad—Estate about to be distributed.]—A party interested in the property of deceased, who desired to call in the probate of his will, & to put the execs. to the proof thereof, resided in Tasmania. The ct. on an affidavit that the estate of deceased was about to be distributed by the Ct. of Ch. amongst those who claimed it under the will, allowed a citation to issue on an affidavit from the person authorised by a power of attorney to institute the suit on behalf of the party interested.—*In the Goods of HUTLEY* (1869), 1 L. R. 1 P. & D. 596; 38 L. J. P. & M. 27; 19 L. T. 704; 33 J. P. 167.

3406. ——— Solicitor of applicant.]—Application for leave for pltf.'s solr. to swear the necessary affidavits to lead the citation & writ in an action for revocation of probate, pltf. being temporarily out of the jurisdiction, refused.—*In the Estate of LAKE* (1909), 25 T. L. R. 825; 53 Sol. Jo. 734.

3407. Effect of citation—On former sentence.]—*PACKMAN'S CASE*, No. 3065, *ante*.

3408. Effect of non-appearance—Party interested in supporting will.]—*BODINCOTE v. GOSSET* (1849), cited in 32 L. J. P. M. & A. at p. 176. *Annotation* :—*Fold*, *Morton v. Thorpe* (1863), 32 L. J. P. M. & A. 171.

3409. ——— Party propounding will.]—*In the Goods of MORTON*, *MORTON v. THORPE*, No. 2013, *ante*.

B. Service.

3410. Necessity for.]—A citation which had not been served on the party against whom it had been entered, holden to be void.—*MURPHY v. MCCARTHY* (1758), 2 Lee, 529; 161 E. R. 428.

3411. ———.]—The Ct. of Probate has no power to dispense with service of citations. Leave to proceed to prove a will in solemn form will not be granted unless citations have been personally served on the persons entitled to see proceedings, or, if personal service is impracticable, have been duly advertised.—*POTTS v. POTTS* (1860), 30 L. J. P. M. & A. 112; 24 J. P. 777.

3412. By whom—Not party to suit.]—Service of a citation by a party to a suit is insufficient.—*GLYDE v. DAVIE* (1864), 33 L. J. P. M. & A. 184.

3413. Mode of—Personal service—Advertisement.]—*POTTS v. POTTS*, No. 3111, *ante*.

3414. ——— Substituted service—Party resident in West Indies—No agent within jurisdiction.]—Administration with will annexed granted to legatee, on a service on the Royal Exchange, & on an affidavit that there was no agent in this country; but, as a rule, where the parties interested are only in the West Indies, the ct. will require notice to be given to them by a requisition.—*NORRINGTON v. NEMBHEAD* (1830), 3 Hag. Ecc. 278, n.; 162 E. R. 1158.

3415. ——— When allowed.]—Where a writ cannot be served personally upon one of several debtors, by reason of his address being unknown & not ascertainable, the ct. will not dispense altogether with the service, but will direct service of the writ to be effected by advertisement, following the old practice of the Ct. of Probate in the service of citations.—*WHITLEY v. HONEYWELL*

(1876), 35 L. T. 517; 41 J. P. 57; 24 W. R. 851; 2 Ch. Pr. Cas. 212.

See Probate Rules (Contentious Business), 1802, rr. 18, 19.

3416. ——— On infant or minor—General rule.]—In all cases of process served on a minor the ct. requires a certificate of its having been served in the presence of the natural or legal guardian of the minor; or at least in that of some person or persons upon whom the actual care & custody of the minor, for the time being, has properly devolved.—*COOPER v. GREEN* (1825), 2 Add. 454; 162 E. R. 361.

Annotation :—*Consd.* *Quinn v. Quinn*, [1920] P. 65.

3417. ———.]—*BROWN v. WILDMAN*, No. 1741, *ante*.

3418. ———.]—Where a minor of the age of seventeen was living in service at a distance from her mother, her natural guardian, the ct. dispensed with the ordinary rule, which requires service of a citation upon a minor to be effected upon her in the presence of her natural or legal guardian, or of some person upon whom her custody for the time being properly devolved.—*LAINSON v. NAYLOR* (1802), 2 Sw. & Tr. 7; 29 L. J. P. M. & A. 126; 2 L. T. 391; 8 W. R. 451; 164 E. R. 892.

3419. ——— Guardian resident at a distance.]—*LAINSON v. NAYLOR*, No. 3118, *ante*.

See, generally, *INFANTS*.

3420. ——— Guardian refusing to be present—Attempted service on next of kin.]—Where a citation was served upon two minors at the house where they resided, but their custodian declined to be present at the service, & an attempt was also made to serve the citation on the next of kin of the minor, but failed by reason of the process server not being permitted to see the next of kin, the ct. held the service on the minors to be sufficient.—*LEAN v. VINEY* (1864), 3 Sw. & Tr. 469; 33 L. J. P. M. & A. 88; 164 E. R. 1357.

3421. ——— On lunatic—On committee.]—Where a person whom it is necessary to cite as interested in the estate of a deceased is a lunatic, & a committee of his estate has been appointed, service of the citation upon such committee is sufficient. It is not necessary that the lunatic should be personally served in the presence of some medical man.—*In the Goods of SURTEES* (1859), 28 L. J. P. & M. 89.

3422. ———.]—When a party upon whom a citation is to be served is a lunatic, the citation should be issued in the usual form, & served upon the committee, or if there is no committee, upon the next of kin of the lunatic, or some other person on his behalf, & the affidavit of service should state the fact of the lunacy, & the manner in which the service has been effected.—*MOSELEY v. BURNS* (1860), 25 J. P. 24.

3423. ——— On guardian—Refusal to allow personal service on lunatic.]—*In the Goods of ATHERTON*, No. 1838, *ante*.

3424. ——— Whether in presence of medical attendant.]—*In the Goods of SURTEES*, No. 3121, *ante*.

3425. ———.]—*In the Goods of PRICE*, *WATKINS v. BUSHELL* (1904), 20 T. L. R. 540.

See, now, R. S. C., Ord. 2, r. 5.

the caveator claimed the right to first call, petitioners to be cross-examined upon statements made by them in their petition; & upon the judge of probate deciding that petitioners should be first called & so cross-examined :—*Held*, the judge's duty upon the return of a citation is to first hear sufficient evidence to establish *prima facie* the validity of the will, & he was in error in ordering that the

caveator be allowed to call petitioner to be cross-examined on matters stated in the petition.—*Re McDONALD* (1920), 47 N. B. R. 379.—*CAN.*

d. Effect of citation.]—Merely citing a person in a probate application does not make him a deft.—*SAROJA SUNDARI BAKAK v. ABHOY CHARAN BAKAK* (1914), 1 L. R. 41 Cal. 819.—*IND.*

PART II. SECT. 21, SUB-SECT. 3.—B.

3413 I. Mode of—Personal service.]—Where execs. applied for probate & there was living a minor widow entitled to maintenance & residence under the will :—*Held*, a special citation should issue upon the widow & be served personally on her & on her father with whom she resided.—*In the Goods of AMRITA LAL MULLICK* (1900), 1 L. R. 27 Cal. 359.—*IND.*

Sect. 21.—Practice of the probate division: Sub-sect. 3, B. & C.; sub-sects. 4 & 5, A., B. (a) & (b) i. & ii.; sub-sect. 6.]

3426. — Where no committee—On next of kin.]—MOSELEY v. BURNS, No. 3422, *ante*.
See, generally, LUNATICS.

3427. Certificate of service—Necessity for indorsement.]—When a citation has been served, a certificate of service should be indorsed on the citation.—GOODBURN v. BAINBRIDGE (1860), 2 Sw. & Tr. 4; 29 L. J. P. M. & A. 163; 2 L. T. 439; 8 W. R. 504; 164 E. R. 891.

3428. Affidavit of service—On lunatic—What must be included.]—MOSELEY v. BURNS, No. 3422, *ante*.

C. Who must be cited.

On proof in solemn form—Necessary parties.]—
See Sect. 6, sub-sect. 9, C. (a), ante.

On application for grant of administration—With will annexed.]—*See Sect. 12, sub-sect. 1, C., ante.*

De bonis non.]—*See Sect. 12, sub-sect. 2, E., ante.*

Pendente lite.]—*See Sect. 12, sub-sect. 7, C., ante.*

To attorney.]—*See Sect. 12, sub-sect. 8, C., ante.*

Ad litem.]—*See Sect. 12, sub-sect. 10, G., ante.*

Limited to specific effects.]—*See Sect. 12, sub-sect. 11, E., ante.*

On application for revocation of grant.]—*See Sect. 15, sub-sect. 3, C., ante.*

SUB-SECT. 4.—SUMMONSES AND MOTIONS.

See Contentious Rules, 98–106.

3429. Notice of application for directions—Who may apply after notice given.]—A notice that application would be made for directions as to the mode of trial having been given by one party in a suit to the other, in pursuance of r. 23, but not such application having been made, the ct. made the order upon the application of the party to whom the notice had been given.—BARNARD v. BURROUGHS (1861), 25 J. P. 440.

3430. Length of notice necessary—Motion—Governed by R. S. C., Ord. 52, r. 5.]—DONOVAN v. DONOVAN (1891), 91 L. T. Jo. 56.

3431. — Summons—Not affected by R. S. C., Ord. 54, r. 4E.]—Rule 100 of the Probate Contentious Rules, 1802, remains in force notwithstanding R. S. C., Ord. 54, r. 4E, & therefore in the case of a summons in a probate action one clear day's service before the return thereof is sufficient.—*Re HAILSTONE, HOPKINSON v. CARTER*, [1909] P. 118; 78 L. J. P. 55; 100 L. T. 420; 53 Sol. Jo. 321, C. A.
Annotation:—Reid, In the Estate of Shrewsbury, McLeod v. Shrewsbury, [1922] P. 112.

SUB-SECT. 5.—DISCOVERY AND PRODUCTION OF DOCUMENTS.

A. Discovery.

See DISCOVERY, Vol. XVIII., p. 54, Nos. 109–112.

PART II. SECT. 21, SUB-SECT. 4.

9. Devise — Summary application to determine—Scope of Rule 938.]—There is no jurisdiction upon an originating summons under Rule 938 to decide a question arising between legal devisees under a will, where the question propounded does not in any way relate to the administration of the

estate.—*Re CAFFERTY'S ESTATE* (1907), 10 O. W. R. 1119; 15 O. L. R. 396.—CAN.

PART II. SECT. 21, SUB-SECT. 5.—B. (a).

1. For what purposes — Preparation of letters ad colligenda bona.]—

Examination of parties as to possession of testamentary documents.]—*See Sub-sect. 5, B. (b) ii., post.*

B. Production.

(a) When ordered.

3432. In respect of what documents—Original will—Withheld by creditor.]—A will withheld by a creditor ordered to be brought in on the application of the extrix.—BETHUN v. DINMURE (1752), 1 Lee, 158; 161 E. R. 59.

3433. — Over which solicitor claims lien.]—*Qu.*: whether an attorney's lien upon papers extends to the original will of his client.

Ordered to produce it before the examiner, & for the hearing of the cause without prejudice.—GEORGES v. GEORGES (1811), 18 Ves. 294; 34 E. R. 328.

3434. — — — — —.]—A solr. has no lien upon the will of his client, & cannot refuse to produce a deed executed by the client in his favour, containing a reservation of a life interest, & a power of revocation.—BALCH v. SYMES (1823), Turn. & R. 87; 37 E. R. 1028, L. C.

Annotations:—Reid, A.-G. v. Thompson (1849), 8 Hare, 106; *Costa Rica Republic v. Erlanger* (1874), L. R. 19 Eq. 33. *Mentz, Roberts v. Jefferys* (1830), 8 L. J. O. S. Ch. 137; *De Bay v. Griffin* (1875), 10 Ch. App. 292, n.; *Angus v. McLachlan* (1883), 23 Ch. D. 330; *Re Taylor, Stilleman & Underwood*, [1891] 1 Ch. 590; *Re Morris*, [1908] 1 K. B. 473.

3435. — — — — —.]—The Ct. of K. B. will not grant a writ of prohibition restraining the Prerogative Ct. of Canterbury from compelling an attorney to bring the will of a deceased client into that ct. & there leave it to be registered, on the ground that the attorney has a lien upon the will for the amount of his bill, due from deceased.—*Re WOOD, Ex p. LAW* (1834), 2 Ad. & El. 45; 4 Nev. & M. K. B. 7; 4 L. J. K. B. 18; 111 E. R. 18.

See, generally, DISCOVERY, Vol. XVIII., pp. 113 et seq.; EVIDENCE, Vol. XXII., pp. 218 et seq., 237 et seq.; SOLICITORS.

3436. — All testamentary papers—Duplicate of will.]—(1) All testamentary papers are to be brought into the Prerogative Ct. when required.

(2) A duplicate is a part of a will, & to be considered as a testamentary paper.—KILLICAN v. PARKER (LORD) (1754), 1 Lee, 662; 161 E. R. 241.

Annotations:—As to (2) Fold. Doe d. Strickland v. Strickland (1849), 8 C. B. 724. *Reid, Atkinson v. Morris*, [1897] P. 40.

3437. — — — — — Papers possibly testamentary.]—Papers which may be of a testamentary nature not to be withheld from the ct.—JANGMEAD v. LEWIS (1815), 2 Phillim. 325; 161 E. R. 1150.

Annotation:—Reid, Peacock & Peake v. Lowe (1867), 36 L. J. P. & M. 91.

3438. — — — — — All wills & testamentary papers of deceased.]—Where the exors. & solrs. of deceased testatrix had refused to give any information as to previous wills alleged to have been executed by testatrix to persons who believed themselves to have been benefited by them, the ct. under Court of Probate Act, 1857 (c. 77), s. 26, ordered them to bring into the registry all wills & testamentary papers of deceased in their possession & to allow appcts. to take copies of them.

I shall make an order that the exors. deposit in the registry the wills & other testamentary documents, the possession of which the solrs. admit in

Where the ct. has given leave to take out letters of administration *ad colligenda bona*, & a person other than the person to whom such leave has been given is in possession of papers of deceased, the ct. will order the person in possession of such papers to lodge them in ct.—*In the Goods of WILSON* (No. 1) (1907), 42 L. L. T. 38.—IR.

their affidavit & that appcts. be at liberty to take copies of them. Appcts. must, however, pay the costs of such deposit & of this motion (JEUNE, J.).—*In the Goods of SHEPHERD*, [1891] P. 323; 60 L. J. P. 102.

3439. — Confined to testamentary papers—Paper purporting to be extract from lost will—Written from recollection.—The ct. refused to order the production of a paper purporting to contain an extract from a lost will, & written from recollection by a person who had made a copy of the will before testator's death.—*DENT v. DENISON* (1860), 24 J. P. 696.

3440. — Settlement referred to in will.—*In the Goods of SIBTHORP*, No. 1374, *ante*.

What papers are testamentary, *see, generally*, WILLS.

3441. For what purposes—Copies to be made by persons interested—Payment of deposit for inspection.—*In the Goods of SHEPHERD*, No. 3438, *ante*.

(b) *How obtained.*

i. *By Subpœna.*

3442. Grounds for granting—Belief of possession.—*Re FLOYD* (1909), 53 Sol. Jo. 790.

3443. Power to issue—For service out of jurisdiction.—*Re HAMBOROUGH* (1894), cited in Halsbury's Laws of England, Vol. XIV., p. 153.

—*See, generally*, EVIDENCE, Vol. XXII., pp. 427 *et seq.*

3444. Effect of non-compliance—Whether contempt—Party not in possession or control of document.—Where a writ of subpœna was issued in a non-contentious matter directing R., a solr., to bring into the Probate Registry a script which was stated to be, but which was not in fact, in his possession or control:—*Held*: his non-compliance with the subpœna was not, under the circumstances, a contempt; the fact that he had not followed the practice general in such a case, & compulsory in a contentious matter, of filing an affidavit explaining the reason for his non-compliance, with which practice he was acquainted, was not a contempt; & there being no contempt, the ct. had no jurisdiction to order him to pay the costs of an application for an order directing him to attend for examination before the judge, or of his consequent attendance.—*Re EMMERSON, RAWLINGS v. EMMERSON* (1887), 57 L. J. P. 1, O. A.

3445. — & omission to file explanatory affidavit—Whether contempt.—*Re EMMERSON, RAWLINGS v. EMMERSON*, No. 3444, *ante*.

See, generally, CONTEMPT OF COURT, Vol. XVI., pp. 41, 42.

3446. — Whether attachment will issue—Nature of application for.—The ct. granted an order for an attachment against A. for the disobedience of a subpœna to bring in a will; but directed that the attachment should lie in the Registry for eight days after notice to A. of its having issued, before proceedings should be taken to enforce it.—*SIMMONS v. DEAN* (1858), 27 L. J. P. & M. 103.

See, generally, CONTEMPT OF COURT, Vol. XVI., pp. 46 *et seq.*

3447. — Forthwith.—Where a subpœna has been personally served upon an individual to bring in a testamentary paper, & such individual fails to comply therewith, the ct. will not at once order an attachment to issue against him, but will make a preliminary order that he shall attend in ct. to be examined in reference to his possession of such paper.—*PARKINSON v. THORNTON* (1867), 37 L. J. P. & M. 3.

Annotation:—Re EMMERSON, RAWLINGS v. EMMERSON (1887), 57 L. J. P. 1.

See, generally, CONTEMPT OF COURT, Vol. XVI., pp. 72, 75, 76.

— **Order for attendance & examination.**—*See* Sub-sect. 5, B. (b) ii., *post*.

ii. *By Order for Attendance and Examination.*

3448. When issued—On non-compliance with subpœna.—*PARKINSON v. THORNTON*, No. 3447, *ante*.

3449. — ——*Re FLOYD* (1909), 53 Sol. Jo. 790.

3450. Right to conduct money.—*Seem*: conduct money cannot be claimed in the first instance by a person who is directed to attend for the purpose of being examined pursuant to Ct. of Probate Act, 1857 (c. 77), s. 26.—*In the Goods of WYATT*, [1898] P. 15; 67 L. J. P. 7; 78 L. T. 80; 46 W. R. 425.

Annotation:—Re EMMERSON, RAWLINGS v. EMMERSON, [1907] P. 239.

3451. — ——Upon a motion to attach a person for not complying with an order made under Ct. of Probate Act, 1857 (c. 77), s. 26, directing his attendance in ct. for cross-examination as to his knowledge of a certain testamentary paper:—*Held*: the motion must be refused, no conduct money having been tendered.—*In the Estate of HARVEY*, [1907] P. 239; 76 L. J. P. 61; 23 T. L. R. 433; 51 Sol. Jo. 357.

Annotation:—Disid. Jeffries v. Jeffries (1907), 51 Sol. Jo. 572.

3452. Conduct of the examination—Whether witness entitled to counsel.—A party having been brought before the ct. under Ct. of Probate Act, 1857 (c. 77), s. 26, to be examined as to her knowledge of the testamentary papers of deceased, counsel was permitted to attend on her behalf, to put questions to her, & also to the other persons who had been required to attend on the same inquiry.—*In the Goods of COPE* (1867), 36 L. J. P. & M. 83.

3453. — Either in open court—Or by interrogatories.—The examination of a person respecting his knowledge of testamentary papers under Ct. of Probate Act, 1857 (c. 77), s. 26, must be either in open ct. or on interrogatories.—*In the Goods of LAWS* (1872), L. R. 2 P. & D. 458; 41 L. J. P. & M. 41; 26 L. T. 530; 36 J. P. 503; 20 W. R. 572.

3454. Examination on commission—Power to order.—The ct. has power, under Ct. of Probate Act, 1857 (c. 77), s. 26, to order a commission to issue to examine a person as to her knowledge of a testamentary paper.—*In the Goods of PICKARD, BANFIELD v. PICKARD* (1881), 6 P. D. 33; 50 L. J. P. 72; 45 J. P. 508; 20 W. R. 613.

3455. Costs of order—Liability of party served not in contempt.—*Re EMMERSON, RAWLINGS v. EMMERSON*, No. 3444, *ante*.

3456. — Liability of party refusing production on subpœna.—*Re FLOYD* (1909), 53 Sol. Jo. 790.

3457. Non-compliance with order—Whether contempt—Where conduct money not tendered.—*In the Estate of HARVEY*, No. 3451, *ante*.

SUB-SECT. 6.—ATTENDANCE AND EXAMINATION OF WITNESSES.

See Court of Probate Act, 1857 (c. 77), ss. 24, 26, & *generally*, EVIDENCE.

3458. Attesting witness—When attendance ordered—Under Court of Probate Act, 1857 (c. 77), s. 24—Refusal to make affidavit.—A will informally executed & attested was carried into the registry to be proved, & was afterwards, on the ground of its informality, sought to be withdrawn, for the purpose of proving a will of earlier date. The registrar, in order to certify refusal of probate of the informal will, required affidavits from two witnesses, who

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though they had subscribed it, had neither witnessed the signature of testator, nor signed in the presence of each other. One of the witnesses refusing to make the necessary affidavit, the ct., upon motion, granted an order under above sect. to enforce his attendance for oral examination in ct. & named a day for that purpose.—*Re PROSSER, Ex p. BOULTON* (1864), 3 New Rep. 611.

3459. ————.]—Where a will was without an attestation clause, & the attesting witnesses refused to make any affidavit as to the execution, the ct. issued a subpoena under above sect. to compel their attendance before the ct. to be examined.—*In the Goods of HAMER* (1872), 25 L. T. 951; 36 J. P. 121; 20 W. R. 303.

3460. ————.]—*In the Goods of SWEET, No. 959, ante.*

3461. ————.]—Where two attesting witnesses to a codicil had refused, after proper application, to make a necessary affidavit as to the execution of the testamentary document, the ct. ordered both to attend for examination unless they made the required affidavit within seven days, & also ordered them to pay the costs caused by their previous refusal.—*Re BAYS* (1910), 54 Sol. Jo. 200.

3462. ———— **Under Court of Probate Act, 1857 (c. 77), s. 26—Refusal to give information as to circumstances of attestation.**—]—The ct. will not, under above sect., order the attendance for examination in open ct. of the attesting witnesses to a will because they may have declined to give information as to the circumstances attending the execution of the same.—*EVANS v. JONES* (1867), 36 L. J. P. & M. 70; 16 L. T. 299; 15 W. R. 775.

——— **Necessity for calling generally.**—]—*See Sect. 6, sub-sect. 3, C. ante.*

Subpoena to produce documents.—]—*See Part 2, Sect. 1, sub-sect. 1 (b) ii., ante.*

Attendance for examination as to knowledge of documents.—]—*See Nos. 3442–3447, ante.*

3463. Examination on commission—Power to order—Witness attending dying relative—By consent.—]—The ct. has power, under Ct. of Probate Act (c. 77), s. 32, to issue a commission to examine a witness who is not prevented by illness or by reason of being without the jurisdiction of the ct. from attending the trial [but who is in attendance on a near relative supposed to be dying], but will not make such an order without the consent of the other side.—*JONES v. WILLIAMS* (1865), 13 W. R. 696.

3464. ———— **When allowed.**—]—In a probate suit the ct. refused an application for a commission to examine a witness who was neither old nor dying; & where no special circumstances could be alleged to justify a departure from the ordinary course.—*ANDREW v. BROOKE* (1874), L. R. 3 P. & D. 181; 43 L. J. P. & M. 39; 31 L. T. 102; 38 J. P. 825; 22 W. R. 712.

3465. ———— **As to what matters—Knowledge of testamentary paper.**—]—*In the Goods of PICKARD, BANFIELD v. PICKARD, No. 3454, ante.*

See, now, Evidence by Commission Act, 1885 (c. 74), & generally, EVIDENCE.

3466. Costs—Liability of attesting witness refusing to make affidavit.—]—*Re BAYS, No. 3461, ante.*

SUB-SECT. 7.—CUSTODY AND DELIVERY OUT OF ORIGINAL DOCUMENTS.

Custody.—]—*See Probate Act, 1857 (c. 77), ss. 52, 66.*

3467. Delivery out—General rule.—]—The rights of other persons may be involved, & we cannot as of course take the will out of that custody in which they are interested & entitled to have it preserved (*per CUR.*).—*WELLS v. CORBYN* (1795), 3 Anst. 648; 145 E. R. 995.

3468. ————.]—A suit had been commenced relative to the will of deceased; it afterwards terminated by a compromise under a private Act of Parliament; the several testamentary papers had, according to the usual practice, been brought into the registry, where they still remained; the ct. refused to deliver them out.—*In the Goods of MIDLETON (VISCOUNT)* (1851), 18 L. T. O. S. 10.

3469. ————.]—The ct. will not allow a will in its custody to be taken out of its jurisdiction on any alleged necessity for the furtherance of justice. It must presume that other ct.s., when satisfied that the original document is withheld by a competent authority, will admit secondary evidence.—*In the Goods of MANFREDI* (1858), 1 Sw. & Tr. 135; 31 L. T. O. S. 171; 6 W. R. 792; 164 E. R. 603.

3470. S. P. In the Goods of HOLL (1858), 1 Sw. & Tr. 136, n.; 27 L. J. P. & M. 38; 31 L. T. O. S. 172, n.; 164 E. R. 604, n.

Annotation:—Refd. In the Goods of Manfredi (1858), 1 Sw. & Tr. 135.

3471. ———— **For purpose of executor swearing oath.**—]—Where the exor. is in this country, the ct. will allow a will, which has been brought into the registry for the purpose of obtaining probate, to be delivered out to the exor., in order that he may be sworn thereto before a comr., on an exemplified copy of it being left in the registry.—*In the Goods of GIBBS* (1859), 28 L. J. P. & M. 90.

3472. ———— **For transmission to proper legal custody—Will originally proved in colony.**—]—*FORBES' WILL CASE* (1792), cited in 2 Rob. Eccl. at p. 609; 1 Eccl. & Ad. at p. 11; 17 Jur. at p. 329; 163 E. R. 1430.

Annotations:—Consd. Re Bonaparte's Will (1853), 2 Rob. Eccl. 606. *Mentd. The Log of the Mayflower* (1897), 76 L. T. 295.

3473. ————.]—*RENTON'S WILL CASE* (1791), cited in 2 Rob. Eccl. at p. 609; 1 Eccl. & Ad. at p. 10; 17 Jur. at p. 329; 163 E. R. 1430. *Annotations:—Consd. Re Bonaparte's Will* (1853), 2 Rob. Eccl. 606. *Refd. The Log of the Mayflower* (1897), 76 L. T. 295.

3474. ———— **Will or codicil relating wholly to property in Scotland.**—]—An original codicil, of which probate had been granted, containing an assignment of £10,000, part of £15,000, secured by a heritable bond on lands in Scotland, delivered out, in order to its being registered in Scotland, & there finally deposited, this being necessary to give the same effect; & the codicil itself, termed in Scotland a deed of disposition, or assignation, not relating to any property of testator in this country.—*In the Goods of NICHOLSON* (1824), 2 Add. 333; 162 E. R. 316.

physicians residing in London.—*BAGOT v. BAGOT* (1878), 1 L. R. Ir. 1.—*IR.*

PART II. SECT. 21, SUB-SECT. 7.

g. Delivery out—For probate abroad.—]—*A domiciled Englishman died abroad leaving a will in favour of L., a domiciled Englishman, as universal*

legatory. The will was recorded in the Books of Council & Session. The English ct. refused to grant probate unless the original will was exhibited, & issued a subpoena to the Deputy Clerk Register to exhibit the original will in the English ct.

The ct. in the special circumstances of the case granted the petition.—

PART II. SECT. 21, SUB-SECT. 6.

3464 i. Examination on commission—When allowed.—]—The Probate Division has jurisdiction to order a subpoena to issue to compel the attendance of witnesses residing in any part of the United Kingdom, & refused to issue a commission for the examination of

3475. — — — — —.]—An original will disposing of real estate in Scotland may, certain conditions being complied with, be delivered out of the registry in order to be proved & recorded at Edinburgh.—*In the Goods of RUSSELL* (1827), 1 Hag. Ecc. 91; 162 E. R. 517.

3476. — — — — —.]—*TAYLOR'S CASE* (1839), cited in 2 Rob. Eccl. at p. 610; 1 Ecc. & Ad. at p. 11; 17 Jur. at p. 328; 163 E. R. 1430.
Annotations:—Ald. Re Bonaparte's Will (1853), 2 Rob. Eccl. 606. *Reid. The Log of the Mayflower* (1897), L. T. 295.

3477. — — — — —.]—On motion made by Her Majesty's Govt. to the Prerogative Ct. to deliver up to a Secretary of State the original will & codicils of Napoleon Bonaparte for the purpose of being made over to the French Govt., the ct. decreed the papers to be delivered out, & a receipt taken for them from the Secretary of State, after notarial copies made, in order that they might be sent to the legal authorities in France to be recorded there in the proper place.

I shall order the papers asked for to be delivered out, not for the purpose of their being sent to the French Govt., but for the purpose of placing them in the custody of the legal authorities in France, to be recorded in the proper place (*per Cur.*).—*Re BONAPARTE'S (NAPOLEON) WILL & CODICILS* (1853), 2 Rob. Eccl. 606; 1 Ecc. & Ad. 9; 17 Jur. 328; 163 E. R. 1429.
Annotation:—Reid. The Log of the Mayflower (1897), 76 L. T. 295.

3478. — — — — — For probate abroad—Will dealing with foreign property only.]—*In the Goods of SMART*, No. 1381, *ante*.

— For production as evidence.]—*See Probate Rules* (Non-contentious), 1862, rr. 82, 83.

SUB-SECT. 8.—STAY OF PROCEEDINGS.

See, generally, R. S. C., Ord. 25, r. 4.

3479. Jurisdiction of court.]—(1) An action was brought to obtain revocation of letters of administration granted in 1798, *plff.* claiming to represent the next of kin of the intestate, & *defts.* being the representatives of deceased administrator:—*Held*: having regard to the lapse of time, the fact that *defts.* did not & could not succeed to the administration sought to be revoked, & the other circumstances of the case, the action was frivolous & vexatious, & must be dismissed.

(2) The Probate Div. has, apart from R. S. C., Ord. 25, r. 4, an inherent jurisdiction, in common with other *cts.*, to stay proceedings which are frivolous & vexatious, & an abuse of the process of the *ct.*—*WILLIS v. BEAUCHAMP (EARL)* (1886), 11 P. D. 59; 55 L. J. P. 17; 54 L. T. 185; 34 W. R. 357; 2 T. L. R. 270, C. A.

Annotations:—As to (2) Reid. Blair v. Cordner (1887), 36 W. R. 64; *Barrett v. Day, Day v. Foster* (1890), 43 Ch. D. 435; *Remington v. Scoles*, [1897] 2 Ch. 1.

3480. Foreigner appearing in English suit.]

—(1) An English lady married an Italian, & was domiciled in Italy from the date of the marriage until her death. An action was now pending in England between deceased's brother, who, as *plff.*, sought to prove a will made by his sister in this country in 1865, & her husband, who, as *def.*, sought to establish the validity of a will made in Italy in 1872. The husband then commenced a suit in the Italian *cts.* to obtain a declaration as to the validity of the will of 1872. The property to be affected by that will was in England, but all the witnesses were in Italy:—*Held*: the *ct.* in

the exercise of its discretion would not restrain *def.* from proceeding with his litigation in Italy.

(2) Where a foreigner has appeared to an English suit he thereby gives the English *ct.* jurisdiction to grant any proper application against him, & if necessary to restrain him from litigating the same subject in a foreign *ct.*; but it is a matter of discretion, & the *ct.* will only exercise this jurisdiction to prevent "double vexation."—*DAWKINS v. SIMONETTI* (1880), 50 L. J. P. 30; 41 L. T. 206; 29 W. R. 228, C. A.

—*See, generally, CONFLICT OF LAWS, Vol. XI., pp. 477 et seq.*

3481. Proceedings in Chancery Division.]—In a probate suit, B. was appointed administrator & receiver *pendente lite*. Two months later an originating summons was taken out in Ch. Div. by W., who claimed to be a *mtgee.* & creditor of testator's estate, asking, as against B. who was made *def.*, that an account might be ordered in respect of a tramway in or near London; that a certain *mtge.* might be declared valid & subsisting; that accounts might be taken of what was due thereunder, & for a sale of the mortgaged property. Upon motion by the administrator & receiver, pursuant to directions, to restrain the Chancery proceedings against him, & for a stay of those proceedings:—*Held*: a judge of this division has no power to restrain or stay proceedings in Ch. Div., but leave should be given to the administrator & receiver to defend those proceedings.

Leave was granted to the administrator & receiver to appeal against this decision on the one point of want of jurisdiction to restrain.—*MARTIN v. TOLEMAN* (1897), 77 L. T. 138; *subsequent proceedings, sub nom. Re TOLEMAN, WESTWOOD v. BOOKER*, [1897] 1 Ch. 806.

3482. Grounds for granting—Proceedings taken in ejectment by alleged heir-at-law.]—The *ct.* refused to order that proceedings instituted in this *ct.* to prove a will in solemn form should be stayed because the heir-at-law had commenced actions of ejectment in reference to the real estate bequeathed by the same will.—*DAVIES v. DEVEREUX & ROBERTS* (1866), 35 L. J. P. & M. 77; 14 W. R. 901.

3483. Proceedings frivolous or vexatious or in abuse of process.]—*WILLIS v. BEAUCHAMP (EARL)*, No. 3479, *ante*.

3484. Double vexation—Matter being litigated in England & abroad.] *DAWKINS v. SIMONETTI*, No. 3480, *ante*.

SUB-SECT. 9.—ENFORCEMENT OF ORDERS AND UNDERTAKINGS.

3485. Orders of Probate Division—Whether "charge upon land"—Under Judgments Act, 1838 (c. 110), s. 13.]—*PRATT v. BULL*, No. 3486, *post*.

See, now, Land Charges Act, 1900 (c. 26); Land Charges Act, 1925 (c. 22); & generally, JUDGMENTS.

3486. Jurisdiction to enforce—By writs of fieri facias & elegit.]—(1) Notwithstanding Court of Probate Act, 1857 (c. 77), s. 25, the orders of the Ch. of Probate are not charges upon land enforceable in equity within Judgments Act, 1838 (c. 110), s. 13.

(2) *Semble*: the Ct. of Probate has power to enforce its orders by writs of *fi. fa.* & *elegit*.—*PRATT v. BULL* (1863), 1 De G. J. & Sm. 141; 1 New Rep. 298; 32 L. J. Ch. 144; 7 L. T. 702; 9 Jur. N. S. 239; 11 W. R. 295; 46 E. R. 55, L. C.

Annotations:—As to (1) Connal. Clarke v. Clarke (1873), proceeding as to who were next of kin.]—*O'REILLY v. WASHINGTON* (1905), 40 L. T. 59. IR.

LEIGH-BENNETT, PETITIONER (1893), 20 R. (Ct. of Sess.) 787; 39 Sc. L. R. 711; 1 S. L. T. 72. SCOT.

PART II. SECT. 21, SUB-SECT. 8.

h. Grounds for granting—Inquiry

Sect. 21.—Practice of the probate division: Sub-sects. 9, 10 & 11, A., B., C. & D. (a) & (b), E., F. & G.; sub-sect. 12. Sect. 22.]

L. R. 3 P. & D. 57. *Refd.* Bull v. Hutchens (1863), 32 Beav. 615; *Ex p.* Holden (1863), 13 C. B. N. S. 641; Waller v. Turner (1864), 10 Jur. N. S. 147; *Re* Harrison & Bottomley, [1899] 1 Ch. 465. *As to* (2) *Fold.* Crispin v. Cumano (1869), L. R. 1 P. & D. 622. *Refd.* Heath v. Heath (1874), 22 W. R. 266.

3487. ———.]—The Ct. of Probate has, under Ct. of Probate Act, 1857 (c. 77), s. 25, the like powers, jurisdiction & authority for enforcing its orders, decrees & judgments as are by law vested in the Ct. of Ch., but the limit of this authority must be found in the powers exercised by the Ct. of Chancery prior to the passing of Judgments Act, 1838 (c. 110). The Ct. of Probate does not possess the additional powers & authority indirectly conferred upon cts. of equity for the enforcing of their orders by that statute.

Where large sums of stock stood in the books of the Bank of England in the name of an unsuccessful deft. in a testamentary suit, who admitted that he held the stock as exor. & trustee for the original deft., & who was condemned in the costs of the suit as exor. & party, the ct. refused to give effect to a writ of sequestration for payment of the costs by granting an order on the Bank of England to pay into ct. the dividends on the stock in question, an adverse order never having hitherto been made by a ct. of equity on a third party to pay over to a creditor money which he owes to the debtor.—*CRISPIN v. CUMANO* (1869), L. R. 1 P. & D. 622; 38 L. J. P. & M. 28; 20 L. T. 150; 17 W. R. 535.

Annotations:—Refd. Clarke v. Clarke (1873), L. R. 3 P. & D. 57; *Re* Slade, Slade v. Hulme (1881), 18 Ch. D. 653; *Craig v. Craig & Hamp*, [1896] P. 171.

See, now, R. S. C., Ord. 42, rr. 3, 24.

3488. ———. *How enforced.—Whether by action in King's Bench Division—Leave to sign final judgment.*]—In an action in the Probate Div. an order was made by the registrar that proceedings should be discontinued, & that deft. should pay plff.'s taxed costs. The costs were taxed, & an order was made by the President of the Probate Div. that deft. should pay to plff. £127, the amount of the taxed costs. Plff. sued deft., in Q. B. Div., upon a specially indorsed writ, to recover that sum of £127, & obtained leave to sign final judgment under R. S. C., Ord. 14:—*Held*: an action could be brought in Q. B. Div. upon the order of the Probate Div., & leave to sign final judgment under R. S. C., Ord. 14, was properly given.—*NORTON v. GREGORY* (1895), 73 L. T. 10; 11 T. L. R. 439; 14 R. 735, C. A.

Annotations:—Refd. Robins v. Robins, [1907] 2 K. B. 13; *Ivimey v. Ivimey*, [1908] 2 K. B. 260. *Mentd.* Godfrey v. George, [1896] 1 Q. B. 48.

3489. ———. *Effect of R. S. C., Ord. 68, r. 1.]*

—The effect of R. S. C., Ord. 68, r. 1, coupled with R. S. C., Ord. 42, r. 24, is that an action cannot be maintained in the High Ct. to enforce an order made by a judge of the Divorce Div., though this does not apply to an order made by a judge of that division in Probate.—*IVIMEY v. IVIMEY*, [1908] 2 K. B. 260; 77 L. J. K. B. 714; 99 L. T. 75; 52 Sol. Jo. 482, C. A.

Annotation:—Mentd. Leavis v. Leavis, [1921] P. 299.

3490. *Undertaking as to damages on grant of injunction—How enforced.*]—Where an interlocutory injunction has been granted by the Probate Div. on the usual undertaking as to damages, & an application is subsequently made to enforce that undertaking, such application should be to that division, & not to the Ch. or K. B. Div.—*Re HAILSTONE, HOPKINSON v. CARTER* (1910), 102 L. T. 877, C. A.

Orders for attendance for examination as to testamentary documents.]—*See* Sub-sect. 5, B. (b) ii., *ante*.

SUB-SECT. 10.—APPEALS AND REHEARING.

See Probate Rules (Contentious), 1862, rr. 87, 88.

3491. *Appeal—Effect of—Former sentence suspended—As distinguished from citations.*]—*PACKMAN'S CASE*, No. 3005, *ante*.

3492. ———.]—In debt brought by an exor. he produced in ct. the will proved by sentence. Deft. pleaded that testator died intestate & that administration was committed to him & showed an appeal from the said judgment of probate of the will:—*Held*: probate was suspended by the appeal.—*ANON.* (1616), 1 Roll. Rep. 226; 81 E. R. 450.

3493. ———. *When appeal lies—Trial by judge without jury.*]—*SUGDEN v. ST. LEONARDS (LORD)*, No. 1019, *ante*.

3494. ———. *Refusal of administration to alleged creditor.*]—A person claiming to be a creditor of an intestate applied for letters of administration, having cited the next of kin, who did not appear. The judge refused the grant, holding that appct. was not a creditor of the intestate. Appct. appealed:—*Held*: whether the application was contentious or non-contentious business, as to which the ct. gave no opinion, there was, under Jud. Act, s. 19, an appeal from the judge's decision to the Ct. of Appeal.—*Re CLOOK* (1890), 15 P. D. 132; 63 L. T. 536, C. A.

3495. ———. *From order in chambers—Necessity for leave or certificate that no further hearing desired.*]—Appeals from orders made in chambers are to be subject to the same rules in the Probate Div. as in Ch. Div., & will not be entertained unless the judge gives leave to appeal direct, or certifies that he does not require to hear

grounds of appeal was that the judge had improperly rejected certain evidence. The evidence in question was tendered after the evidence in rebuttal had been finished & was intended to prove declarations of deceased made a year or two before the date of his will & inconsistent therewith:—*Held*: this was a matter clearly within the discretion of the judge, & was not a valid ground for appeal.—*Re McLELLAN'S ESTATE* (1896), 28 N. S. R. (16 R. & G.) 226.—*CAN.*

p. ———. *By one of two executors—Failure to give notice of appeal—To other executor.*]—By the master's report exors. were found indebted to the estate, one of whom being dissatisfied with the finding of the master, gave notice of appeal to plff., but did not serve any notice of appeal on the other

PART II. SECT. 21, SUB-SECT. 10.

k. Appeal — On questions of fact.]—The full ct. deals with appeals in probate matters on questions of fact in the same way as with appeals on questions of fact in civil matters.—*THE PIGOTT'S WILL* (1891), 17 V. L. R. 455.—*AUS.*

l. ———. *When made—Jurisdiction of equity judge.*]—An appeal from the Probate Ct. must be made to the Supreme Ct. in term, & not to a judge sitting in equity; & where such appeal is made to a judge his proper course is to decline to hear it, having no jurisdiction, & not to dismiss the appeal.—*Ex p.* ROACH (1871), N. B. Dig. 649.—*CAN.*

m. ———. *Refusal of master—To take account with rests.*]—The master has authority to take the account with

rests, under the ordinary reference, as against an exor., but where he declines to charge the exor. in this way, if it is intended to appeal, he should be required to report the facts to enable the ct. to determine on the propriety of his decision.—*SILVEWRIGHT v. LEYS* (1882), 1 O. R. 375.—*CAN.*

n. ———. *To investigate questions of wilful default.*]—Under an administration order granted by a local master he may investigate questions of wilful default & misconduct arising upon the accounts, & if he refuses, plff. should appeal.—*SULLIVAN v. HARTY* (1883), 9 P. R. 500.—*CAN.*

o. ———. *Rejection of evidence—Discretion of judge.*]—On appeal from the judgment of a judge of probate admitting to probate a will, one of the

further argument.—*Re SMITH, RIGG v. HUGHES* (1884), 9 P. D. 68; 53 L. J. P. 62; 50 L. T. 293; 32 W. R. 355, C. A.

Annotation:—*Reid*. The Receipts (1893), 1 R. 644.

3496. —Time for—From order of registrar.]—The time for appealing from an order made by a registrar of the Probate Div. is the same as that limited by R. S. C., Ord. 54, r. 21, for appealing from an order of a master: viz. four days from the decision, although a registrar is not mentioned in that rule.—*In the Goods of PATRICK* (1889), 14 P. D. 42; 58 L. J. P. 36; 60 L. T. 343; 37 W. R. 393; 5 T. L. R. 302, C. A.

3497. Rehearing—When allowed.]—*SUGDEN v. ST. LEONARDS (LORD)*, No. 1019, *ante*.

SUB-SECT. 11.—IN PARTICULAR MATTERS.

A. On Application for Leave to Swear Death.
See Sect. 2, sub-sect. 1, C., ante.

B. On Proof in Solemn Form.
See Sect. 6, sub-sect. 9, D., ante.

C. Where Undue Influence Alleged.
See Sect. 9, sub-sect. 5, C., ante.

D. On Application for Grant of Administration.
(a) In General.
See Sect. 11, sub-sect. 7, ante.

(b) Application by Creditor.
See Sect. 11, sub-sect. 4, K. (d), ante.

E. Putting Administrator's Bond in Suit.
See Sect. 13, sub-sect. 7, C. (b), ante.

F. Revocation of Grant.
See Sect. 16, sub-sect 3, ante.

G. Interest Causes.

3498. Pleading—Legitimacy of deceased disputed.]—In an interest suit, instituted by the Queen's Proctor, who alleged that E., deceased, died a widow, without lawful issue, intestate & a bastard, deft., who claimed as nephew of deceased, pleaded that E. was not a bastard; that she was the legitimate child of W. & M. his wife; that W. & M. his wife had one other lawful child, of whom deft. was the lawful child:—*Held*: the plea was sufficient, & it was not necessary that the time & place of the birth of deceased's parents should be alleged.—*DYKE (QUEEN'S PROCTOR) v. WILLIAMS, In the Goods of EMSLEY* (1861), 2 Sw. & Tr. 465; 6 L. T. 227; 10 W. R. 586; 164 E. R. 1077; *sub nom. H.M. PROCURATOR GENERAL v. WILLIAMS*, 31 L. J. P. M. & A. 90.

See, generally, BASTARDY, Vol. III., pp. 360 *et seq.*

exor.—*Held*: a special application would be necessary to be allowed to give notice of the appeal after the regular time for so doing.—*LARKIN v.* (1859), 1 Ch. Ch. 31.—**CAN.**

g. Decree re-opened & re-considered.]—A judge of probate re-opened his decree settling an estate, at the instance of a party who was represented by counsel at the settlement, & had the opportunity of appeal—

3499. Mode of trial—By jury—Though application opposed by Queen's Proctor.]—In an interest suit in which a question of legitimacy was raised between a person claiming to be the lawful nephew & next of kin of a deceased intestate & the Queen's Proctor, the ct. directed the issue joined to be tried by a jury, on the application of the next of kin, although the application was opposed by the Queen's Proctor.—*In the Goods of EMSLEY, QUEEN'S PROCTOR v. WILLIAMS* (1862), 4 Sw. & Tr. 221; 31 L. J. P. M. & A. 86; 164 E. R. 150.

SUB-SECT. 12.—OTHER CASES.

3500. Requisition to foreign court—Sufficiency of compliance.]—When the authorities in a foreign country refuse to execute a requisition in the precise form prescribed by the Prerogative Ct., on the alleged ground that the law of the foreign country requires its own forms to be followed, the Prerogative Ct. will, under such special circumstances, accept a return showing a virtual compliance with the object of the requisition.—*In the Goods of TOWNDROW* (1852), 2 Rob. Eccl. 437; 163 E. R. 1371.

3501. Amendment of pleadings—Allegation that testator prevented from executing new will—Evidence appearing during hearing.]—D., testatrix, in 1853 made her will, by which she gave her property equally between plffs., defts. & interveners. In an action by plffs. propounding this will, it appeared that in 1874 she gave instructions for another will, which would have deprived plffs. of all interest in her estate. In the course of plffs.' case some evidence was given tending to show that testatrix was prevented by force & threats from executing the proposed will. The ct. allowed the pleadings to be amended by adding statements to that effect, & praying for a declaration that plffs. held their shares as trustees for defts. & interveners. —*BETTS v. DOUGHTY* (1879), 5 P. D. 26; 48 L. J. P. 71; 41 L. T. 500.

3502. Restraining dealings with estate—Rights of person in possession claiming as widow disputed.]—Deceased died intestate. Plff., as next of kin, claimed the grant of administration, alleging that deceased had died a bachelor. At plff.'s instance a writ of summons issued against deft., who claimed to be the lawful widow of deceased, & was in possession of his personal estate, but there was some difficulty in serving the writ upon her. The ct. granted an injunction restraining her from dealing with the estate.—*BRAND v. MITSON* (1876), 45 L. J. P. 41; 34 L. T. 854; 40 J. P. 407; 24 W. R. 524; 2 Chur. Pr. Cas. 83.

SECT. 22.—APPOINTMENT OF RECEIVERS.

See, generally, RECEIVERS.

..... he desired to do so:—*Held*: the decree re-opening & re-considering the previous decree must be set aside.—*Re WALTON'S ESTATE* (1893), 26 N. S. R. (14 R. & G.) 125.—**CAN.**

3512. Bond given by a co-parcener.]—Bond given by one parcener to pay to the other parcener, his exors. or administrators, an annual sum during the life of S. for owlty of partition, shall go to the exor., & not to the heir.—*HULBERT v. HART* (1882), 1 Vern. 133; 23 E. R. 367.

3513. Vested interests.]—Where an interest is actually vested in any one, it will go to their exors., otherwise not.—*HUTCHINS v. FOY & GOVER* (1740), 2 Com. 716; 92 E. R. 1282.

*Annotations:—**Reid*, *Hodgson v. Rawson* (1747), 1 Ves. Sen. 44; *Jeale v. Titchener* (1771), Amb. 703; *Godwin v. Munday* (1779), 1 Bro. C. C. 191; *Scurfield v. Howes* (1790), 3 Bro. C. C. 90.

3514. Goods subject to equitable lien—Created by deceased.]—Parol authority by debtor to creditor to go & take certain goods & sell them, & pay himself a particular debt out of the proceeds:—*Held*: to amount to the creation of an equitable lien upon such goods, & as such to be valid as against a claim by the personal representative of debtor after his death.—*GURNELL v. GARDNER* (1863), 4 Giff. 626; 3 New Rep. 59; 9 L. T. 367; 9 Jur. N. S. 1220; 12 W. R. 67; 66 E. R. 857.

*Annotation:—**Mentd.*, *Parish v. Poole* (1884), 53 L. T. 35.

3515. Value of goodwill of business.]—The widow of a surgeon, who died intestate, agreed with R., in consideration of £600, to obtain for him certain appointments held by her late husband. The widow subsequently renounced her right to take out letters of administration to her husband's estate. On bill filed for the administration of intestate's estate:—*Held*: the whole of the £600 belonged to intestate's estate.—*JONES v. JONES* (1874), 30 L. T. 251.

3516. Testamentary gift—In discharge of debt.]—Testator by his will declared that one-fifth of the residue of his personal estate should be divided amongst certain of his creditors named in a schedule to his will. The schedule contained both the names of the creditors, & the debts due to them respectively:—*Held*: the parties so named in the schedule were not to be considered as legatees, but strictly as creditors, & consequently, that the representatives of such as died in the testator's lifetime were entitled to the benefit of the will.—*WILLIAMSON v. NAYLOR* (1838), 3 Y. & C. Ex. 208; 160 E. R. 676.

*Annotations:—**Consd.*, *Phillips v. Phillips* (1844), 3 Hare, 281. *Follid.*, *Stevens v. King*, [1904] 2 Ch. 30. *Reid*, *Turner v. Martin* (1857), 7 De G. M. & G. 429. *Mentd.*, *Courtenay v. Williams* (1844), 3 Hare, 539; *Wild v. Banning* (1866), L. R. 2 Eq. 577; *Ashley v. Ashley* (1877), 4 Ch. D. 757; *Wilson v. Church* (1911), 106 L. T. 31.

3517. — — —.]—A testamentary appointment in discharge of a moral or legal obligation does not lapse merely by reason of the appointee predeceasing testator, but extends to the legal personal representatives of the appointee.—*STEVENS v. KING*, [1904] 2 Ch. 30; 73 L. J. Ch. 535; 90 L. T. 665; 52 W. R. 443.

REAL (1911), 33 N. Z. L. R. 1312.—**N.Z.**

b. — — Personally not specifically bequeathed.]—*HOLMES v. WOLFE* (1879), 26 Gr. 228.—**CAN.**

c. License—Right to transfer.]—The agent of the administrator of a deceased licensed victualler, appointed to carry on the business of an hotel until the expiry of the licence under Licensing Act, 1890 (No. 1111), s. 115, is not the holder of the licence within sect. 102. The administrator himself is the holder within that sect. & entitled to transfer the licence. *Re BALLEHUSEN, Ex p. McMANUS* (1893), 19 V. L. R. 66.—**AUS.**

d. Benefit of judgment.]—In those cases in which an action would abate upon the death of plff. before judgment,

the action would not abate if final judgment had been obtained before the death of plff., in which case the benefit of the judgment would go to his legal representative.—*GOPAL GANESHI ABHYANKAR v. RAMCHANDRA SADASHIV SAHASRABUDHIE* (1902), I. L. R. 26 Bom. 597.—**IND.**

e. Money deposited in joint names.]—A sum of money was deposited in a bank, for which a receipt was given in the following words: "Received from P. & H., to be drawn by either of them, or the survivor, \$1,400 for which we are accountable, with interest, or receiving fifteen days' notice." P. sent the receipt to the bank, & applied for the money, but the manager, not being satisfied that the person who brought the receipt had authority to receive

3518. Not interests passing by survivorship.]—By an indenture of lease one J. demised a house to T. for a term of seventy-nine & a half years, less ten days, at the yearly rent of £180; & by an indenture made in 1895 between T., as the vendor, & S. & C., as the purchasers, the vendor, in consideration of the sum of £50, assigned the house "unto the purchasers, their & each of their exors., administrators, & assigns," & the purchasers & each of them for himself, his heirs, exors., & administrators, covenanted to pay the rent reserved by the lease. S. & C. entered into possession of the house & carried on business therein in co-partnership; but in 1900, for the purpose of dissolving the partnership, they entered into an agreement whereby C. retired from the partnership & assigned to S. all his interest in the lease of the premises, & C. undertook to execute a formal agreement, but no formal agreement was ever executed. S. died in Feb. 1908, & at his death C. was still living. In an action by the assignees of the reversion against the exors. of S. to recover two quarters' rent which had accrued due after the death of S., C. being still alive:—*Held*: (1) the deed of 1895 created in the purchasers S. & C. a joint tenancy, at all events during their joint lives & the life of the survivor, & not a tenancy in common. (2) The agreement of 1900 not having been an assignment by deed did not operate as a severance in law of the joint tenancy; upon the death of S. the whole interest at law passed by survivorship to C. & not to the exors. of S., & therefore there was no privity of estate between the plffs. as assignees of the reversion & the exors. of S. to enable the plffs. to maintain the action for rent.—*GODDARD v. LEWIS* (1909), 101 L. T. 528; 25 T. L. R. 813.

Transmission of shares on death of shareholder.]—*See COMPANIES*, Vol. IX., p. 101, Nos. 2591 *et seq.*

Goods of deceased person in criminal prosecutions.]—*See CRIMINAL LAW*, Vol. XV., p. 915, Nos. 10,078-10,081.

B. Merger.

See, generally, *EQUITY*, Vol. XX., p. 222; *REAL PROPERTY*.

3519. Interests in different rights Term of years & reversion.]—If a *feme sole* extrin. of a term, marry him in the reversion, & dies, the term is not drowned, but the administration of it shall be committed. Otherwise perhaps if she had purchased the reversion.—*BRACE'S CASE* (1628), Hct. 120; 124 E. R. 390.

3520. — — —.]—If one, who has a term of years as exor., purchases the reversion, the term is extinguished: *aliter*, if the reversioner acquire the term by executorship.—*ANON.* (1670), *Freem. K. B.* 289; 89 E. R. 209.

the money, declined to pay it. P. died three days after this:—*Held*: on his death, the right to receive the money vested in H., & P.'s administrators could not recover it from the bank.—*CONDON v. BANK OF BRITISH NORTH AMERICA* (1870), N. B. Dig. 376.—**CAN.**

f. Law of Jersey—Respective rights of executor & heirs.]—By the law & custom of Jersey a testator who dies leaving issue can only dispose of a part of his personal estate, but the exors. of such testator are entitled in possession to the entirety of the personal estate until they have fulfilled the duties of the administration.—*LA CLOCHRE v. LA CLOCHRE* (1870), 39 L. J. P. C. 25.—**CHANNEL ISLANDS.**

Sect. 1.—Personal estate and chattels real: Sub-sect. 2, B. & C. (a), (b), (c) & (d), D., E., F. & G.]

3521. ———.]—C., an administrator, granted an underlease for a term of years of land held by him as administrator. Shortly afterwards the underlessee assigned the land to C. for the residue of the term:—*Held*: there was in equity no merger of the term, & plffs. who would be entitled to the land if the term was in existence could maintain an action to establish their title to the land for the term, & for mesne profits.—*CHAMBERS v. KINGHAM* (1878), 10 Ch. D. 743; 48 L. J. Ch. 169; 39 L. T. 472; 27 W. R. 289.

Annotation:—Mentd. Capital & Counties Bank v. Rhodes, [1903] 1 Ch. 631.

3522. ———.]—*Executrix & jointress.*—A. covenants, that in consideration of £1,200 he & all claiming under him will convey to B. or pay back the money. A conveyance is made, & then B. is evicted by a jointress, who claimed under a settlement made by her husband the former owner of the estate. B. makes the jointress his extrix. & dies. A. shall pay back the money, & the extrix. of B. shall have it & her jointure too.—*JASON v. JERVIS* (1684), 1 Vern. 284; 23 E. R. 472.

3523. ———.]—A. in consideration of a portion, articles to settle a jointure, & dies before the portion paid, or settlement made. The wife takes administration, & so becomes entitled to the money, & then brings a bill against the heir of the husband to have her jointure settled. Bill dismissed, for that she was not entitled to the money & the jointure too. But *quære*.—*MEREDETH v. JONES* (1687), 1 Vern. 463; 23 E. R. 589.

3524. ———.]—*Life interest & reversion.*—A father, who was tenant for life under his marriage settlement, had power to appoint among his children, & in default of appointment the fund was to go to all the children equally, the shares to be vested at twenty-one or marriage. There were issue of the marriage three sons; one died an infant; the other two attained twenty-one; but one of them died a bachelor & intestate. The father took out administration to the last-mentioned son, & executed a deed releasing his power of appointment & then took out a summons calling on the trustee of the settlement to transfer one moiety to him:—*Held*: (1) the release of the power was valid & the father was entitled to the son's reversionary interest as his administrator; (2) inasmuch as the father's life interest & the son's reversion were held by the father in different rights, there was no merger, & so long as the father's life interest subsisted the fund ought to remain in the hand of the trustee of the settlement; (3) on the father's executing a surrender of his life interest he was entitled to have one moiety of the fund transferred to him.—*Re RADCLIFFE, RADCLIFFE v. BEWES*, [1892] 1 Ch. 227; 61 L. J. Ch. 186; 66 L. T. 303; 40 W. R. 323; 36 Sol. Jo. 151, O. A.

Annotations:—As to (2) Reid. Re French-Brewster's Settlements, Walters v. French-Brewster, [1904] 1 Ch. 713. Generally, Mentd. Re Somes, Smith v. Somes, [1896] 1 Ch. 250; A.-G. v. Beech, [1898] 2 Q. B. 147; Blood v.

Blood, [1902] P. 190; Re Solot's Trust, [1902] 1 Ch. 488; Evans v. Evans, [1904] P. 274; Re Evered, Molineux v. Evered, [1910] 2 Ch. 147; Re Attkins, Life v. Attkins, [1913] 2 Ch. 619.

C. Chattels.

(a) Emblements.

Emblements generally, see AGRICULTURE, Vol. II., pp. 58–60, Nos. 316–344; LANDLORD & TENANT.

3525. Whether executor entitled to—Corn.]—A. is bound in an obligation that B. shall enjoy a lease of Blackacre immediately after his death. The land being sown, the exors. of A. take the corn:—*Held*: the obligation was not forfeited, for by the laws the corn belonged to the exors.—*LAUNTON'S CASE* (1578), 4 Leon. 1; 74 E. R. 685.

3526. ———.]—Emblements shall go to the exor. & not to the heir or remainderman, it being for the benefit of the kingdom, which is interested in the produce of corn & other grain & will not suffer them to go to the heir (LORD HARDWICKE, C.).—*LAWTON v. LAWTON* (1743), 3 Atk. 13; 26 E. R. 811.

Annotations:—Mentd. Dudley v. Warde (1751), 1 Amb. 113; *Elwes v. Maw* (1802), 3 East, 38; *Grymes v. Bowerun* (1830), 6 Bing. 437; *Trappes v. Harter* (1833), 2 Cr. & M. 153; *Re Walsh, Ex p. King* (1840), 4 Jur. 510; *Egerton v. Brownlow* (1853), 4 H. L. Cas. 1; *Bishop v. Elliott* (1855), 11 Exch. 113; *Elliott v. Bishop* (1855), 25 L. T. O. S. 150; *Walsley v. Milne* (1859), 7 C. B. N. S. 115; *Wake v. Hall* (1883), 8 App. Cas. 195; *Ward v. Dudley* (1887), 57 L. T. 20; *Gough v. Wood* (1894), 42 W. R. 469; *Hill v. Bullock*, [1897] 2 Ch. 55; *Re De Falbe, Ward v. Taylor*, [1901] 1 Ch. 523; *Re Hulso, Beattie v. Hulso*, [1905] 1 Ch. 406; *Re Whaley, Whaley v. Roehrich*, [1908] 1 Ch. 615.

3527. ———.]—*As against heir.*—Corn is *fructus industrialis*, & he that sows it has a kind of property *ipso facto* in it divided from the land, & therefore the exor. shall have it, & not the heirs (*per CUR.*).—*GRANTHAM v. HAWLEY* (1615), Hob. 132; 80 E. R. 281.

Annotations:—Mentd. Robinson v. Macdonnell (1816), 5 M. & S. 228; *Muskett v. Hill* (1839), 5 Bing. N. C. 694; *Gale v. Burnell* (1845), 7 Q. B. 850; *Lunn v. Thornton* (1845), 1 C. B. 379; *Petch v. Tutin* (1846), 15 L. J. Ex. 280.

3528. ———.]—*As against devisee.*—Where the owner of land sows it with corn & dies before severance, having devised the land, the devisee takes the corn, & not the devisor's exor. *SPENCER'S CASE* (1622), Win. 51; 124 E. R. 44.

3529. ———.]—Where one devised a farm in his own occupation to A. for life, remainder to B. in tail, & also devised to A. all his goods & chattels, stock of his farm, bonds, etc., & all other his movables whatsoever, & made her extrix:—*Held*: growing corn which was not reaped till after the death of testator & of A., who died soon after him, passed to her representative & not to B., the devisee of the land.—*COX v. GODSALVE* (1699), 6 East, 604, n.; 102 E. R. 1420.

Annotations:—Apld. West v. Moore (1807), 8 East, 339. *Consd. Re Roose, Evans v. Williamson* (1830), 17 Ch. D. 696. *Reid. Vaisey v. Reynolds* (1828), 5 Russ. 12.

3530. ———.]—The devisor having devised estates to A. in fee; & to his exors. all his money, etc., stock upon his farm, with the

PART III. SECT. 1, SUB-SECT. 2.—C. (a).

3528 I. Whether executors entitled to—Corn—As against devisee.]—Growing crops on the land of a testator may or may not be assets according to the contents of the will. In ordinary circumstances they go to the exor., & not to the heir, but if the land on which the crops are growing is devised by the will, that will in general make the crops go with the land.—*FAHER v. TRUEMAN* (1853), 10 U. C. R. 617.—*CAN.*

3528 II. ———.]—*M. in the*

spring of 1852 agreed by parol with A. to work his farm on shares, & put in a crop of rye. In Dec. 1852, A. entered into a written agreement with G. to rent the farm to him for three years, & in Jan. 1853, A. died, leaving a will. M. in 1853, with the assent of G., reaped the crop which he had sown in the previous year:—*Held*: the share of such crop to which A. would have been entitled must go to the devisee of the land, & not to the exors.—*TUBBS v. MORGAN* (1854), 12 U. C. R. 151.—*CAN.*

3528 III. ———.]—*The rule*

is, that where there is an express legate of growing crops they vest in the exors., & do not go to the devisee of the land.—*STEWART v. HUNTER* (1868), 2 Ch. Ch. 336.—*CAN.*

3528 IV. ———.]—*Testator had sown a quantity of grain which was in the ground after his decease. One of the next of kin sought to charge the exors. with the value thereof. The land on which it was, having been devised to the widow for life:—Held: the widow, not the exors., was entitled to the emblements.*—*CUDNEY v. CUDNEY* (1874), 21 Gr. 153.—*CAN.*

implements of husbandry, & all other his personal estate of what nature or kind soever, in trust to pay debts & legacies, etc. :—*Held*: the devise of the stock upon his farm carried the standing crops of corn growing there at the time of his death from the devisee of the land to the exors.; although there were assets sufficient to pay all the debts & legacies without that aid.—*WEST v. MOORE* (1807), 8 East, 339; 103 E. R. 372.

Annotations:—*Consd. Re* ROOSE, Evans v. Williamson (1880), 17 Ch. D. 696. *Reid. Vaisey v. Reynolds* (1828), 5 Russ. 12.

3531. ———.—[The devisee of land is entitled to the emblements, unless they are expressly bequeathed by the will to another. A mere bequest of all testator's residuary personal estate to his exors. does not entitle them to the emblements as against a devisee of the land.—*COOPER v. WOOLFITT* (1857), 2 H. & N. 122; 26 L. J. Ex. 310; 29 L. T. O. S. 212; 3 Jur. N. S. 870; 5 W. R. 790; 157 E. R. 51.

3532. ———.—*Hops*.]—*ANON.* (1696), *Freem. Ch.* 210; 22 E. R. 1165.

3533. ———.—*Executor of tenant for life & remainderman for life*.]—The remainderman for life shall have the emblements sown by the deviser in fee, in preference to the exor. of the tenant for life.—*ANON.* (1587), *Cro. Eliz.* 61; 78 E. R. 321.

(b) *Heirlooms.*

See REAL PROPERTY.

(c) *Fish in Ponds.*

See, generally, FISHERIES.

3534. *Pass to heir*.]—Fish in a pond shall go to the heir & not to the exor.—*PARLET & BARTHOLOMEW v. GRAY* (1505), *Cro. Eliz.* 372; 78 E. R. 619; *sub nom. ANON.* *Keil.* 118.

3535. ———.—[*GREYES CASE* (1594), *Owen*, 20; 74 E. R. 860.

3536. ———.—[Gray brings trespass against T., for entering into his close, & taking of fish out of a fish-pond with nets & other engines; deft. pleaded that, long time before the trespass was done, one Thomas Grey was seized of the close & pond, & put the fishes into the pond, & after Thomas Grey made deft. his exor. & died; & he as exor. took the fishes, & upon that plff. demurred :—*Held*: the heir should have the fishes in the pond, & not the exors., for they were chattels descendible.—*GRAY v. TROWE* (1601), *Gouldsb.* 129; 75 E. R. 1043.

(d) *Other Chattels.*

3537. *Estrays*.]—*ANON.* (1551), *Moore*, K. B. 11; 72 E. R. 405.

See, further, COPYHOLDS, Vol. XIII., pp. 21–23, Nos. 136–170.

3538. *Papers of deceased*.]—If A. has in his possession a box containing papers belonging to a person deceased, & send the box with its contents to his solrs., with directions to deliver the box & papers to the exor., on his giving an inventory of them, & a receipt :—*Held*: trover lies against the solrs., if they refuse to deliver the box & papers to the exor., he refusing to give an inventory &

receipt, although the solrs. offered to give them up if the exor. would give an inventory & receipt.

Defts. had no right to insist upon an inventory before they delivered up the box. *Plff.*, as exor., was entitled to the possession of the papers of the deceased, & he is entitled to recover in this action (*ABBOT, C.J.*).—*COBBETT v. CLUTTON* (1826), 2 C. & P. 471, N. P.

3539. *Grant of arms*.]—A. obtained from the *Heralds' College* a grant of arms, to be borne by him & his descendants & the descendants of his brother. He died without issue, leaving two nephews, the sons of his brother :—*Held*: the nephews had not such an exclusive interest in the exemplification or instrument issued to A. by the College as to entitle them to maintain an action of detinue against his widow, who retained possession of it, & to whom all the household effects were bequeathed. One of the nephews & another person were appointed joint exors. of A.'s will :—*Held*: even assuming the exors. could claim the document by action, the provisions of *Common Law Procedure Act, 1860* (c. 126), s. 19, by which judgment may be given in favour of plffs. by whom the action is brought, or of one or more of them, did not apply to this case, where the two nephews were the plffs., so as to enable the nephew, exor., to recover.—*STUBS v. STUBS* (1862), 1 H. & C. 257; 31 L. J. Ex. 510; 158 E. R. 881.

Annotation:—*Mend.* *Hannay v. Smurthwaite*, [1893] 2 Q. B. 412.

D. *Widow's Paraphernalia.*

See HUSBAND & WIFE.

E. *Fixtures.*

See LANDLORD & TENANT.

F. *Partnership Property.*

See, generally, PARTNERSHIP.

Rights of proof in bankrupt partnership.]—See *BANKRUPTCY*, Vol. IV., pp. 461–463, Nos. 4168, 4182.

G. *Property Subject to General Power of Appointment.*

Powers generally, see POWERS.

3540. *Where power exercised—Representative's right to distribute fund*.]—Where a married woman who was the donee of a general power of appointment executed it by will, & appointed as exors. persons who were neither appointees, nor the trustees of the settlement :—*Held*: it was the duty of the exors., & not of the trustees of the deed conferring the power, to distribute the property appointed among the appointees.—*Re PHILBRICK'S SETTLEMENT* (1865), 5 New Rep. 502; 34 L. J. Ch. 368; 12 L. T. 261; 11 Jur. N. S. 558; 13 W. R. 570.

Annotations:—*Folld. Re* *Hoskin's Trusts* (1877), 5 Ch. D. 229. *Consd. Re* *Treasure, Wild v. Stanham*, [1900] 2 Ch. 648; *Re* *Moore, Moore v. Moore*, [1901] 1 Ch. 681.

Folld. Re *Peacock's Settlement*, *Keley v. Harrison*, [1902] 1 Ch. 552. *Apprvd. Re* *Hadley, Johnson v. Hadley*, [1900] 1 Ch. 20. *Expld. O'Grady v. Wilmut*, [1916] 2 A. C. 231. *Reid. Re* *Marten, Shaw v. Marten* (1901), 71 L. J. Ch. 203.

3541. ———.—[Where a *feme covert* or any

PART III. SECT. 1. SUB-SECT. 2.—
C. (d.)

g. *Wool in hands of agent in England*.]—Wool in hands of an agent in London at the time of the death of testator is not a thing in action, but property of testator locally situated in England, which does not vest in the exors. under the *New Zealand probate*.—*Re McLEAN* (1904), 23 N. Z. L. R. 504.—*N.Z.*

h. *Seal & charter of company & other documents—In possession of governor of company—Claim to lien*.]—The governor of a co. had in his possession at the time of his death the co.'s seal & charter among other papers of the co. His exors. claimed to hold these until they obtained payment of a large sum alleged to be due to the governor by the co. The co. contended that the principle of re-

tention did not apply where debtor had placed papers or effects in his creditor's hands for a special purpose except for the expenses incurred in effectuating that purpose :—*Held*: the co. was entitled to have the seal & charter delivered up to them; but the exors. had a hypothec on the other papers of the co. in their possession.—*YORK BUILDING CO. v. ROBERTSON* (1805), 13 Fac. Coll. 492.—*SCOT.*

Sect. 1.—Personal estate and chattels real: Sub-sect. 2, G., H. & I. (a) i. & ii.]

other person having a general power of appointment over a fund of personalty, makes an appointment of the fund by will & appoints an exor., the exor., when he has proved the will, is entitled to receive the appointed fund (JAMES, L.J.).—*Re Hoskin's Trusts* (1877), 6 Ch. D. 281; 46 L. J. Ch. 817; 25 W. R. 779, G. A.

*Annotations:—*Consd. *Re Treasure, Wild v. Stanham*, [1900] 2 Ch. 648; *Re Moore, Moore v. Moore*, [1901] 1 Ch. 691; *Re Power, Re Stone, Acworth v. Stone*, [1901] 2 Ch. 659; *Re Lawley, Zaker v. Lawley*, [1902] 2 Ch. 799. **Fold.** *Re Peacock's Settlement, Kelcey v. Harrison*, [1902] 1 Ch. 552. **Consd.** *Re Fearnside, Baines v. Chadwick*, [1903] 1 Ch. 250; *O'Grady v. Wilmot*, [1916] 2 A. C. 231. **Reid.** *Re Dixon, Penfold v. Dixon*, [1902] 1 Ch. 248; *Re Marten, Shaw v. Marten*, [1902] 1 Ch. 314; Stamp Duties Comrs. v. Stephen, [1904] A. C. 137; *Re Dodson, Re Dodson, Gibson v. Dodson*, [1907] 1 Ch. 284; *Re Hadley, Johnson v. Hadley*, [1909] 1 Ch. 20; *Re Pryce, Lawford v. Pryce*, [1911] 2 Ch. 286; *Re Wernher, Wernher v. Belt*, [1918] 2 Ch. 82. **Mentd.** *Turner v. Hancock* (1882), 20 Ch. D. 303; *Re Bradford* (1883), 11 Q. B. 373.

3542. ———.]—The administrator with the will annexed of the donee of a general power of appointment who has exercised the power by will is the proper person to distribute the appointed fund, & to give a valid discharge for the same to the trustees of the settlement.—*Re Peacock's Settlement, Kelcey v. Harrison*, [1902] 1 Ch. 552; 71 L. J. Ch. 325; 86 L. T. 414; 50 W. R. 473; 46 Sol. Jo. 297.

*Annotation:—***Reid.** *O'Grady v. Wilmot*, [1916] 2 A. C. 231.

3543. ———.]—Under a settlement G. had a general testamentary power of appointment over a fund. In 1892 he made his will, executed the power in favour of L., & appointed him exor. In 1900 a receiving order was made against G., & on Oct. 1, 1900, he was adjudicated a bkpt. L. proved in this bkpty. for £1,131. G. never obtained his discharge, & in 1904 he died. At the time of his death he was indebted to various persons for debts incurred since the date of the receiving order. The question in dispute was whether the appointed fund ought to be paid to L. as exor. of G. for the benefit of the subsequent creditors, or to the bkpty. trustee to be administered as assets for payment of the debts provable in the bkpty. —**Held:** (1) the property divisible amongst the creditors in the bkpty. did not include the appointed fund; the trustee in the bkpty. was not entitled to receive the fund; (2) the duty of dividing it devolved upon the exor; (3) the creditors who had become so after the bkpty. were the only creditors who had a right to share in the fund; & the question of retainor by L. did not arise.—*Re Guedalla, Lee v. Guedalla's Trustee*, [1905] 2 Ch. 331; 75 L. J. Ch. 52; 94 L. T. 94; 51 W. R. 77; 12 Mans. 392.

*Annotation:—*As to (1) **Consd.** *Re Benzon, Bower v. Chetwynd*, [1914] 2 Ch. 68.

3544. Where power not exercised—Effect of gift over to heirs, executors, administrators, & assigns.]—Testator gave, devised & bequeathed all his residuary personal estate, & also all his freehold

& copyhold estate, unto & to the use of trustees, to pay the rents, issues & profits to his niece & her assigns for life; & after her decease he gave, devised & bequeathed his real & personal estates unto the heirs, exors., administrators & assigns of his niece, according to the several natures & qualities thereof.—**Held:** as to the real estate the niece had a general power of appointment after her death, & in default of appointment her heir would take by purchase, & the personal estate was given absolutely.—**QUESTED v. MICHELL** (1855), 3 Eq. Rep. 1014; 24 L. J. Ch. 722; 25 L. T. O. S. 232; 1 Jur. N. S. 488; 3 W. R. 435.

*Annotations:—***Mentd.** *Brookman v. Smith* (1871), L. R. 6 Exch. 291; *Re White & Hindle* (1877), 47 L. J. Ch. 85; *Milman v. Lane*, [1901] 2 K. B. 745.

Property "passing to representative as such"—Within Finance Act, 1894 (c. 30), s. 9 (1)—For purpose of death duties.]—*See ESTATE & OTHER DEATH DUTIES*, Vol. XXI., pp. 30, 31.

Liability of property for debts.]—*See POWERS; HUSBAND & WIFE.*

H. Donations mortis causi

See GIFTS.

I. Choses in Action Accruing in Lifetime, of Deceased.

See Civil Procedure Act, 1833 (c. 42), ss. 2, 37; Administration of Estates Act, 1925 (c. 23), s. 26.

(a) Arising out of Contract.
i. In General.

3545. Rights continue in representative.]—In what case soever there is a contract made to testator or intestate, or anything which arises by contract, there an action will lie for the exor. or administrator; but personal actions die with testator or intestate.—**ANON.** (1639), March, 9; 82 E. R. 388.

*Annotation:—***Reid.** *Raymond v. Fitch* (1835), 1 Gale, 337.

3546. — Action on mutual promises.]—*Assumpsit sur mutual promise to pay A. £100. A. may have the action, so may the party or his administrator.*—**BAPFIELD v. COLLARD** (1646), Aleyn, 1; 82 E. R. 882; *sub nom.* **ANON.**, Sty. 6.

3547. —].—**BECKHAM v. DRAKE**, No. 3550, *post*.

3548. Rights of representative same as those of deceased.]—H. transferred certain shares into the names of trustees, & by a deed, which, on the face of it, was voluntary, declared trusts of the shares for the immediate & absolute benefit of the sister of his deceased wife, with whom he shortly afterwards went through the form of marriage. Upon bill filed ten years after the death of H., by his legal personal representative against the lady, a husband whom she subsequently married, & the surviving trustee, praying for a re-transfer of the shares:—**Held:** the transfer having been complete, a ct. of equity would not have interfered on behalf

PART III. SECT. 1, SUB-SECT. 2.—
I. (a) i.

3548 i. Rights of representative same as those of deceased.]—A married woman, whose husband is insane & confined in a lunatic asylum, & who is compelled to support herself by keeping a boarding-house, may sue & recover in her own name the amount due from a boarder lodging in the house after her husband's insanity. The amount due from a boarder in such circumstances vests in the wife as her separate property, & will not pass to the husband's representatives on his

death.—**ARKELL v. LIGHT** (1867), 12 N. B. R. (1 Han.) 97.—**CAN.**

k. — Right to call for transfer of property.—*Exercisable during lifetime of testator.]—*A., who had built a ship with her own funds, had it registered in the names of her son & daughter in equal shares; & obtained from them an obligation, by which they found themselves & their heirs & successors to sail & manage the vessel for their mother's behoof, accounting to her for the freights & profits; & they also further found themselves & the foreshaids at any time when

required by their mother to grant to her a regular vendition & conveyance of the vessel; but should no such conveyance be called for during her lifetime, it was understood that after her death the vessel should be the absolute property of the son & daughter equally between them. The son predeceased his mother. After that event the mother called for & obtained from the daughter a conveyance of the shares which were registered in her name, but no such requisition was made upon the son or his representatives for the shares standing in his name. Thereafter, the mother having died

of the settlor who was a *particeps criminis*, & his personal representative stood in no better position.—**AYERST v. JENKINS** (1873), L. R. 16 Eq. 275; 42 L. J. Ch. 690; 29 L. T. 126; 38 J. P. 37; 21 W. R. 878.

Annotations.—**Reid**, *Pawson v. Brown* (1879), 13 Ch. D. 202; *Phillips v. Probyn*, [1899] 1 Ch. 811.

ii. Personal Contracts.

3549. General rule.—**ANON.** (1639), No. 3545, *ante*.

3550. —.]—An exor. stands in the place of his testator & represents him as to all his personal contracts, & is by law his assignee & therefore may maintain any action in his right which he himself might. That must be understood to mean any action on a contract for an exor. never could sue for wrongs to his testator. . . & with respect to contracts some exceptions have been introduced by modern decisions, & the exor. cannot sue upon contracts the breach of which is a mere personal wrong (**PAIRKE, B.**).

The exor. represents deceased as to all his contracts & personal rights whether they are available for the payment of assets or not (**WILLIAMS, J.**).—**BECKHAM v. DRAKE** (1819), 2 H. L. Cas. 579; 13 Jur. 921; 9 E. R. 1213, H. L.; *affg. S. C. sub nom. DRAKE v. BECKHAM* (1813), 11 M. & W. 315, Ex. Ch.

Annotations.—**Reid**, *Formby v. Barker*, [1903] 2 Ch. 539. **Mentd.** *Hill v. Smith* (1844), 13 L. J. Ex. 243; *Williams v. Chambers* (1847), 10 Q. B. 337; *Galsworthy v. Strutt* (1818), 1 Exch. 659; *Beil v. Carey* (1849), 8 C. B. 887; *Wetherell v. Julius* (1850), 10 C. B. 267; *Elliot v. Clayton* (1851), 16 Q. B. 581; *Boddington v. Castelli* (1853), 1 E. & B. 879; *Kimmens v. Elderton* (1853), 13 C. B. 495; *Stanton v. Collier* (1854), 3 E. & B. 274; *Northampton Gas Light Co. v. Parnell* (1855), 24 L. T. O. S. 239; *Robinson v. Ruckins* (1856), 26 L. J. Ex. 56; *Betts v. Burch* (1859), 4 H. & N. 506; *Bristow v. Whitmore* (1861), 30 L. J. C. P. 268; *Spurr v. Cass*, *Cass v. Spurr* (1870), L. R. 5 Q. B. 656; *Calder v. Dobell* (1871), L. R. 6 C. P. 486; *Wadling v. Oliphant* (1875), 1 Q. B. D. 145; *Enden v. Carte* (1881), 17 Ch. D. 169; *Kellaway v. Bury* (1892), 66 L. T. 599; *Re Boyts v. Craig, Ex p. Trustee* (1894), 70 L. T. 561; *Rose v. Buckett*, [1901] 2 K. B. 449; *Bailey v. Thurston*, [1903] 1 K. B. 137; *Wilson v. United Counties Bank*, [1920] A. C. 102.

3551. Right to redeem pawn.—In case of a pawn, he who pledges it has time to redeem it during his life; for it is a condition solely knit by him, & to be performed by him, & the death of him to whom it was pawned is no impediment of the redemption; but it is otherwise of the death of him who pawned it; for his exor. cannot redeem it, for it is a condition personal, & being generally pawned extends only to the person of him who pawned it . . . if the pawn be of a perishable nature, as corn, oil, etc., & no time of redemption limited, & the party stays till it is perished in nature & spoilt, forasmuch as there is no default in him who took the pledge, he shall have debt for his money, & the other no remedy for his pawn, for the law of this part hath dissolved the contract; for things in their nature perishable cannot be preserved (*per CUR.*).—**RATCLIFF** (SIR JOHN) *v.*

DAVIS (1610), Yelv. 178; 1 Bulst. 29; Cro. Jac. 244; Noy, 137; 80 E. R. 118.

Annotations.—**Mentd.** *Ryall v. Rowles* (1750), 1 Ves. Sen. 348; *Donald v. Suckling* (1866), L. R. 1 Q. B. 585.

See, now, Pawnbrokers Act, 1872 (c. 93), s. 9.

3552. Breach of promise of marriage.—**CHAMBERLAIN v. WILLIAMSON**, No. 3805, *post*.

3553. —.]—No action lies for damages for breach of promise of marriage against the personal representatives of the promisor, unless in respect of special damages—that is, actual loss to the temporal estate of the promisee, flowing directly from the breach, or which may reasonably be supposed to have been in the contemplation of both parties at the time of the promise as the probable result of the breach of it.—**FINLAY v. CHIRNEY** (1888), 20 Q. B. D. 494; 57 L. J. Q. B. 247; 58 L. T. 664; 52 J. P. 324; 30 W. R. 534; 4 T. L. R. 322, C. A.

Annotations.—**Consd.** *Quirk v. Thomas*, [1916] 1 K. B. 516. **Reid**, *Harvey v. North Eastern Marine Engineering Co.* (1902), 5 W. C. C. 30. **Mentd.** *Davies v. Hood* (1903), 88 L. T. 19; *United Collieries v. Simpson*, [1909] A. C. 383; *Admiralty Comrs. v. S.S. Amerika*, [1917] A. C. 38.

3554. Right of action vested before death of testator.—Although a contract involving personal confidence is put an end to by the death of the party confided in, it is not thereby rescinded so as to take away a right of action already vested. Defts. employed S. as consulting engineer for fifteen months to complete certain works. S. was to be paid £500 for his services in equal quarterly instalments. Before the work was finished, & whilst two quarterly instalments which were due to him were still unpaid, he died: **Held**: his personal representative was entitled to recover them.—**STUBBS v. HOLYWELL RY. CO.** (1867), L. R. 2 Exch. 311; 36 L. J. Ex. 166; 16 L. T. 631; 15 W. R. 869.

Annotation.—**Mentd.** *Krell v. Hen y.*, [1903] 2 K. B. 740.

3555. Right to benefit of restrictive contract.—**HINKINS v. ALDER** (1900), 50 Sol. Jo. 258, D. C.

3556. Right to recover commission on business introduced by testator.—Defts. agreed with W. to pay him 5 per cent. commission on all accounts introduced by him so long as they did business with the persons he placed on their books: **Held**: the commission on accounts introduced by W. continued to be payable to his exors. after his death so long as defts. continued to do business with the persons introduced by him.—**WILSON v. HARPER**, [1908] 2 Ch. 370; 77 L. J. Ch. 607; 99 L. T. 391.

Annotations.—**Mentd.** *Levy v. Goldhill*, [1917] 2 Ch. 297; *Marshall v. Glanvill*, [1917] 2 K. B. 87.

3557. Agreement to maintain bastard child.—By an agreement in writing the father of a bastard child agreed to pay to the mother a certain weekly sum until the child should attain a certain age, & in consideration of those payments the mother agreed not to apply to justices for a bastardy order & further agreed to maintain & bring up the child. On the death of the mother before the child had attained the stipulated age the father discontinued the payments. The administrator of the mother's

after executing a general conveyance of her means & property, an action was commenced, at the instance of her exors. against those of her son, to have it found that she had effectually conveyed these shares to the pursuers, & to have the defenders ordained to convey them.—**Held**: these shares had been the property of the son & had passed to the defenders, his exors., free from any obligation on their part to convey them to the pursuers.—**BOYD'S EXECUTORS v. MARTIN'S EXECUTORS** (1847), 9 Duml. Ct. of Sess.] 1234; 19 Sc. Jur. 537.—**SCOT.**

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PART III. SECT. 1, SUB-SECT. 2.— I. (a) II.

1. Contract terminated by death.—**Publication of book by instalments.**—**Price of portion completed.**—An author agreed with a bookseller for the publication of a work of science, the price according to a certain rate per sheet to be payable by instalments as the work was published. After publication of one volume, constituting in itself a complete part, the progress of the work was interrupted by the death of the author.—**Held**: his

representatives were entitled to the price of the finished portion according to the stipulated rate.—**CONSTABLE & CO. v. ROBINSON'S TRUSTEES** (1808), 14 Fac. Coll. 166.—**SCOT.**

m. — Sale of business — Purchase-money payable by instalments.—The exor. of the estate of G. claimed upon the following contract: "I, J., hereby agree to pay G. in consideration of his having sold me his butcher's business without asking any charges for the goodwill, £5 per month from Apr. 1, 1914, to Mar. 31, 1917, provided

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Sect. 1.—Personal estate and chattels real: Sub-sect. 2, I. (a) ii., iii., iv. & v.]

estate brought an action against the father upon the agreement:—*Held*: the father's obligation came to an end with the mother's death & the action would not lie.—*JAMES v. MORGAN*, [1909] 1 K. B. 564; 78 L. J. K. B. 471; 100 L. T. 238; 73 J. P. 149; 25 T. L. R. 267; 53 Sol. Jo. 245, D. C.

Sec, further, CONTRACT, Vol. XII., pp. 593, 594, —Nos. 4934–4948.

iii. Bonds.

Bonds generally, *see* BONDS, Vol. VII., pp. 164 *et seq.*

3558. Bond for payment of annuity during life of obligor—Death of annuitant.]—*ST. NICHOLAS v. HARRIS* (1641), 1 Rep. Ch. 149; 21 E. R. 534.

3559. Bail bond—Representative of assignee.]—*NOTT v. STEPHENS* (1730), Fortes. Rep. 367; 92 E. R. 894.

3560. ———.]—*RUSH v. RUSH* (1733), Fortes. Rep. 370; 92 J. R. 895.

Sec, further, BONDS, Vol. VII., pp. 177, 178, 186, 210, 233, Nos. 154, 168, 266, 516, 750; CORPORATIONS, Vol. XIII., p. 276, No. 63.

iv. Bills of Exchange and other Negotiable Instruments.

Sec, generally, BILLS OF EXCHANGE, Vol. VI., pp. 9 *et seq.*

3561. Promissory note—Declaration by testator of intention not to ask for payment.]—Notwithstanding declarations of testator to his exor., that he never meant to call for payment of a promissory note, it was held part of the assets; which were insufficient for the legacies; a charge on the real estate failing for want of a proper attestation of the will.—*BYRN v. GODFREY* (1798), 4 Ves. 6; 31 E. R. 3, L. C.

*Annotations:—**Reid*, Cross v. Sprigg (1849), 6 Harc. 552. *Mentd.*, Edon v. Smyth (1830), 5 Ves. 341; *Itc* Applebee, Lovison v. Beales, [1891] 1 Ch. 422.

3562. ———.]—Though no evidence that held by deceased.]—A. made a promissory note, payable to B. or order. B. indorsed it, & gave it to C. to get it discounted. C. went away, & shortly afterwards came back to B. with the money. The exors. of C.'s father, of whom C. was one, brought an action on the note as exors.:—*Held*: as the exors. produced the note on the trial as exors., they might recover on it, although there was no evidence that C.'s father ever had the note in his lifetime.—*GODSON v. RICHARDS* (1833), 6 C. & P. 188, N. P.

—*J.*—*Sec* BILLS OF EXCHANGE, Vol. VI., pp. 91, 210, Nos. 661, 1296–1298.

Bills of exchange.]—*Sec* BILLS OF EXCHANGE, Vol. VI., pp. 99, 303, 320, Nos. 556, 2029, 2179, 2182, 2183.

v. Covenants relating to Land.

Sec, now, Land Transfer Act, 1897 (c. 65), s. 1, repealed by Law of Property Act, 1922 (c. 16),

that G. does not within this period open a butcher's business in town. Should G. fail to carry out this stipulation or should I sell or let my business before Mar. 31, 1917, this agreement shall be cancelled." G. died on Aug. 5, 1915.—*Held*: the agreement ended at G.'s death & from the date of his death no right to receive payments in future passed to his exor.—*SMITH v. GOTZE'S ESTATE* (1916), C. P. D. 338.—*S. AF.*

PART III. SECT. 1. SUB-SECT. 2.—I. (a) v.

3563 i. Breach in lifetime of deceased

s. 155 (11); Administration of Estates Act, 1925 (c. 23), s. 1.

3563. Breach in lifetime of deceased—Damage accrued in lifetime of deceased—Covenant running with land.]—Though the covenant were made only to S., his heirs & assigns, & it were an estate of inheritance; yet the breach being in testator's lifetime, the exor. had well brought the action for the damages (*per* CUR.).—*LUCY v. LEVINGTON* (1671), 1 Vent. 175; 2 Lev. 26; 2 Keb. 831; 86 E. R. 119.

*Annotations:—**Expld. & Distd.* Kingdon v. Nottle (1813), 1 M. & S. 355. *Consd.* Knights v. Quarles (1820), 4 Moore, C. P. 532; Orme v. Broughton (1834), 10 Bing. 533; Raymond v. Fitch (1835), 2 Cr. M. & R. 588. *Reid*, King v. Jones (1814), 1 Marsh. 107. *Mentd.* Kiddell v. White (1794), 1 Anst. 281; Doe d. Anglesea v. Rugeley (1844), 6 Q. B. 107. *Stead v. Carey* (1845), 1 C. B. 496; Dawson v. Paver (1847), 5 Harc. 415; *Itc* Wilton's S. E., [1907] 1 Ch. 50.

3564. ———.]—Where a covenant is made with a man, his heirs, exors. & assigns, if there be a breach in the time of the heir, the exor. may have the action; but in our case the breach was in the time of testator, & the misfeasance is all one continued act (*per* CUR.).—*SMITH v. SIMONDS* (1687), Comb. 64; 90 E. R. 345.

*Annotation:—**Reid*, Raymond v. Fitch (1835), 2 Cr. M. & R. 588.

3565. ———.]—*MORLEY v. POLHILL* (1689), 2 Vent. 56; 86 E. R. 305; *sub nom.* ANON., 3 Salk. 109, pl. 10.

*Annotations:—**Consd.* Ricketts v. Weaver (1844), 12 M. & W. 718. *Reid*, Raymond v. Fitch (1835), 2 Cr. M. & R. 588.

3566. ———.]—Where pltf., as extrix., declared that deft., by deed, conveying to pltf.'s testator certain lands in fee, subject to redemption on payment of a sum certain, covenanted with testator that he was at the time of the execution of the deed seized in fee, & had a right to convey, etc.; & assigned for breach that deft. was not seized, etc., & had not a right to convey, etc.; this was held ill upon special demurrer, & that the extrix. could not maintain an action for such breaches of covenant, without showing some special damage to testator in his lifetime, or that pltf. claimed some interest in the premises.—*KINGDON v. NOTTLE* (1813), 1 M. & S. 355; 105 E. R. 133; *subsequent proceedings* (1815), 4 M. & S. 53.

*Annotations:—**Distd.* King v. Jones (1814), 5 Taunt. 418. *Consd.* Orme v. Broughton (1834), 10 Bing. 533. *Distd.* Raymond v. Fitch (1835), 2 Cr. M. & R. 588. *Consd.* Spoor v. Green (1874), L. R. 9 Exch. 99. *Reid*, Knights v. Quarles (1820), 4 Moore, C. P. 532; Ricketts v. Weaver (1844), 12 M. & W. 718; Beckham v. Drake (1849), 2 H. L. Cas. 579; Moffatt v. Laurie (1855), 15 C. B. 583; Johnstone v. Hall (1856), 25 L. J. Ch. 462; Goodman v. Boycott (1861), 6 L. T. 25. *Mentd.* Onward Bldg. Soc. v. Smithson, [1893] 1 Ch. 1.

3567. ———.]—On a covenant made with a man & his heirs, the covenant running with the land, his exors. cannot sue, unless they show either a breach in the lifetime of their testator, or that the breach has been the means of damnifying the personal estate.—*SAMPSON v. EASTERRY* (1827), 5 L. J. O. S. K. B. 291; *subsequent proceedings*,

—*Damage accrued in lifetime of deceased—Covenant running with land.]—*In the case of covenants running with the land, where only a formal breach takes place in the life of the ancestor, the remedy for damages accruing after his death passes to the heir, or devisee; but where not only the breach took place, but damages accrued in the lifetime of the ancestor, the remedy for these damages passed to the personal representative.—*PLATT v. GRAND TRUNK RY. CO.* (1886), 11 O. R. 246.—*CAN.*

a. ——— Covenant for title.]—

Where breach of a covenant for title, & the damage resulting therefrom, both occurred in the lifetime of testator, the action for such breach should be brought by the exor.—*CUNNINGHAM v. SCOTTLAR* (1859), 9 N. B. R. (4 All.) 385.—*CAN.*

c. ———.]—P. brought an action for damages sustained & to be sustained by reason of breaches of covenants for title in a conveyance of certain lands to him, & before the trial died intestate, whereupon his administratrix took out an order of revivor, which order it was now sought

sub nom. **EASTERBY v. SAMPSON** (1830), 6 Bing. 644, Ex. Ch.

3568. ——— **Personal covenant.**—In an indenture of lease, the lessee covenanted with the lessor, his heirs & assigns, to indemnify the overseers for the time being of the parish in which the premises demised were situate from all costs & charges by reason of the lessee's taking an apprentice or servant who should thereby gain a settlement within, or become chargeable to the parish:—*Held*: the action was well brought by the exors. of the lessor, as the covenant was with him personally, & did not run with the land.—**WALSH v. FUSSELL** (1829), 6 Bing. 163; 3 Moo. & P. 457; 2 Man. & Ry. M. C. 280; 7 L. J. O. S. C. P. 261; 130 E. R. 1243.

Annotation:—**Mentd.** **Bennett v. Batten** (1850), 15 L. T. O. S. 181.

3569. ——— ————*]*—About 1870 a considerable building property called "The Branksome Estate," belonging to G. in fee simple, was in course of development on building agreements entitling the builders to leases, with an option of purchasing the fee simple, & in 1876 S. held one of the leases & options in respect of land & a workshop called 14, Wharf Road. G. died in 1882, having devised the Branksome Estate to E. & F., their heirs & assignees, on trust to pay the rents to E. for life, & after her death to stand seized upon trust for such persons as she should by will appoint, & in default of appointment in trust for her right heirs. Soon after G.'s death S. exercised his option, & E. & F. conveyed 14, Wharf Road, to him in fee, subject to restrictive covenants, therein contained, by him with E. & F. their heirs & assigns, to the end that the covenants might for ever thereafter run with the hereditaments thereby granted, that S. & all persons deriving title under him would not, without the written consent of E. & F., their heirs or assigns, or the persons deriving title under them or either of them (*inter alia*), (a) carry on or permit to be carried on on the premises conveyed any trade or business except that of a builder or coal merchant; & (b) would not do or permit on the premises any act, matter or thing whatsoever which might be a nuisance, annoyance or disturbance to E. & F., or the persons deriving title under them or either of them. F. died in 1885. E. died in 1917, having by her will exercised her power of appointment so as to make I. tenant for life of the portion of the Branksome Estate of which 14, Wharf Road, was part, & given him one half of her residuary personalty. I. & R. were appointed her exors. S. died in 1883, having by his will vested in the trustees thereof 14, Wharf Road, which they let for a term of years to X. to be used, & which were used for a business which was not permitted by covenant (a). X. in the course of this business committed breaches of covenant (b) as regarded annoyance & disturbance. I. as tenant for life of adjoining freehold lands also forming part of the Branksome Estate, sued S.'s trustees & X. for an injunction to restrain the breaches of covenant. At the trial R., the other exor. of E., was joined as co-pltf., he & I. being the legal personal representatives of the survivor of the original covenantees:—*Held*: (1) there was not enough in the words or contract of the

conveyance to S. to annex the benefits of the covenants to the whole of the Branksome Estate then remaining in the hands of the covenantees or to any particular parts thereof; (2) the dispositions of E.'s will did not amount to an assignment to her devisees of the benefit of the covenants; (3) the benefit could pass by operation of law as well as by express assignment, & the covenants could be enforced by I. & R. as representing together both her real estate & personal estate.—**IVES v. BROWN**, [1919] 2 Ch. 314; 88 L. J. Ch. 373; 122 L. T. 267.

Annotations:—*As to* (1) **Refd.** **Northbourne v. Johnston**, [1922] 2 Ch. 309; **Chambers v. Randall**, [1923] 1 Ch. 149. *As to* (3) **Distd.** **Chambers v. Randall**, [1923] 1 Ch. 149. **Refd.** **Northbourne v. Johnston**, [1922] 2 Ch. 309.

3570. ——— ————*]*—An exor. may maintain an action for a breach of covenant committed in the lifetime of testator, relating to the realty if it be collateral.

Semble: also, he may for a substantial breach in the lifetime of testator of a covenant running with the land.—**RAYMOND v. FITCH** (1835), 2 Cr. M. & R. 588; 1 Gale, 337; 5 Tyr. 985; 5 L. J. Ex. 45; 150 E. R. 251.

Annotations:—**Folld.** **Ricketts v. Weaver** (1844), 12 M. & W. 718. **Consd.** **Beecham v. Drake** (1849), 2 H. L. Cas. 579. **Refd.** **Jackson v. Watson**, [1909] 2 K. B. 193. **Mentd.** **Formby v. Barker** (1903), 89 L. T. 219; **Eastern Construction Co. v. National Trust Co. & Schmidt**, [1914] A. C. 197.

3571. ——— ———— **Collateral contract.**—**RAYMOND v. FITCH**, No. 3570, *ante*.

3572. ——— ————*]*—The exor. of a tenant for life may recover for the breach of a covenant to repair committed by the lessees of testator in his lifetime without averring a damage to his personal estate.—**RICKETTS v. WEAVER** (1844), 12 M. & W. 718; 13 L. J. Ex. 195; 3 L. T. O. S. 78; 152 E. R. 1388.

Annotation:—**Mentd.** **Formby v. Barker** (1903), 89 L. T. 219.

3573. ——— **Damage accrued after death of deceased.**—On a covenant for further assurance, where the breach happened in the time of the covenantee, but the damage accrued to the heir; the heir has a preferable title to the exor., to bring the action of covenant.—**KING v. JONES** (1814), 5 Taunt. 418; 1 Marsh. 107; 128 E. R. 751; *affd.* *sub nom.* **JONES v. KING** (1815), 4 M. & S. 188.

Annotations:—**Expld.** **Orme v. Broughton** (1831), 10 Bing. 533. **Distd.** **Raymond v. Fitch** (1835), 2 Cr. M. & R. 588. **Expld.** **Ricketts v. Weaver** (1844), 12 M. & W. 718; **Spoor v. Green** (1874), L. R. 9 Exch. 99. **Refd.** **Knights v. Quarles** (1820), 4 Moore, C. P. 532; **Goodman v. Boycott** (1861), 6 L. T. 25. **Mentd.** *Re* **Durham, Grey v. Durham** (1887), 57 L. T. 164; *Re* **Jones, Farrington v. Forrester**, [1893] 2 Ch. 461.

3574. ——— ———— **Damifying estate of deceased.**—**SAMPSON v. EASTERBY**, No. 3567, *ante*.

3575. ——— ————*]*—Where a restrictive covenant has been entered into by a purchaser of land for the protection of the vendor's immediately adjoining land, but not so as to annex the benefit of the covenant to that land, the covenant is not enforceable against an assign of the covenantor by the exors. of the covenantee if he had disposed of the whole of the adjoining property before his death. It can make no difference even when the exors. are persons to whom part of the covenantee's property had previously been assigned without an express assignment of the benefit of the covenant. *Semble*: the covenantee himself could

to set aside on the ground that the right of action did not survive to her:—*Held*: as to damages which accrued during the lifetime of P., his administratrix was entitled to sue for the same; but that this was not so as to damages which might have accrued

since his death. *Semble*: the heir, or devisee, might bring an action for such damages.—**LATT v. GRAND TRUNK RY. CO.** (1886), 11 O. R. 246.—**CAN.**

P. Option of purchase—Right to

exercise option.—Where a lease for years contains an agreement for sale of the fee, the right to purchase goes to the heir-at-law, not to the personal representative of the lessor.—**HENRIHAN v. GALLAGHER** (1862), 9 Gr. 488.—**CAN.**

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not enforce the covenant against an assign of the covenantor after he had parted with all the adjoining property.—*CHAMBERS v. RANDALL*, [1923] 1 Ch. 149; 92 L. J. Ch. 227; 128 L. T. 507; 39 T. L. R. 6; 67 Sol. Jo. 61.

3576. Breach after death of testator—Covenant with testator & his executors.]—Lessee covenants with the lessor & his exors., to repair, yet covenant lies for the heir.—*LOUGHER v. WILLIAMS* (1873), 2 Lev. 92; 83 E. R. 405.

*Annotation:—***Reid.** Forster v. Elvet Colliery Co., Quinn v. Same, Seed v. Same, Morgan v. Same (1908), 77 L. J. K. B. 521.

Covenants running with the land, generally, *see*, generally, LANDLORD & TENANT.

3577. Covenant for renewal of lease.]—Lessor covenanted to renew the lease at the request of the lessee within the term; lessee did not request, but exors. do within the term; lessor is compellable to renew.—*HYDE v. SKINNER* (1723), 2 P. Wms. 106; 24 E. R. 697, L. C.

*Annotations:—***Expld.** Willis v. Murray (1850), 4 Exch. 843. **Reid.** Foster v. Baggot (1838), 1 Will. Woll. & H. 182. **Mentd.** Kurnial v. Crew (1744), 3 Atk. 83; Iggulden v. May (1806), 7 East. 237; Edwards v. Walters, [1896] 2 Ch. 167; Lewis v. Stephenson (1898), 67 L. J. Q. B. 296; Muller v. Trafford, [1901] 1 Ch. 54.

Covenant to surrender copyholds.]—*See* COPYHOLDS, Vol. XIII., p. 110, No. 1404.

vi. Contract Negligently Performed.

Negligence generally, *see* NEGLIGENCE.

3578. Innkeeper & guest—Loss of chattel.]—An innkeeper is liable to the administrator of an intestate for the loss of the intestate's horse, whilst in his care; there is a contract or *assumpsit* in law between the innkeeper & guest; the injury suffered is not a tort only.—*SAUNDERS v. PLUMMER* (1862), O. Bridg. 223; 124 E. R. 557.

See, generally, INNS AND INNKEEPERS.

3579. Solicitor & client—Lack of professional skill.]—Where pltf. as administrator, declared in *assumpsit* that the intestate had retained deft. as his attorney, to investigate & procure a good title of an estate about to be conveyed to the intestate as purchaser, & assigned for breach that he did not do so, but accepted a bad & defective title in the lifetime of the latter, whereby his personal estate was much injured:—*Held*: the action was well brought, although it was objected first, though it was framed in contract, it was in substance a tort, arising from a neglect of duty by deft.; secondly, the heir should have sued, & not the administrator, as it was a contract which ran with the land, & lastly, it was not alleged in the declaration, that deft. undertook to ascertain & procure a good title in his professional character as an attorney; for by the demurrer deft. admitted the promise to the intestate, as well as the allegation that the injury accrued to his personal estate during his lifetime, & it must be implied that he was bound to fulfil his duty as an attorney, it being alleged that the intestate employed him as such.—*KNIGHTS v. QUARLES* (1820), 2 Brod. & Bing. 102; 4 Moore, C. P. 532; 120 E. R. 896.

*Annotations:—***Reid.** Orme v. Broughton (1834), 10 Bing. 533; Bradshaw v. L. & Y. Ry. (1875), L. R. 10 C. P. 189; Potter v. Met. Ry. (1875), 32 L. T. 36; No. 7 Steam Sand Pump Dredger (Owners) v. S.S. Greta Holme, The Greta Holme, [1887] A. C. 596; Quirk v. Thomas, [1916] 1 K. B. 516. **Mentd.** Alton v. Mid. Ry. (1865), 19 C. B. N. S. 213; Jackson v. Watson, [1909] 2 K. B. 193.

See, generally, SOLICITORS.

3580. Common carrier—Liability for personal injury resulting in death—Damage to personal

estate.]—Where a passenger on a railway was injured by an accident, & after an interval died in consequence:—*Held*: his extrix. might recover in an action for breach of contract against the railway company the damage to his personal estate arising in his lifetime from medical expenses & loss occasioned by his inability to attend to business.—*BRADSHAW v. LANCASHIRE & YORKSHIRE RY. CO.* (1875), L. R. 10 C. P. 189; 44 L. J. C. P. 148; 31 L. T. 847; 23 W. R. 310.

*Annotations:—***Apld.** Leggott v. G. W. Ry. (1876), 1 Q. B. D. 599. **Consd.** Pulling v. G. E. Ry. (1882), 9 Q. B. D. 110; No. 7 Steam Sand Pump Dredger (Owners) v. S.S. Greta Holme, The Greta Holme, [1897] A. C. 596. **Reid.** Quirk v. Thomas, [1916] 1 K. B. 516. **Mentd.** Griffiths v. Dudley (1882), 47 L. T. 10; Jackson v. Watson, [1909] 2 K. B. 193.

3581. — — — — —.]—Pltf., in the lifetime of her husband, received, during a journey as a passenger on defts.' railway, a bodily injury, in consequence of defts.' negligence, by reason whereof her husband incurred expenses, & suffered pecuniary loss; &, on her husband's death, without having received any compensation for the damage thereby incurred, she, as his extrix., sued defts., upon their contract safely & securely to carry, etc., to recover compensation for such expenses & loss to her testator's personal estate:—*Held*: the action was an action of contract, & a loss or damage from the breach of the contract having accrued to the personal estate of the testator, an action to recover damages by reason of that loss survived to pltf. as extrix., & therefore the action was maintainable.—*POTTER v. METROPOLITAN RY. CO.* (1875), 32 L. T. 36, Ex. Ch.

*Annotation:—***Apld.** Bradshaw v. L. & Y. Ry. (1875), L. R. 10 C. P. 189.

3582. — — — — —.]—Claim, stating that pltf. was administratrix of her husband L., who, being a season-ticket holder, was received by defts., a railway co., at their station to be conveyed as a passenger, & by their negligence was injured, & in consequence unable to attend to his business from that day to the day of his death, & incurred expense, etc. Defence, first, denying specifically all allegations in the statement relating to the injury to the deceased & the damage arising from it, &, secondly, that after the death of L., pltf., as his administratrix, for the benefit of herself, as his wife, & of his children, sued defts. in respect of the injury caused to them by his death, & recovered damages. Reply, that defts. were estopped from denying the facts relating to the accident, as in the previous action they had pleaded not guilty, & that L. was not received by them as a passenger, & those issues were found by the jury in pltf.'s favour:—*Held*: the second action was not barred by the judgment & satisfaction under the first; there was no estoppel of which either party could take advantage, as pltf. sued in a different right in either action.—*LEGGOTT v. GREAT NORTHERN RY. CO.* (1876), 1 Q. B. D. 599; 45 L. J. Q. B. 557; 35 L. T. 334; 24 E. R. 784.

*Annotations:—***Consd.** Pulling v. G. E. Ry. (1882), 9 Q. B. D. 110. **Reid.** Quirk v. Thomas, [1916] 1 K. B. 516. **Mentd.** Griffiths v. Dudley (1882), 47 L. T. 10.

3583. — — — — — Compensation accepted in lifetime of deceased.]—Where a person, injured through the negligence of others, has in his lifetime accepted compensation in full satisfaction & discharge of all claims & causes of action against them, his exor. cannot after his death, resulting from the injuries received, maintain an under Lord Campbell's Act for the injury sustained by the widow & children of the deceased.—*READ v. GREAT EASTERN RY. CO.* (1868), L. R.

3 Q. B. 555; 9 B. & S. 714; 37 L. J. Q. B. 278; 18 L. T. 822; 33 J. P. 199; 16 W. R. 1040.

Annotations.—*Consol.* Williams v. Mersey Docks & Harbour Board, [1905] 1 K. B. 804. *Reid.* Davidson v. Hill, [1901] 2 K. B. 606; Nunan v. Southern Ry. (1923), 130 L. T. 131. *Mentl.* Griffiths v. Dudley (1882), 9 Q. B. D. 357; British Columbia Electric Ry. v. Gentile, [1914] A. C. 1034.

3584. — **Death through carriage of dangerous goods.**—*Pltf.'s* husband was a common carrier of goods which he conveyed in a keel of which he was the owner & in the working of which he was assisted by *pltf.* Defts., who carried on business as carriers & forwarding agents, delivered to *pltf.'s* husband to be carried from Goole to Sheffield certain goods described by them as general cargo. The goods in question which were packed in casks, consisted of a chemical known as ferro-silicon, which was always liable to be dangerous by giving off poisonous gases. *Pltf.'s* husband did not know that the goods delivered to him for carriage on board his keel were of a dangerous character, but defts. who knew that the casks contained ferro-silicon did not in fact know that ferro-silicon was of a dangerous character, & gave no notice to *pltf.'s* husband of the contents of the casks. During the carriage of the goods the ferro-silicon gave off poisonous gases, in consequence of which the husband died & *pltf.* suffered from serious illness. In an action by *pltf.*, suing as administratrix & also on her own behalf, to recover damages for the loss of her husband & also in respect of her illness:—*Held*: under the circumstances *pltf.* was entitled to recover.—*BAMFIELD v. GOOLE & SHEFFIELD TRANSPORT CO., LTD.*, [1910] 2 K. B. 94; 79 L. J. K. B. 1070; 103 L. T. 201, C. A.

Annotations.—*Mentl.* The West Cock, [1911] P. 208; Blacker v. Iako & Elliot (1912), 106 L. T. 533; G. N. Ry. v. L. E. P. Transport & Depository, [1922] 2 K. B. 742; Transoceanica Soc. Italiana Di Navigazione v. Shipton, [1923] 1 K. B. 31.

See, further, CARRIERS, Vol. VIII., pp. 5 et seq.

vii. Rights relating to Stocks and Shares.

3585. Right to unclaimed stock.—**In names of Commissioners for Reduction of National Debt.**—Where unclaimed stock has for some years been standing in the names of the Comrs. for the Reduction of the National Debt, the ct. will not order a transfer to the personal representative of the party entitled, without inquiry as to the parties beneficially interested.—*Re MOLONY* (1860), 1 John. & H. 249; 3 L. T. 465; 9 W. R. 68; 70 E. R. 740; *sub nom.* *Re MALONY*, 7 Jur. N. S. 42.

3586. — — — *A* fund was carried over, in the year 1847, to the separate account of B, a sailor, of whom nothing had been heard since Oct. 1844, although numerous inquiries had been made. In 1857, it was transferred, together with all accumulations on it, to the Comrs. for the Reduction of the National Debt. In 1880 administration of the sailor's estate was duly granted, & the administrator petitioned for payment of the fund & the accumulations to him:—*Held*: there was not sufficient evidence of the death of B.; & the petition was ordered to stand over, with liberty to apply.—*WOODHOUSELEE (LORD) v. DALRYMPLE* (1861), 30 L. J. Ch. 607; 4 L. T. 455; 7 Jur. N. S. 615; *sub nom.* *Re BEAMISH, WOODHOUSELEE (LORD) v. DALRYMPLE*, 9 W. R. 564, L. JJ.

Transfer of unclaimed stock & dividends to National Commissioners for Reduction of Debt, *see* REVENUE.

3587. Right to claim allotment of shares.—**Death of shareholder before resolution for issue & offer.**—“Member” in Companies Act, 1862 (c. 89),

Table A, art. 27, which provides that on the increase of the capital of a co. the new shares shall be offered to the “members” in proportion to their existing shares—includes a deceased member so long as his name is on the register.

Thus, where, in the case of a co. regulated by Table A, new shares had been created by special resolution in the lifetime of a member, but were not actually offered to the members of the co. until after his death:—*Held*: the legal personal representative of deceased member, whose name still remained on the register, could require an allotment of the shares which the latter would, if living, have been entitled to have offered him, these shares not yet having been disposed of by the co.; but, *qu.*, as to the title of the legal personal representative to the shares, if, as was not the case, the co. had sent by post a letter containing the offer directed to him at the registered address of the deceased member, or directed to the place of abode or business of the representative or his solr., & not having received an answer applying for the shares within the time limited by the letter, had proceeded to dispose of them otherwise.—*JAMES v. BUENA VENTURA NITRATE GROUNDS SYNDICATE, LTD.*, [1896] 1 Ch. 456; 65 L. J. Ch. 284; 74 L. T. 1; 44 W. R. 372; 12 T. L. R. 176; 40 Sol. Jo. 238, C. A.

Annotations.—*Consol.* Llewellyn v. Kasintoe Rubber Estates, [1914] 2 Ch. 670. *Reid.* Allen v. Gold Reefs of West Africa, [1900] 1 Ch. 656.

3588. Right to indemnity.—**Stock not duly transferred.**—(1) A., through his brokers, sold shares to B., a stock-jobber for the account & “with registration guaranteed.” B. duly gave the name of C. as buyer of the shares, & A. executed a transfer to C. C., however, neglected to execute the transfer & to have it registered.

A. filed his bill against B. for specific performance & indemnity:—*Held*: he was entitled to the indemnity.

(2) After bill filed, A. died, & his estate was sworn under £100. His exor. revived the suit:—*Held*: the indemnity was not to be limited to £100.—*CRUSE v. PAINE* (1868), L. R. 6 Eq. 641; 37 L. J. Ch. 711; 19 L. T. 127; 17 W. R. 44; *affd. on appeal* (1869), 4 Ch. App. 441, L. C.

Annotations.—*As to* (1) *Consol.* Maxted v. Paine (1871), L. R. 6 Exch. 152; *Re Richardson, Ex p. St. Thomas's Hospital*, [1911] 2 K. B. 705. *Reid.* Davis v. Haycock (1869), L. R. 4 Exch. 373; Bowring v. Shepherd (1871), L. R. 6 Q. B. 309; Merry v. Nickalls (1872), 7 Ch. App. 733; Lacey v. Hill, Crowley's Claim (1874), L. R. 18 Eq. 182; Thacker v. Hardy, Same v. Hardy, Same v. Wheatley (1878), 48 L. J. Q. B. 289; Neilson v. James (1882), 9 Q. B. D. 546; Wolmershausen v. Gullick, [1893] 2 Ch. 514; Liverpool Mortgage Insee. Co.'s Case, [1914] 2 Ch. 617; British Union & National Insee. v. Tawson (1916), 85 L. J. Ch. 769. *Generally, Mentl.* *Re Blundell, Blundell v. Blundell* (1888), 40 Ch. D. 370; *Re Perkins, Poyser v. Beyfus*, [1898] 2 Ch. 182.

Right of transmission.—**In shares of public companies.**—*See* COMPANIES, Vol. IX., pp. 404, 405, Nos. 2591–2598.

— **Stock standing in books of Bank of England.**—*See* BANKERS, Vol. III., pp. 123, 124, Nos. 5–13.

viii. Apportionment.

See, now, Apportionment Act, 1870 (c. 35), s. 4.

3589. Exclusion of apportionment.—**Necessity for express direction.**—**Apportionment Act, 1834 (c. 22).**—(1) Testator gave to his wife the dividends which should happen to become due & payable in her lifetime, upon several specific sums of stock standing in the names of three persons, & after the decease of his wife he gave all subsequent dividends upon the sums of stock to be applied for certain charitable purposes for ever. After

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the date of the will one of the persons in whose name the specific sums of stock were standing died, & thereupon testator became absolutely entitled to such sums of stock, & caused them to be transferred into his own name:—*Held*: there had been no ademption of the specific legacies of the stock; the gift of the dividends of stock for charitable purposes for ever passed the corpus of the fund, & there must be an apportionment of dividends, in which the widow took a life interest, for the period intervening between her death & the half-yearly days of payment.

(2) The above Act requires, in order to exclude apportionment, either an express direction that there shall be none or language so express in the terms of gift that apportionment is clearly impossible consistently with it. Inference from the whole tenor & context of the will is not sufficient to exclude the operation of the statute.—*TYRRELL v. CLARK* (1854), 2 Drew. 86; 2 Eq. Rep. 333; 23 L. J. Ch. 283; 22 L. T. O. S. 313; 18 Jur. 323; 2 W. R. 152; 61 E. R. 651.

Annotations:—As to (2) Held, Trevalion v. Anderton (1896), 66 L. J. Q. B. 230; *Re Lysaght, Lysaght v. Lysaght*, [1898] 1 Ch. 115; *Re Oppenheimer, Oppenheimer v. Boatman* (1907), 76 L. J. Ch. 287.

3590. Apportionment Act, 1834 (c. 22).—What is instrument in writing—Not order of court.]—Where the ct. has ordered money arising from the sale of timber cut with its sanction to be invested, & the dividends to be paid to the tenant for life, the first owner of the inheritance or the first tenant for life unimpeachable for waste is entitled to the corpus of the fund in ct. In such a case the legal personal representatives are not entitled to an apportionment of a dividend accrued due during the lifetime of the tenant for life to whom the dividends have been ordered to be paid.

An order of the ct. is not an instrument in writing within Apportionment Act, 1834 (c. 22), so as to create a right to an apportionment of dividends of a fund paid in under it.—*JODRELL v. JODRELL* (1869), L. R. 7 Eq. 461; 38 L. J. Ch. 507; 20 L. T. 349; 17 W. R. 602.

3591. Dividends declared after death.]—By a will, dated in 1795, an estate was devised to A. for life, with remainder to B. The estate was purchased by a railway co., & the purchase-money was paid into ct. & invested. Upon the death of A.:—*Held*: his representatives were not entitled to have an apportionment of the dividends becoming payable after his decease.—*Re LONGWORTH'S ESTATE* (1853), 1 K. & J. 1; 2 Eq. Rep. 770; 23 L. J. Ch. 104; 22 L. T. O. S. 197; 2 W. R. 124; 69 E. R. 343.

Annotations:—Apld. Jodrell v. Jodrell (1869), 20 L. T. 349. *Held. Ex p. London* (Bp.) (1863), 3 New Rep. 246.

3592. —.]—Land forming part of the estate of intestate was sold under the compulsory powers of an Act of Parliament, & one-third of the purchase-money was invested in Consols & set apart to meet his widow's dower:—*Held*: the representative of the widow was entitled, under Distress for Rent Act, 1737 (c. 19), s. 15, to a portion of the dividends up to the day of her death.—*HARROP v. WILSON* (1865), 34 Beav. 166; 5 New Rep. 266; 34 L. J. Ch. 235; 11 L. T. 699; 11 Jur. N. S. 102; 13 W. R. 334; 55 E. R. 598. *Annotation:—Held. Re Wilson, Wilson v. Clark*, [1916] 1 Ch. 220.

3593. —.]—*JODRELL v. JODRELL*, No. 3590, ante.

3594. —.]—Stock in a public co., forming part of testator's residuary estate, was settled upon trust for A. for life & after her death "to pay,

transfer & assign my residuary estate & the stocks, funds & securities upon which the same shall be invested unto & amongst " certain beneficiaries. After the death of the tenant for life the stock was sold "cum dividend" under an order of the ct. for the purpose of distribution. This order was made in the absence of the legal personal representatives of the tenant for life. After the sale a dividend was declared & received by the purchaser in respect of profits, a portion of which had been earned prior to the death of the tenant for life:—*Held*: the estate of the tenant for life was not entitled under the Apportionment Act, 1870 (c. 35), to be paid out of the purchase-money of the stock anything in respect of the dividend; but inasmuch as if the trust had been strictly carried out in accordance with the terms of the will, by transferring the investments to the beneficiaries, the representatives of the tenant for life would have been in a position, either directly or through the trustees, to obtain payment of an apportioned part of the dividend, their claim ought under the special circumstances of the case to be acceded to.—*BULKELEY v. STEPHENS*, [1896] 2 Ch. 241; 65 L. J. Ch. 597; 74 L. T. 409; 44 W. R. 490; 12 T. L. R. 350; 40 Sol. Jo. 458.

Annotations:—Distd. Re Peel's S. E., [1910] 1 Ch. 389; *Re Sale, Nisbet v. Philp*, [1913] 2 Ch. 697.

— **As between tenant for life & remainderman.]—***See SETTLEMENTS.*

3595. Annuity—Death of annuitant before date of payment.]—D. having an annuity of £150 under the will of T., without any direction as to the time of payment, under the decree payment was directed at the end of one year from the death of testator. D. died eight days before the annuity became due under that order, but payment was refused on the ground that the case did not come within the Apportionment Act, 1834 (c. 22), which applied only to specific annuities given in

W. R. 380.

3596. — Payable in advance—Apportionment on death of grantor.]—By a separation deed the husband agreed to pay to the wife an annuity of £150, payable half-yearly in advance on Mar. 1 & Sept. 1 in every year during their joint lives. An instalment of £75 was paid on Mar. 2, 1896, & the husband died on Mar. 13. The extrix of the husband sued the wife to recover back the sum of £75, less an apportioned part for the period from Mar. 1 to Mar. 13:—*Held*: the sum of £75 was not apportionable, & no part thereof could be recovered back from debt.—*TREVALION v. ANDERTON* (1897), 66 L. J. Q. B. 489; 76 L. T. 642; 13 T. L. R. 401, C. A.

Rent.]—See LANDLORD & TENANT.

Right of representative to distrain.]—See DISTRESS, Vol. XVIII., pp. 270, 285, 286, Nos. 83, 191-210.

ix. Right to exercise Option or Power of Selection.

3597. Right to exercise option.]—Testator devised & bequeathed certain real & personal property, including an hotel, to trustees upon trust to pay out of the rents, issues, & income thereof, annuities to his widow & sister, & during their lives & the life of the survivor to divide the residue of the rents, issues & income equally between his four children, & after the decease of the survivor of his wife & sister he declared that his son should have the option of purchasing the hotel at the price of £10,000, such sum to fall into testator's residuary personal estate; but if the son should decline

to purchase the hotel at that price within six months after the decease of the survivor of testator's wife & sister, he directed that his trustees should sell the hotel, & that the moneys arising from the sale thereof should fall into his residuary personal estate. The son died very soon after his father, testator, also leaving a will whereby he appointed exors. Testator's wife & sister being also dead :—*Held* : the option to purchase the hotel was a right personal to the son, & could not be exercised after his death by his exors.—*Re COUSINS, ALEXANDER v. CROSS* (1885), 30 Ch. D. 203, C. A.

Annotation :—*Mentd.* County Hotel & Wine Co. v. L. & N. W. Ry., [1918] 2 K. B. 251.

3598. —.]—A lease of land contained a covenant by the lessor with the lessee, his exors., administrators, & assigns, that if the lessee, his exors., etc., should at any time thereafter be desirous of purchasing the fee simple of the demised land, & should give notice in writing to the lessor, his heirs, & assigns, then the lessor, his heirs, or assigns, would accept £1,200 for the purchase of the fee simple, & on receipt thereof would convey the fee simple to the lessee, his heirs or assigns, or as he or they should direct. The lessee died intestate, & nearly twenty years after his death, his heir, who was also administrator of his personal estate, called on the devisee of the lessor to convey the fee simple to him in accordance with the covenant, & a conveyance was executed accordingly. The heir afterwards contracted to sell part of the property thus conveyed to him :—*Held* : the option to purchase was attached to the lease & passed with it ; it consequently passed as part of the lessee's personal estate to the administrator, & the administrator could not make a good title to the purchaser, unless the next of kin of the lessee would concur in the sale.—*Re ADAMS & KENSINGTON VESTRY* (1884), 27 Ch. D. 394 ; 54 L. J. Ch. 87 ; 51 L. T. 382 ; 32 W. R. 883, C. A.

Annotations :—*Refd.* *Re* Isaacs, Isaacs v. Roginald, [1894] 3 Ch. 506 ; *Friary Holroyd & Healey's Breweries v. Singleton*, [1899] 2 Ch. 261 ; *Woodall v. Clifton*, [1905] 2 Ch. 257 ; *County Hotel & Wine Co. v. L. & N. W. Ry.*, [1918] 2 K. B. 251. *Mentd.* *Re* Martineau (1884), 48 J. P. 295 ; *Re* Diggle, Gregory v. Edmondson (1888), 39 Ch. D. 253 ; *Cochrane v. Dundonald* (1894), 10 T. L. R. 262 ; *Re* Hamilton, Trench v. Hamilton, [1895] 2 Ch. 370 ; *Hill v. Hill*, [1897] 1 Q. B. 483 ; *Re* Williams, Williams v. Williams, [1897] 2 Ch. 12 ; *Re* Atkinson, Atkinson v. Atkinson (1911), 80 L. J. Ch. 370.

3599. — *Right to call for allotment of shares.* —*JAMES v. BUENA VENTURA NITRATE GROUNDS SYNDICATE, LTD.*, No. 3587, *ante*.

3600. Lease of land parcel of larger quantity—*Death of lessee before selection.*—If one grant a house & a hundred acres of land in D., where he has a hundred & eighteen acres, for a hundred years, & the grantee die, his exor. may elect which hundred acres he will have.—*MORRIS v. LEVESAY* (1594), 1 Roll. Abr. 725.

3601. —.]—A. makes a lease for years to B. of 40 acres, parcel of 60 ; the election may be made by B.'s exor.—*JONES v. CHERNEY* (1680), Freem. K. B. 530 ; 89 E. R. 397.

x. Other Cases.

3602. Salaries.—Arrears of salary, which had accrued to a master of a school, who had been dismissed, whether rightly or wrongly was immaterial, will be paid to his representative.—*A.-G. v. LUDLOW CHARITIES* (1852), 19 L. T. O. S. 58.

PART III. SECT. 1, SUB-SECT. 2.— 1. (b) i.

q. General rule.—The maxim *actio personalis moritur cum persona* does

not hold always, if at all, in Scotland. Thus, where a deceased person has by a fraud occasioned pecuniary loss to another person also deceased, the repre-

Wages of seamen.—*See* ADMIRALTY, Vol. I., p. 135, Nos. 423, 424.

3603. Repair of vicarage.—H., the incumbent of a vicarage, died leaving the buildings of the vicarage out of repair. B. succeeded him, & died, whereupon S. was appointed. The premises still being dilapidated, the extrix. of B. was compelled to pay S. the amount necessary to put them in repair, & she then brought an action against the exor. of H. :—*Held* : the action was maintainable, this being a personal right, which survived to the extrix. ; she was entitled to recover so much as would compensate for the dilapidations which occurred in the time of H. ; & the fact of there being timber or stone on the glebe which might be used for repairs, was only a circumstance in diminution of damages.—*BUNBURY v. HEWSON* (1849), 3 Exch. 558 ; 18 L. J. Ex. 258 ; 13 J. P. 571.

3604. Compensation paid by executors of deceased tenant for life to outgoing tenant—Agricultural Holdings (England) Act, 1883 (c. 61).—Under above Act, the exors. of a landlord, tenant for life, who have been compelled under the Act to pay compensation for improvements to an outgoing tenant, who had claimed compensation & whose tenancy had been determined before the death of the landlord, are entitled to a charge upon the holding in respect of the amount which they have so paid.—*Re AGRICULTURAL HOLDINGS (ENGLAND) ACT, 1883*, *GOUGH v. GOUGH*, [1891] 2 Q. B. 665 ; 60 L. J. Q. B. 726 ; 65 L. T. 110 ; 55 J. P. 807 ; 39 W. R. 593 ; 7 T. L. R. 608, C. A.

Money advanced from building society.—*See* BUILDING SOCIETIES, Vol. VII., p. 474, No. 123.

(b) Arising out of Torts.

See, now, Administration of Estates Act, 1925 (c. 23), s. 20.

i. In General.

3605. Right does not continue in representative.]

—(1) An administrator cannot have an action for breach of promise of marriage where no special damage is alleged.

(2) "The general rule of law is *actio personalis moritur cum persona*, under which rule are included all actions merely personal. Exors. & administrators are the representatives of the temporal property, that is the debts & goods of deceased, but not of their wrongs except when those wrongs operate to the temporal injury of their personal estate" (LORD ELLENBOROUGH, C.J.).—*CHAMBERLAIN v. WILLIAMSON* (1814), 2 M. & S. 408 ; 105 E. R. 433.

Annotations :—*As to* (1) *Consd.* *Raymond v. Fitch* (1835), 2 Cr. M. & R. 588 ; *Finlay v. Chirney* (1888), 20 Q. B. D. 494.

Refd. *Kingdon v. Nottle* (1815), 4 M. & S. 53 ; *Beckham v. Drake* (1849), 2 H. L. Cas. 579 ; *Bunbury v. Hewson* (1849), 3 Exch. 558 ; *Hall v. Wright* (1859), K. B. & E. 765 ; *Bradshaw v. L. & Y. Ry.*, [1875], L. R. 10 C. P. 189 ; *Quirk v. Thomas*, [1916] 1 K. B. 516. *As to* (2) *Apld.* *Twydross v. Grant* (1878), 4 C. P. D. 40. *Refd.* *Jackson v. Watson*, [1909] 2 K. B. 193.

3606. —.]—The parties to an action for a tort agreed before trial to refer the matter in dispute to an arbitrator. The order of reference contained a clause that the arbitrator should publish his award "ready to be delivered to the parties in difference, or such of them as require the same, or their respective personal representatives, if either of the parties die before the making of the award." After the hearing of the reference had been concluded, but before the award was made, *pltf.* died.

representative of the wrongdoer must make compensation to the representative of the injured party.—*DAVIDSON v. TULLOCH* (1860), 3 Macq. 783.—*SCOT.*

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The arbitrator afterwards published the award, & the exors. of pltf. having proved his will, took up the award:—*Held*: the cause of action being in tort died with pltf. & did not pass to his personal representatives by force of the clause above mentioned, which in an action of tort was inoperative, & the exors. were not entitled to be substituted as pltf. in place of their testator.—*BOWKER v. EVANS* (1885), 15 Q. B. D. 565; 54 L. J. Q. B. 421; 53 L. T. 801; 33 W. R. 695, C. A.

3607. —.]—“The application of the maxim *actio personalis moritur cum persona* is limited to actions in which remedy is sought for a tort or for something which involves at any rate the notion of wrong doing” (LORD MACNAGHTEN).—UNITED COLLIERIES, LTD. v. SIMPSON, [1909] A. C. 383; 78 L. J. P. C. 129; 101 L. T. 129; 25 T. L. R. 678; 53 Sol. Jo. 630; *sub nom.* UNITED COLLIERIES, LTD. v. HENDRY, 2 B. W. C. C. 308, H. L.
Annotations:—*Refd.* Krzus v. Crow's Nest Pass Coal Co., [1912] A. C. 590. *Mentd.* Daff v. Midland Colliery Owners' Mutual Indemnity Co. (1913), 82 L. J. K. B. 1340; Grime v. Fletcher, [1915] 1 K. B. 734; Phillips v. Kershaw, Leese, [1920] 3 K. B. 297.

ii. Injury to Personal Estate.

See Civil Procedure Act, 1833 (c. 42), s. 2; Administration of Estates Act, 1925 (c. 23), s. 26 (1).

3608. General rule—Action maintainable where damage caused to personal estate.—LEMASON & DICKSON'S CASE (1627), Poph. 189; Benl. 200; W. Jo. 173; 79 E. R. 1282.

Annotations:—*Consd.* Raymond v. Fitch (1835), 2 Cr. M. & R. 588. *Refd.* Williams v. Grey (1695), 1 Ld. Raym. 40; Hambly v. Trott (1776), 1 Cowp. 371.

3609. —.]—TWYCROSS v. GRANT, No. 3021, *post*.

3610. Application of rule—Trover & conversion.—The exor. might have detainee or trespass for the personal wrong; where the thing itself certain is to be recovered, there the exor. is sure to have an action, as detainee, replevin, etc., but where damages only, or things uncertain, there the exors. shall not have action.—RUSSEL & PRAT'S CASE (1500), 4 Leon. 44; 74 E. R. 718, Ex. Ch.

3611. —.]—Trover lies by an exor. upon a conversion in the time of testator, although the goods have never been in the actual possession of the exor.; & the time of the conversion is not traversable, & need not be alleged in the declaration.—RUTLAND (COUNTRESS) v. RUTLAND (COUNTRESS) (1595), Cro. Eliz. 377; 78 E. R. 624.
Annotations:—*Refd.* Piver v. Godskirt (1597), Cro. Eliz. 568; Thurpe v. Stallwood (1843), 6 Scott. N. R. 715. *Mentd.* Foxwith v. Tremain (1670), 1 Mod. Rep. 296.

3612. —.]—SMYTH v. MILWARD (1699), 2 Lut. 1493; 125 E. R. 823.

Annotation:—*Refd.* Buckley v. Barber (1851), 6 Exch. 161.

3613. — Trespass.—An administrator may maintain an action for trespass in the lifetime of intestate.—SMITH v. COLGAY (1595), Cro. Eliz. 384; 78 E. R. 630.

Annotation:—*Refd.* Twycross v. Grant (1878), 48 L. J. Q. B. 1.

3614. —.]—LEMASON & DICKSON'S CASE (1627), Poph. 189; W. Jo. 173; Benl. 200; 79 E. R. 1282.

Annotations:—*Consd.* Raymond v. Fitch (1835), 2 Cr. M. & R. 588. *Refd.* Williams v. Carey (1695), 1 Salk. 12; Hambly v. Trott (1776), 1 Cowp. 371.

3615. —.]—The term had an existence as soon as administration was granted, & the administrator may have a special action of trespass (*per cur.*).—TREVILLIAN v. ANDREW (1698), 5 Mod. Rep. 384; 87 E. R. 719.

3616. —.]—A. had his goods distrained

on for rent, no rent being due, & was obliged to pay a sum of £9 13s. to procure the distress to be withdrawn. A. died, & his extrix. brought trespass for the taking of the goods, & the declaration stated that the goods were detained till A. paid £9 13s. whereby his personal estate was diminished:—*Held*: on this declaration the extrix. could only recover damages to the amount of £9 13s. *Semble*: the extrix. could not have received any greater amount if the declaration had been in any other form.—LOCKIER v. PATERSON (1844), 1 Car. & Kir. 271, N. P.

3617. — Detinue & replevin.—LEMASON & DICKSON'S CASE (1627), Poph. 189; Benl. 200; W. Jo. 173; 79 E. R. 1282.

Annotations:—*Consd.* Raymond v. Fitch (1835), 2 Cr. M. & R. 588. *Refd.* Williams v. Grey (1695), 1 Ld. Raym. 40; Hambly v. Trott (1776), 1 Cowp. 371.

3618. — Failure to return by sheriff.—An exor. or administrator may maintain an action on the case against a sheriff for not returning a *fi. fa.* on account of his testator.—SPURSTOW v. PRINCE (1633), Cro. Car. 297; 79 E. R. 860.

3619. — False return by sheriff.—If A. obtain a judgment & sue out a *fi. fa.*, & the sheriffs falsely return “levied” but that the goods remain for want of buyers, the exor. of A. may maintain an action against the sheriff on this false return though made in the lifetime of testator.—WILLIAMS v. CARY (1695), 4 Mod. Rep. 403; 12 Mod. Rep. 71; 1 Salk. 12; 3 Salk. 149; Holt, K. B. 307; 87 E. R. 468; *sub nom.* WILLIAMS v. GREY, 1 Ld. Raym. 40.

Annotation:—*Refd.* Twycross v. Grant (1878), 4 C. P. D. 40.

3620. —.]—The better opinion is, that an action on the case will not lie for an exor. for the false return of a process of execution (POWELL, J.).

I have known the contrary adjudged (HOLT, C.J.).—BERWICK v. ANDREWS (1704), 6 Mod. Rep. 125; Holt, K. B. 314; 2 Ld. Raym. 971; 1 Salk. 314; 87 E. R. 882.

Annotation:—*Refd.* Twycross v. Grant (1878), 4 C. P. D. 40.

3621. — Action for deceit.—An action was brought to recover from the promoters of a public co. the price paid by pltf. for shares which had proved valueless, on the ground that the prospectus issued by them, in breach of 30 & 31 Vict. c. 131, s. 38, omitted to disclose certain contracts, which ought to have been specified therein. After judgment & pending an appeal to the House of Lords pltf. died:—*Held*: under R. S. C., 1875, Ord. 50, r. 4, pltf.'s interest in the action survived & was capable of transmission to his personal representative.

At common law the rule as to torts was correctly expressed by the maxim, “*Actio personalis moritur cum persona*.” This rule was greatly altered at an early stage of our legal history by 4 Edw. 3, c. 7, & this statute being remedial in its nature, & also those amending it, have been construed very liberally: they have been held to extend to all torts except those relating to testator's freehold, & those where injury done is of a personal nature (BRAMWELL, L.J.).—TWYCROSS v. GRANT (1878), 4 C. P. D. 40; 48 L. J. Q. B. 1; 39 L. T. 618; 27 W. R. 87, C. A.

Annotations:—*Distd.* Pulling v. G. E. Ry. (1882), 9 Q. B. D. 110. *Apld.* Hatchard v. M'ge (1887), 18 Q. B. D. 771. *Consd.* Finlay v. Chirney (1888), 20 Q. B. D. 494. *Distd.* London & London Road Car Co. (1888), 4 T. L. R. 448. *Refd.* Quirk v. Thomas, [1915] 1 K. B. 798.

3622. — Slander of title.—An action for defamation, either of private character or of a person in relation to his trade, comes to an end on the death of pltf., but an action for the publication of a false & malicious statement, causing damage

to the pltf.'s personal estate, survives:—*Held*: a claim for falsely & maliciously publishing a statement calculated to injure pltf.'s right of property in a trade-mark was put an end to by the death of pltf. after the commencement of the action only so far as it was a claim for libel, but so far as the claim was in the nature of slander of title the action survived, & could be continued by his personal representative, who would be entitled to recover on proof of special damage.—*HATCHARD v. MEE* (1887), 18 Q. B. D. 771; 56 L. J. Q. B. 397; 56 L. T. 662; 51 J. P. 277; 35 W. R. 576; 3 T. L. R. 546, D. C.

Annotations:—*Consd.* London R. London Road Car Co. (1888), 4 T. L. R. 448. *Refd.* Quirk v. Thomas, [1916] 1 K. B. 516. *Mentd.* British Ry. Traffic & Electric Co. v. C. R. C. Co. & L. C. C., [1922] 2 K. B. 260.

iii. Injury to Real Estate.

See, now, Civil Procedure Act, 1833 (c. 42), s. 2; Administration of Estates Act, 1925 (c. 23), s. 26 (2), (5).

3623. General rule—Rights do not continue in representative.—*TWYXCROSS v. GRANT*, No. 3621, *ante*.

3624. Action commenced by deceased—Right of representative to continue.—*Civil Procedure Act, 1833 (c. 42), s. 2.*—The sole pltf. in an action for a mandatory injunction & damages for obstruction to the access of light to a freehold house having died more than six months after the issue of the writ, B. the exor. & devisee obtained the common order to carry on proceedings. On motion to discharge this order for irregularity, on the ground that the cause of action did not continue & that there was no transmission of interest to B.:—*Held*: though any action by B., as exor. for injury to pltf.'s real estate might under above Act be limited to the six months prior to pltf.'s death, still he could recover damages to this extent; that, with regard to the peculiar equitable remedy to have the obstruction to light removed, this was an equitable right subsisting in pltf. at the time of her death which, with the equitable remedy by mandatory injunction, devolved to B. as her devisee & consequently proceedings could properly be carried on by B. Motion accordingly refused.—*JONES v. SIMES* (1890), 43 Ch. D. 607; 59 L. J. Ch. 351; 62 L. T. 447.

Annotation:—*Consd.* Peebles v. Oswaldtwistle U. D. C., [1896] 2 Q. B.

iv. Personal Injury.

3625. Rights do not continue in representative.—The maxim "*actio personalis moritur cum personâ*" is not affected by C. L. P. Act, 1852 (c. 76), ss. 135, 136, & 137. Where, therefore, an action was brought for a personal injury to pltf., & upon the trial the jury not agreeing were discharged, & shortly afterwards pltf. died:—*Held*: his administrator was not entitled to enter a suggestion of pltf.'s death upon the record in order to proceed with the action.—*FLYNN v. PERKINS* (1862), 1 New Rep. 105; 8 Jur. N. S. 1177; 11 W. R. 95; *sub nom.* *FLINN v. PERKINS*, 32 L. J. Q. B. 10; 7 L. T. 364.

3626. —.—*TWYXCROSS v. GRANT*, No. 3621, *ante*.

3627. —.—*Though personal estate thereby diminished.*—Pltf. sued as the administratrix of her late husband, who, whilst crossing defts.' railway at a level crossing, was, through the negligence of defts., run over by an engine & sustained personal injuries which prevented him from following his occupation & earning wages, & caused him to incur expenses for medical attend-

ance & nursing, whereby his personal estate was diminished in value:—*Held*: pltf. could not sue in respect of damage to intestate's estate arising, as above mentioned, from the tortious injury to intestate's person, & the action was therefore not maintainable.—*PULLING v. GREAT EASTERN RY. Co.* (1882), 9 Q. B. D. 110; 51 L. J. Q. B. 453; 40 J. P. 617; 30 W. R. 798, D. C.

Annotation:—*Refd.* London R. London Road Car Co. (1888), 4 T. L. R. 448.

3628. —.—*Application of administratrix to be allowed to continue action for loss of earnings of deceased & medical expenses.*

No case showed that an action for personal injuries causing pecuniary loss could be continued after the death of the party injured (LORD COLERIDGE, C.J.).—*LONDON R. LONDON ROAD CAR Co.* (1888), 4 T. L. R. 448, D. C.

Personal injuries causing death—Lord Campbell's Act, 1846 (c. 93).—*See NEGLIGENCE.*

—**Workmen's Compensation Acts.**—*See Administration of Estates Act, 1925 (c. 23), s. 20 (6), & generally, MASTER & SERVANT.*

v. In respect of Unpublished Letters and Patents.

3629. Property in unpublished letters—Vests in representative.—Injunction to restrain the exor. of the person to whom they were written from publishing private letters, without leave of the exors. of the person who wrote them.—*THOMPSON v. STANHOPE* (1774), Amb. 737; 27 E. R. 470, L. C.

Annotations:—*Mentd.* Percival v. Phipps (1813), 2 Ves. & B. 19; Gee v. Pritchard (1818), 2 Swan. 402; Labouchere v. Hess (1897), 77 L. T. 559.

3630. —.—*The property in letters is in the person to whom they are sent, & passes to the legal personal representative. But where the publication of certain letters is not necessary for the vindication of character of a deceased person, the extrix. of such person will be restrained by interlocutory injunction, upon the application of the exor. of the writer of the letters, from publishing, or parting with the possession of such letters.*—*LYTTON (EARL) v. DEVEY* (1884), 54 L. J. Ch. 203; 52 L. T. 121; 1 T. L. R. 41.

Annotations:—*Refd.* Macmillan v. Dent, [1906] 1 Ch. 101.

Mentd. Labouchere v. Hess (1897), 77 L. T. 559.

3631. —.—*Although at common law the writer of a letter & his legal personal representatives are entitled to prevent its publication, & this is a right of property, the copyright in a letter published after the death of the writer is vested by Copyright Act, 1812 (c. 45), in the proprietor of the letter itself—i.e. of the paper & the writing upon it.*

The proprietors of unpublished manuscripts, written by an author long deceased, assigned to E. & Co., in 1895, "all copyright which we possess & the exclusive right of publishing the entire collection of letters," E. & Co. "undertaking to return to us all the MSS. when copied." E. & Co. copied the letters, published them in 1898, & returned the originals to the assignors. Deft. subsequently purchased the originals from the assignors, with any rights which they might still have therein. He also took from the legal personal representative of deceased author an assignment of the copyright & all other rights of the author in the letters. E. & Co. were now registered as owners of the copyright:—*Held*: by the assignment E. & Co. had become proprietors of the author's manuscript so as to enable them by first publication to obtain the copyright in the letters, & they were entitled to an injunction restraining deft. from publishing the letters.—*MACMILLAN &*

Sect. 1.—Personal estate and chattels real: Sub-sect. 2, I. (b) v. & vi., (c) & (d), & J. (a) i.]

Co. v. DENT, [1907] 1 Ch. 107; 76 L. J. Ch. 136; 95 L. T. 730; 23 T. L. R. 45; 51 Sol. Jo. 46, C. A.

—*See* COPYRIGHT, Vol. XIII., pp. 200, 201, Nos. 355–373.

3632. Property in unpublished patent—Right of representative to obtain patent.—In an action to restrain the infringement of a patent granted to S., as widow & administratrix of H., deceased, “a communication from H.,” defts. demurred to the statement of claim on the ground that the patent was invalid because S. was not herself the first & true inventor of the supposed invention, & that it was not communicated to her from abroad:—*Held*: S. was not entitled to take out a patent as the legal personal representative of an inventor who had died before taking out a patent for his invention.

There is no ground for extending the principle of the decisions under the statute 21 Jac. 1, c. 3, whereby the importer of a new invention from beyond the seas is treated as standing in a position equivalent to that of the first & true inventor, to the case of the communication of an invention made by one British subject to another in England.—*DALTON v. SAVILLE STREET FOUNDRY & ENGINEERING CO.* (1878), 39 L. T. 97, C. A.

See, now, Patent & Designs Act, 1907 (c. 29), s. 43 (1).

vi. In respect of Trade Marks.

See, generally, TRADE MARKS.

3633. Right to use of trade mark.—H. & P. filed their bill, in which they alleged a right to a trade mark in the word “Ethiopian,” upon black cotton stockings, acquired by H. while in partnership with others deceased, praying an injunction, & an account of profits. Defts., by their answer, denied pltf.’s right to the mark as a trade mark, alleging that other persons were in the practice of using the word prior to H. & any of his previous partners; but they admitted that they, defts., had copied the mark from pltf.’s stockings, denying, however, they did so with any fraudulent intention. The evidence adduced by pltf.s as to their right in the mark was by no means satisfactory, but in some parts contradictory. But the etc. in refusing a motion to dissolve an injunction held defts. having made so complete a copy of pltf.’s trade mark, the difference being only nominal, must have been taken to have done so with an intent to obtain an advantage to which they were not entitled:—*Held*: although the personal representative of H.’s deceased partner might have some right to participate with H. in the property of the mark, yet H. had such a *prima facie* interest therein as entitled him to file the bill.

A right to use a trade mark is in the nature of a personal chattel, & will devolve to the party’s representatives (*per Cur.*).—*HINE v. LAST* (1846), 7 L. T. O. S. 41; 10 Jur. 106.

Annotation:—*Reid*, *Dent v. Turpin*, *Tucker v. Turpin* (1861), 2 John. & H. 139.

3634. —*See*—An action to restrain the infringement of a registered trade mark with the usual claim for an account of profits & damages is not within the rule *actio personalis moritur cum persona*, but, being brought in respect of injury to the property of the owner of the mark, may be continued by his exors. after his death.—*OAKLEY & SONS v. DALTON* (1887), 35 Ch. D. 700; 56 L. J. Ch. 823; 57 L. T. 18; 35 W. R. 709; 3 T. L. R. 701.

(c) Breach of Statutory Duty.

3635. Action for not setting out tithes.—*MORETON v. HOPKINS* (1669), 2 Keb. 502; 84 E. R. 316; *sub nom.* *MORTON v. HOPKINS & SPENCER*, 1 Sid. 407; *sub nom.* *MORETON’S CASE*, 1 Vent. 30.

Annotations:—*Reid*, *Berwick v. Andrews* (1704), 6 Mod. Rep. 125; *Hamby v. Trott* (1776), 1 Cowp. 371; *Spencer v. Swannell* (1837), 3 M. & W. 154. *Mentd.* *Dimes v. Cottenham* (1850), 1 L. M. & P. 318.

3636. Duty of local authority to provide sewers.—An action was commenced by a manufacturer for a *mandamus* to compel defts., under Public Health Act, 1875 (c. 55), s. 15, & Rivers Pollution Prevention Act, 1876 (c. 75), s. 7, to make a sewer to enable pltf. to dispose of the liquids proceeding from his factory. Pltf. died, & his exors. applied to be substituted as pltf.s:—*Held*: as the alleged cause of action arose out of a statutory duty to deceased it survived to his exors.—*PEEBLES v. OSWALDTWISTLE URBAN DISTRICT COUNCIL*, [1896] 2 Q. B. 159; 65 L. J. Q. B. 499; 74 L. T. 721; 44 W. R. 513, C. A.; *subsequent proceedings, sub nom.* *PASMORE v. OSWALDTWISTLE URBAN COUNCIL*, [1898] A. C. 387, H. L.

Annotations:—*Apld.* *Darlington v. Roscoe*, [1907] 1 K. B. 219. *Reid*, *Tomalin v. Pearson*, [1909] 2 K. B. 61.

(d) Limitation of Actions.

See, generally, LIMITATION OF ACTIONS.

3637. Effect of death after accrual of cause of action.—Where Stat. Limitations is pleaded to an action brought by an exor. on a promise made to his testator the six years are computed from the time when the cause of action arose, & not from the time of obtaining the probate of the will.—*LICKMAN v. WALKER* (1737), Willes, 27; 125 E. R. 1037.

Annotations:—*Consd.* *Scales v. Jacob* (1826), 3 Bing. 638. *Mentd.* *Rhodes v. Smethurst* (1840), 9 L. J. Ex. 330.

3638. —*See*—A declaration by an extrix. stated, that after the death of testator, to wit, on Oct. 1, 1832, deft. was indebted to pltf., as extrix., in £11 for goods sold & delivered by testator in his lifetime to deft., & in consideration thereof, & that pltf., as extrix., had agreed with deft. to accept a suit of clothes, to be made by him for R., pltf.’s servant, in part discharge of the debt, pltf. being indebted to R. in a greater amount for wages, & R. having agreed & being willing to receive the clothes in part payment, & had also agreed to forbear & give deft. a reasonable time for the payment of the remainder of the debt, deft. undertook & promised pltf., as extrix., to make & provide the suit of clothes for R. within a reasonable time, & to pay her the remainder of the debt after a reasonable time for such forbearance. The declaration then averred, that though a reasonable time had elapsed, etc., deft. had not made or provided the clothes, or paid the residue of the debt. Plea, that the debt, in consideration of which the promise was made, did not, nor did any part thereof, accrue to testator within six years next before the commencement of the suit, & that such promise was by words only:—*Held*: the agreement stated in the declaration was only an agreement for an accord, & did not extinguish the original debt, which, therefore, was barred by Stat. Limitations.—*REEVES v. HEARNE* (1836), 1 M. & W. 323; 2 Gale, 4; 5 L. J. Ex. 156; 150 E. R. 457.

Annotation:—*Reid*, *Earle v. Oliver* (1848), 2 Exch. 71.

3639. —*See*—Absence of deceased abroad.]—Where a person died abroad to whom a right of action has accrued during his residence there, & he never returned to this country after the accrual thereof, his exors. may sue for it, although more

than six years have elapsed since it accrued. *Qu.* : whether, in such case, the exors. are not bound to sue within six years after their testator's death.—**TOWNSEND v. DEACON** (1849), 3 Exch. 706; 6 Dow. & L. 659; 18 L. J. Ex. 298; 13 L. T. O. S. 165; 13 Jur. 366; 154 E. R. 1029.

Annotations :—**Consd.** *Forbes v. Smith* (1855), 11 Exch. 161. **Refd.** *Townes v. Mead* (1855), 24 L. J. C. P. 89.

3640. ———. ———.]—By will, dated in 1829, testator gave to A. £800 "to enable him to take his father's farm after his decease, if the landlord will consent, or to place him in any other situation which the trustees might think fit" & if not, then the interest was to be paid to A. for life, with remainder to his son, if he should have any. Testator died the same year. In 1831 A. went to America, where he died intestate & unmarried in 1854. No part of the legacy or interest was ever paid to A. or applied for his benefit. In 1856 A.'s administrator filed this suit for the legacy, with interest since the testator's decease:—**Held** : Stat. Limitations was no bar.—**LORD v. LORD** (1857), 3 Jur. N. S. 485.

3641. ———. **Action brought within reasonable time.**—It is not competent to an exor. to maintain an action for a debt which accrued to this testator, & for which he might have sued, more than six years before the issuing of the writ.

A. had a right of action against B. for a debt in respect of which Stat. Limitations began to run in Sept., 1856. A. died on May 31, 1862. His exor. probed the will on July 12, & commenced an action against B. on Nov. 5:—**Held** : Stat. Limitations was a bar to the claim, notwithstanding a jury, or an arbitrator, might think that the exor. had commenced the proceeding within a reasonable time.—**PENNY v. BRICE** (1865), 18 C. B. N. S. 393; 11 L. T. 632; 13 W. R. 342; 144 E. R. 497.

J. Choses in Action Accruing After Death.

(a) Arising out of Contracts.

i. In General.

3642. Right of administrator de bonis non—On contracts of deceased executor.]—An exor. sells goods of his testator, & dies before he receives the money. *Qu.* : what remedy an administrator of first testator shall have to recover it.—**PERKINS v. CLARK & CLEYDON** (1595), Cro. Eliz. 435; 78 E. R. 676.

See, also, 25 Edw. 3, St. 5, c. 5; Administration of Estates Act, 1925 (c. 23), s. 7.

3643. Right to bring action—Whether in personal or representative capacity.—An exor. may sue in his own name on an account stated with himself.—**NEEDHAM v. CROKE** (1681), 1 Freem. K. B. 538; 89 E. R. 403.

3644. ———. **Bill indorsed to deceased after death.**—**MURRAY v. EAST INDIA CO.**, No. 3669, *post*.

3645. ———. ———.]—**CLARK v. HOUGHAM**, No. 3654, *post*.

3646. ———. ———.]—Pltfs., exors. of A., continued to carry on his business, & draw bills as exors. for goods which they sold to defts. : defts. having accepted sundry such bills:—**Held** : pltfs. might properly sue as exors. for the price of the goods.—**ASPINALL v. WAKE** (1833), 10 Bing. 51; 3 Moo. & S. 423; 2 L. J. C. P. 227; 131 E. R. 824.

3647. ———. ———.]—A coat ordered of A., a tailor, by B. was cut out, tacked together, & tried on in A.'s lifetime, but was finished & delivered, after his death, by his administratrix:—**Held** : the price of the coat might be recovered under a count for goods sold & delivered by pltf. as administratrix.—**WERNER v. HUMPHREYS** (1841), 2 Man. & G. 853; Drinkwater, 206; 3 Scott, N. R. 226; 10 L. J. C. P. 214; 133 E. R. 989.

Annotation :—**Refd.** *Moseley v. Rendell* (1871), L. R. 6 Q. B. 338.

3648. ———. ———.]—An administrator cannot sue in his representative character upon contracts made after the death of intestate, in the course of carrying on intestate's business. Pltfs., husband & wife, sued deft. for goods supplied to him by them in the course of carrying on the business of the wife's deceased father, whose administratrix the wife was. The goods so supplied were made of materials purchased out of moneys received on account of intestate's estate:—**Held** : the wife was wrongly joined as a party, & the husband must sue alone.—**BOLINGBROKE v. KERR** (1860), L. R. 1 Exch. 222; 35 L. J. Ex. 137; 14 L. T. 305; 14 W. R. 657.

Annotations :—**Consd.** *Abbott v. Parfitt* (1871), L. R. 6 Q. B. 346; *Moseley v. Rendell* (1871), L. R. 6 Q. B. 338.

3649. ———. ———.]—(1) A., a coach builder, was employed up to his death by deft. a jobmaster : A.'s widow took out administration, & during two or three months, until her own death, did substantial repairs to carriages of deft. on intestate's premises & with his tools, all the materials employed being intestate's, except one shaft. On the widow's death A.'s daughter took out administration *de bonis non* to A.'s estate, & sued deft. for the price of the work done by administratrix:—**Held** : the proper inference was that the first administratrix had carried on the business for the benefit of the estate, & the money recovered would therefore be part of A.'s assets, & consequently the action was rightly brought by the administratrix *de bonis non*.

(2) Pltf. having declared as administratrix of A., & alleged the work, materials, etc., to have been done & supplied to deft. by her as such administratrix:—**Held** : the declaration might & ought to be amended by stating pltf. to be administratrix *de bonis non*, & the work, etc., to have been done by the first administratrix.—**MOSELEY v. RENDELL** (1871), L. R. 6 Q. B. 338; 40 L. J. Q. B. 111; 23 L. T. 774; 19 W. R. 619.

Annotations :—*As to* (1) **Refd.** *Abbott v. Parfitt* (1871), L. R. 6 Q. B. 346. *As to* (2) **Consd.** *Re Watson* (1884), 53 L. J. Ch. 305. *Generally*, **Mentd.** *Jennings v. Mather*, [1901] 1 K. B. 108.

3650. ———. **How determined.**—The exors. of a deceased baker carried on the business for about ten months under directions in the will, & during that time they supplied bread & flour to deft., but it did not appear that any of the materials had belonged to testator:—**Held** : as the money when recovered would be assets of testator, pltfs. could sue as exors.—**ABBOTT v. PARFITT** (1871), L. R. 6 Q. B. 346; 40 L. J. Q. B. 115; 24 L. T. 469; 19 W. R. 718.

Annotations :—**Refd.** *Dowse v. Gorton*, [1891] A. C. 190; *Re Reynolds, Ex p. White*, [1915] 2 K. B. 186. **Mentd.** *Jennings v. Mather*, [1901] 1 K. B. 108.

3651. ———. **On new promise—In consideration of rights waived under testator's contract.**—

PART III.—SECT. 1, SUB-SECT. 2.— J. (a) i.

r. Money due under gratuity certificate.—A gratuity certificate, issued by the Board of Trade of Toronto, to a member of the gratuity fund for the

payment, on his death, of a sum of money to his representatives, was made subject to the bye-laws of the board whereby the amount was payable to certain persons or class of persons, & in such proportions as might be designated by the member in writing &

under his signature, a blank being left in the certificate for such designation, but, unless he so designated, the amount was payable, where there was a wife & children, as was the case here, in the proportion of half to the wife & half to the children. No designation

Sect. 1.—Personal estate and chattels real: Sub-sect. 2, J. (a) i., ii. & iii., & (b).]

DUCKING v. WELLS (1669), 2 Keb. 531; 84 E. R. 333; *sub nom.* **WELLS v. WELLS**, 1 Lev. 273; 1 Vent. 40.

Annotation:—*Reid. Hawkes v. Saunders* (1782), 1 Cowp. 289.

3652. Action to recover money paid—On failure to fulfil promise—For delivery of testator's documents.]—If an exor. give a person a sum of money on his promising to deliver up certain writings then in his possession belonging to testator, & he afterwards refuses to perform his promise, the exor. may recover back the money so paid by *indebitatus assumpsit*.—**HOLMES v. HALL** (1704), Holt, K. B. 36; 6 Mod. Rep. 161; 90 E. R. 917, N. P.

3653. — Under testator's illegal contract.]—Testator having borrowed money on a *respondentia* contract prohibited by the laws of this country, his exors., plifs., refunded the money to the lenders, defts.:—*Held*: the exors. could not maintain an action for money had & received to recover back this money, notwithstanding defts. could not have compelled them to pay it.—**MUNT v. STOKES** (1792), 4 Term Rep. 561; 100 E. R. 1176.

For enforcement of void & illegal contracts, generally, *see* CONTRACT, Vol. XII., pp. 277 *et seq.*, Nos. 2275 *et seq.*

3654. — Under mistake induced by misrepresentation.]—A., by means of misrepresentation, received of B. & several other persons, his tenants, various sums of money, to which he was not entitled. Pltf., an administratrix, after the death of intestate, made one such wrongful payment as before mentioned, out of the assets:—*Held*: she might recover it in her representative character.—**CLARK v. HOUGHAM** (1823), 2 B. & C. 149; 3 Dow. & Ry. K. B. 322; 1 L. J. O. S. K. B. 249; 107 E. R. 339.

Annotations:—*Mentd. A'Court v. Cross* (1825), 11 Moore, C. P. 198; *Gibbs v. Guild* (1882), 46 L. T. 248.

3655. — Estate duty on property not liable—Right to be recouped out of property liable—Finance Act, 1894 (c. 80), s. 14 (1).]—On the death of an owner in fee who, by his marriage settlement had charged the real estate with the payment after his death of a sum of money to be held on the trusts therein declared & who by his will had subsequently devised the same real estate in strict settlement:—*Held*: above sect. applied & his exor. having paid estate duty on the real estate was entitled to recover from the trustees of the marriage settlement an amount equal to the proper ratable part of the estate duty in respect of the sum so charged.—*Re* **HACKETT, HACKETT v. GARDINER**, [1907] 1 Ch. 385; 76 L. J. Ch. 249; 96 L. T. 420.

3656. Contracts in carrying on deceased's business—Action for freight—Where vessel assigned to defendants—To secure debt owing by testator.]—A lighterman having a vessel, & being indebted to A., & B. agreed to assign it to them for the debt, & their names were painted on it; but it was further agreed, that he should work the vessel, paying one third of the profits to A. & B. After his death his widow worked the vessel & carried three freights of limestone for A., & now brought an action against him to recover the amount:—*Held*: the action could be maintained by her, for that she ought to receive the whole freight, & then

pay over the third to A., & B. jointly.—**WELDRAKE v. HIRST** (1823), 2 L. J. O. S. K. B. 2.

— Action for price of goods supplied.]—*See* Nos. 3646–3650, *ante*.

3657. Action on covenant—Respecting property held by deceased as trustee.]—Action on a covenant in an indenture of demise by the administrator of the lessor against A., B., & C., the lessees, for not leaving & yielding up to pltf. at the expiration of the term machinery, etc., of a value equal to the value of the machinery, etc., on the premises at the time of the demise. Plea by A. & B. that pltf.'s intestate held the premises, etc., merely as trustees for C., that C. had become bkpt., & that defts. had left & yielded up, etc., to the assignees of C., machinery, etc., of equal value, etc.:—*Held*: the plea was bad as being no answer at law, but disclosing matter of equity only.—**BRITTEN v. PERROTT** (1834), 2 Cr. & M. 597; 149 E. R. 898.

3658. — Covenant restricting user.]—When on the sale of the whole of a vendor's land the purchaser enters into a covenant restricting the user of the land, the exor. of the vendor cannot maintain an action for an injunction against an assign of the purchaser in respect of a breach of the covenant committed after the vendor's death.—**FORMBY v. BARKER**, [1903] 2 Ch. 539; 72 L. J. Ch. 716; 89 L. T. 249; 51 W. R. 646; 47 Sol. Jo. 690, C. A.

Annotations:—*Consd. Chelsham & Woldingham Asscn. v. Haywood* (1911), 76 J. P. 52; *L. C. C. v. Allen*, [1914] 3 K. B. 642. *Distd. Ives v. Brown*, [1919] 2 Ch. 314. *Apld. Chambers v. Randall*, [1923] 1 Ch. 149. *Reid. Re Nisbet & Potts' Contract* (1906), 75 L. J. Ch. 238; *Northbourne v. Johnson*, [1922] 2 Ch. 309. *Mentd. Brigg v. Thornton*, [1904] 1 Ch. 386; *Elliston v. Reacher*, [1908] 2 Ch. 665; *L. C. C. v. Cannon Brewery Co.*, [1911] 1 K. B. 235.

ii. In respect of Stocks and Shares.

See, generally, COMPANIES, Vol. IX., pp. 404 *et seq.*, Nos. 2591 *et seq.*

3659. Entry of probate in company's books—How enforced—Mandamus.]—*Semble*: shares in a canal co. (which, by the act creating the co. are declared to be personal property) are *bona notabilia* in the diocese wherein the testator died, & wherein the shares are registered at the office of the co., although the canal may pass through other dioceses. The ct. will grant a *mandamus* to the co. to register the probate of the testator's will; leaving any question as to the validity & effect of the probate to be raised by a return to the writ.—*Re* **WORCESTER CANAL CO.** (1828), 1 Man. & Ry. K. B. 529; 1 Man. & Ry. M. C. 195; 6 L. J. O. S. K. B. 173.

3660. Right to receive dividends.]—A., being possessed of £12,058 6s. 8d. stock, bequeathed to E. C. a certain interest in £5,000, parcel thereof. A judgment having been obtained against E. C., the judgment creditor obtained a judge's order charging this latter sum with the judgment debt, which upon cause shown was made absolute as to so much of the dividends as were payable to E. C. for her own use. These orders having been served upon the Bank of England, the Bank refused in consequence to pay the dividends upon the £12,058 6s. 8d. to the exors. under A.'s will, & they brought an action against the Bank to recover those dividends; & the Bank now applied for a stay of proceedings on payment of a portion of the dividends:—*Held*: there was no ground or necessity for the application, the Bank being bound to pay the dividends to the legal owners, the exors.

was made on the certificate by the member & his will in no way referred to it:—*Held*: under the terms of the

certificate & bye-laws the amount went to the widow & children to be divided between them & formed no part of his

estate in the hands of his exors.—**BABE v. TORONTO BOARD OF TRADE** (1898), 30 O. R. 69.—CAN.

who were answerable for their proper application.

—CHURCHILL v. BANK OF ENGLAND (1843), 11 M. & W. 323; 7 Jur. 353, 538; 152 E. R. 827; *sub nom.* FOWLER v. CHURCHILL, 2 Dowl. N. S. 767; 7 Jur. 156; *sub nom.* FOWLER v. CHURCHILL, CHURCHILL v. BANK OF ENGLAND, 12 L. J. Ex. 233.

Annotations:—*Reid. Hague v. Dandeson* (1848), 17 L. J. Ex. 269; *South Western Loan Co. v. Robertson* (1881), 8 Q. B. D. 17.

3661. Right to be registered as owner—Where co-representative already registered—By means of forged transfers.]—Railway stock was registered in the names of two persons who were exors. & trustees of a will. One of them sold & transferred the stock, forging the signature of the other to the transfers, which were registered by the railway co. On the forgeries being discovered by the other exor., a new trustee of the will was appointed in place of the forger, who then left this country. The two trustees informed the co. of the forgeries, & applied to be registered as owners of the stock. The co. refused to comply with the application, & the two trustees thereupon brought an action for replacement of the stock in their names:—*Held*: plffs. were entitled to treat the transfers as nullities, & the co. must be ordered to register plffs. as owners of the stock.—**BARTON v. NORTH STAFFORDSHIRE RY. CO.** (1888), 38 Ch. D. 458; 57 L. J. Ch. 800; 58 L. T. 549; 30 W. R. 754; 4 T. L. R. 403.

*Annotations:—***Folld.** Barton v. L. & N. W. Ry., Barton v. Scinde Punjab & Delhi Ry. (1889), 5 T. L. R. 644.

Refd. Bank of England v. Cutler, [1908] 2 K. B. 208.
Mentd. The Pongola (1895), 73 L. T. 512; *Re Severn &*

Wye & Severn Bridge Ry., [1896] 1 Ch. 559; **Oliver v. Bank of England,** [1902] 1 Ch. 610.

3662. —————.]—In the case of cos. governed by Cos. Act, 1845 (c. 16), all persons entitled to shares must have their names entered in the register of shareholders before they can make a valid transfer of them; & when this has been done they become ordinary shareholders; so that one of two co-exors. cannot transfer shares registered in their joint names, although described as co-exors. in the register.

Application having been made to a co. to register a [forged] transfer of shares, the co. sent a notice to pltf., whose name was registered as holder of the shares. As she made no reply, they registered the transfer:—*Held*: she was not estopped from claiming her right to have her name restored to the register.—**BARTON v. LONDON & NORTH WESTERN RY. CO.** (1889), 24 Q. B. D. 77; 59 L. J. Q. B. 33; 62 L. T. 164; 38 W. R. 197; 6 T. L. R. 70, C. A.

Annotation :—**Mentd.** *Oliver v. Bank of England* (1902), 71 L. J. Ch. 388.

3663. — **Of qualifying shares for directorship.**—Pltf. & others were exors. of a shareholder in the deft. co. The co. on production of probate registered them as joint holders of the shares. Pltf. was afterwards appointed a director of the co. subject to his acquiring the necessary qualification. The articles of association required each director to be the registered holder of not less than twenty shares. Pltf. already held five shares in his own name. The exors. executed a transfer of fifteen of the testator's 112 shares to pltf. for a nominal consideration. On the next day one of

the transferors wrote to the co. revoking his signature of the transfer & notifying the co. not to register the transfer. The directors of the co. thereupon refused to register the transfer, & subsequently informed pltf. that he had ceased to be a director, not having acquired the necessary qualification within the statutory period, & thenceforth excluded him from the directors' meetings. In an action by pltf. for an injunction to restrain the directors from excluding him, & for rectification :—*Held*: the notice acquired by the co. by production of probate was limited to a notice of the names & addresses of the persons who had constituted themselves exors. of the testator, & the co. were not justified in gratuitously assuming that the transfer necessarily involved a breach of trust &, in the absence of any specific reason for the withdrawal of the signature in refusing indefinitely to register the transfer; & the register must be rectified by the registration of the transfer.

(2) *Held*: ptf. was qualified to be a director of the co. by virtue of his registration as a joint holder of the testator's shares.—(*GRUNDY v. BRIGGS*, [1910] 1 Ch. 444; 70 L. J. Ch. 211; 101 L. T. 901; 54 Sol. Jo. 163; 17 Mans. 30.)

Annotation :— As to (1) **Reid**, *Macquereth v. Wigan Coal & Iron Co.*, [1916] 2 Ch. 293.

iii. *In respect of Insurance Policies.*

Insurance of testator's life—As security for debt.]—*See, generally, INSURANCE.*

(b) Arising out of Torts.

3664. Right to bring action—For injury to growing crops—Though sold in testator's lifetime—Trespass.]—ANON. (1510), Keil. 159; 72 E. R. 334.

3885. ---- In personal or representative capacity
—Whether fact of possession material —Trespass.
—An exor. may bring trespass for taking the goods
of his testator *tempore mortis suae*, without alleging
they were taken *extra custodiam suam*. —*Adams v.*
Cheyverel (1606). (Cro. Jac. 113 ; 79 E. II. 97.

3686. — — — — —.]—HUDSON v.
HUDSON (1627), Lat. 214 ; 82 E. R. 352.
Annotation:—*Conrad*, R. v. Wilkins (1789), 1 Leuch, 520.

Sec. generally, 'TRESPASS.'

See, generally, 'TRESPASS.

3667. ----- Conversion.] - Administrators declaring in trover on a possession of the goods by their intestate & a conversion in their own time, & being non-suited are liable to costs; for the fact of their possession is immaterial, & they may sue in their own right.

The question is whether it were necessary for plffs. to have declared as administrators? & here it certainly was not necessary, for on the death of testator they were in point of law the owners of goods which belonged to the intestate, & whether actually possessed by them or not before the conversion, they might declare as any other person upon their own property when wrongfully converted by another (LORD ELLENBOROUGH, C.J.).—*HOLLIS v. SMITH* (1808), 10 East, 293; 103 E. R. 789.

Annotation :—**Reid**. Jones v. Jones (1823), 1 Bing. 219.

See, generally, TROVER.

PART III. SECT. 1, SUB-SECT. 2.—
J. (b).

s. Right to bring action—Injury to person—Causing death—Felony.—Deceased had been assaulted & killed by a person who became intoxicated by drinking to excess in def.'s inn:—**Held:** the legal representative might under Temperance Act, 1864, maintain an action under C. S. C. 78, before

prosecution for felony.—**MCCURDY v. SWIFT** (1866), 17 C. P. 126.—**CAN.**

t. — [1886, —]. — On Dec. 25, 1911, a man was knocked down in a street by a van belonging to a railway co. On Dec. 28, 1911, the law agents of the injured man wrote to the co. intimating that he held them liable for his injuries. On Jan. 5, 1912, he executed a will in favour of a certain lady whom he appointed his extri...

Sect. 1.—Personal estate and chattels real: Sub-sect.

(c) Operation of Statute of Limitations.

See, generally, LIMITATION OF ACTIONS.

3668. Against administrator—Operation suspended—Pending grant of administration.]—A. received intestate's money, & afterwards administration was granted to B. The cause of action accrues by the administration.

The statute could be no bar, because pltt.'s title commenced by taking out letters of administration, & this was not a cause of action in intestate (*per Cur.*).—**CARY v. STEPHENSON** (1894), 2 Salk. 421; 91 E. R. 366; *sub nom.* **CURRY v. STEPHENSON**, Carth. 335; Comb. 311; Holt, K. B. 98; 4 Mod. Rep. 376; Skin. 555.

Annotations:—**Fold.** Murray v. East India Co. (1821), 5 B. & Ald. 204. **Consd.** Rhodes v. Smethurst (1838), 4 M. & W. 42. **Mentd.** Chandler v. Roberts (1779), 1 Doug. K. B. 58.

3669. — — — — —.]—(1) In an action by an administrator upon a bill of exchange, payable to testator, but accepted after his death:—**Held:** Stat. Limitations begins to run from the time of granting the letters of administration, & not from the time the bills become due, there being no cause of action until there is a party capable of suing.

(2) An agent having money in his hands belonging to his principal purchases with it a bill of exchange, which he indorses specially to his principal; the latter at the time of the indorsement was dead, but that fact was not known to the agent:—**Held:** (2) the property in the bill passed to the administrator of the principal, & he might therefore sue upon the bill in that character; (3) the administrator was only entitled to recover interest upon bills accepted after the death of testator, from the time of demand of payment made by the administrator, & not from the time the bills became due.

(4) Where the declaration stated the drawing of certain bills of exchange, & their acceptance after the death of intestate, the granting of the letters of administration to pltt., deft.'s liability, etc.; & defts. pleaded that the cause of action did not accrue within six years, to which the pltt. replied generally, that it did accrue within six years:—**Held:** the replication was good.—**MURRAY v. EAST INDIA CO.** (1821), 5 B. & Ald. 204; 106 E. R. 1167.

Annotations:—**As to (1)** **Apld.** Perry v. Jenkins (1836), 1 My. & Cr. 118. **Consd.** Rhodes v. Smethurst (1838), 4 M. & W. 42; Curlewis v. Mornington (1858), 27 L. J. Q. B. 439. **Refd.** It. v. Okoford Fitzpayne (1830), 9 L. J. O. S. M. C. 12; Cowper v. Godmond (1833), 9 Bing. 748; Rhodes v. Smethurst (1840), 6 M. & W. 351; Webster v. Kirk (1852), 17 Q. B. 944; *Re* Fuller (1853), 2 E. & B. 573; Thomson v. Harding (1853), 2 E. & B. 630; Sturgis v. Darcil (1859), 4 H. & N. 622; Musurus Bey v. Gadban, [1894] 2 Q. B. 352; Smith v. Islington Grdns. (1902), 66 J. P. 664; Meyappa Chetty v. Supramanian Chetty, [1916] 1 A. C. 603. **Generally, Mentd.** Tolson v. Kaye (1822), 3 Brod. & Bing. 217; Blades v. Free (1829), 7 L. J. O. S. K. B. 211; Ward v. Shaw (1833), 9 Bing. 608; Esdalle v. La Nauze (1835), 1 Y. & C. Ex. 394; Goldstone v. Tovey (1839), 6 Bing. N. C. 98; Davidson v. Stanley (1841), 2 Man. & G. 721; Bateman v. Mid-Wales Ry. (1866), Har. & Ruth. 508; Crouch v. Credit Foncier of England (1873), L. R. 8 Q. B. 374.

3670. — — — — —.]—In trover by an administrator "not guilty of the premises within six years" is a bad plea, not being equivalent to an allegation that the cause of action did not accrue within six years.

As soon as letters of administration are granted the administrator becomes clothed with all the rights which appertained to testator at the time

of his death; but no right of action accrues to the administrator until he has sued out letters of administration. It may consequently be true that deft. has not been guilty of any conversion within six years, & yet that the cause of action has accrued to pltt. within six years (**BAYLEY, J.**).—**PRATT v. SWAINE** (1828), 8 B. & C. 285; 2 Man. & Ry. K. B. 350; 6 L. J. O. S. K. B. 353; 108 E. R. 1049.

3671. — — — — —.]—An agent who was a solr. in London held a power of attorney from his principal in America to sell his property & invest the proceeds in his name. The agent received certain moneys under the power & paid them in to his own bankers to the general account of his firm. The principal died in 1859 intestate. In 1867 his widow took out administration to his estate, & in 1868 she filed a bill against the agent for an account:—**Held:** (1) the agent held the money in trust for his principal, & therefore, Stat. Limitations was no bar to the suit. **Semble:** (2) if there had been no fiduciary relation between the parties, inasmuch as the agency lasted till the death of the principal, Stat. Limitations would not have begun to run till administration was taken out.—**BURDICK v. GARRICK** (1870), 5 Ch. App. 233; 39 L. J. Ch. 369; 18 W. R. 387, L. C. & L. J.

Annotations:—**As to (1)** **Apld.** *Re* Bell, Lake v. Bell (1886), 34 Ch. D. 462. **Consd.** Lyell v. Kennedy, Kennedy v. Lyell (1889), 14 App. Cas. 437; Soar v. Ashwell, [1893] 2 Q. B. 390. **Apld.** North American Land & Timber Co. v. Watkins, [1904] 1 Ch. 242. **Consd.** Reid-Newfoundland Co. v. Anglo-American Telegraph Co., [1912] A. C. 555; Henry v. Hammond, [1913] 2 K. B. 515; *Re* Allsop, Whittaker v. Bamford, [1914] 1 Ch. 1; *Re* Richardson, Pole v. Pattenden, [1920] 1 Ch. 423. **Refd.** Gray v. Bateman (1872), 21 W. R. 137; Boatwright v. Boatwright (1873), 43 L. J. Ch. 12; Watson v. Woodman (1875), L. R. 20 Eq. 721; Banner v. Berridge (1881), 18 Ch. D. 254; Flitcroft's Case (1882), 21 Ch. D. 519; Charles v. Jones (1887), 35 W. R. 645; *Re* Sharpe, *Re* Bennett, Masonic & General Life Assce. v. Sharpe, [1892] 1 Ch. 154; Friend v. Young, [1897] 2 Ch. 421; Nocton v. Ashburton, [1914] A. C. 932; Taylor v. Davies, [1920] A. C. 636. **Generally, Mentd.** Gilroy v. Stephens (1882), 51 L. J. Ch. 834; Dooby v. Watson (1888), 39 Ch. D. 178; Phillips v. Homfray (1890), 44 Ch. D. 694; Silkstone & Haigh Moor Coal Co. v. Edey, [1900] 1 Ch. 167; Dominion Coal Co. v. Maskinonge S.S. Co., [1922] 2 K. B. 132.

3672. — — — — —.]—If a creditor dies intestate on the day a debt becomes payable to him, & there is no evidence to show whether he died before or after the moment when the debt became payable, the statute does not begin to run against creditor's administrator until letters of administration have been taken out (**LORD ESHEIT, M.R.**).—**ATKINSON v. BRADFORD THIRD EQUITABLE BENEFIT BUILDING SOCIETY** (1890), 25 Q. B. D. 377; 59 L. J. Q. B. 360; 62 L. T. 857; 38 W. R. 630, C. A.

Annotations:—**Refd.** Smith v. Islington Grdns. (1902), 66 J. P. 664; Joachimson v. Swiss Bank Corp., [1921] 3 K. B. 110. **Mentd.** *Re* Tidd, Tidd v. Overall, [1893] 3 Ch. 154.

3673. — — — — —.]—Upon revocation of the grant of probate of a forged will the grant becomes void *ab initio*, & therefore in an action for account by the administrator, subsequently appointed, Stat. Limitations begins to run only from the date of the grant of the letters of administration so necessitated.—**CHAN KIT SAN v. HO FUNG HANG**, [1902] A. C. 257; 71 L. J. P. C. 49; 80 L. T. 245; 51 W. R. 18; 18 T. L. R. 420, P. C.

K. Leaseholds.

(a) In General.

3674. Devolution on representative.]—ANON (1530), Benl. 1; 73 E. R. 931.

PART III. SECT. 1, SUB-SECT. 2.—K. (a).

a. Devolution on representative—Recovery of rent in arrears—Payment in

produce.]—Exors. may sue for use & occupation of testator's land during his lifetime, but not where the agreement has been that the tenant should

ps. in produce, not in money.—**W. v. HAROLD** (1864), 23 U. C. R. 279.—**CAN.**

b. — — — — — Tenant in possession

3675. — **If deceased had vested interest.]**—ANON. (1587), 3 Leon. 195; 4 Leon. 192; 74 E. R. 628, 814.

Annotation:—**Mentd.** Outram v. Morewood (1803), 3 East, 346.

3676. — **—**—**]**—SPERKE v. SPERKE (1598), Owen, 125; 74 E. R. 948; *sub nom.* SPARK v. SPARK, Cro. Eliz. 660.

Annotations:—**Refd.** Alford's Case (1662), O. Bridg. App. 584; Poole v. Haskey (1663), O. Bridg. 364. **Mentd.** Osborne v. Sture (1686), 2 Lut. 1361.

3677. — **Lease subject to conditions.]**—A lease of a house was made to a widow for forty years, *sub conditione quod si tamdiu vixent sola et inhabitaverit*; & she died in the house unmarried within the term. These words make a condition & the lease shall go to her exor.—HARDY v. SEYER (1595), Cro. Eliz. 414; 78 E. R. 656; *sub nom.* SAWYER v. HARDY, Poph. 99; Moore, K. B. 400.

3678. — **—**—**]**—READ v. HOWET (1670), 3 Rep. Ch. 61; 21 E. R. 729.

3679. — **Beneficial interest in residue of term — Not disposed of by will.]**—When testator gives it for his life expressly & is silent as to the residuum then it shall remain with the exors. of the deviser.—ANON (1697), 2 Eq. Cas. Abr. 320; 23 E. R. 272.

See, now, Executors Act, 1830 (c. 40); Administration of Estates Act, 1925 (c. 23), s. 56.

3680. — **After several life interests.]**—Devise of a term of years to several successively for life. After all are dead, exor. of deviser shall have the residue.—EYRES v. FAULKLAND (1698), 1 Salk. 231; 91 E. R. 204.

3681. — **How affected by covenant not to assign—Except assignment by will.]**—If the vendor of a lease, in which is a covenant not to assign, contract to assign his interest, it is incumbent on him, & not on the purchaser to procure the lessor's licence for the assignment. If a covenant not to assign contain an exception in favour of assignment by will. *Semble:* exors. claiming under the will are not within the exception so as to be at liberty to sell for payment of debts without licence of the lessor.—LOYD v. CRISPE (1813), 5 Taunt. 249; 128 E. R. 685.

Annotations:—**Refd.** Mason v. Corder (1816), 2 Marsh. 332. **Mentd.** Walls v. Atcheson (1826), 3 Bing. 462; M'Neill v. Reid (1832), 9 Bing. 68; Smith v. Butler (1900), 48 W. R. 583.

3682. — **A conclusion of law.]**—A., on May 11, 1811, devised lands to B. & C., upon trust, that they & their heirs should let the lands, & out of the rents thereof should, in the first place, pay £121 10s. 6d. which A. owed to D.; & in the next place, should pay to E. F. G. H. & I. £10 apiece, as soon as the clear rents & profits of the lands would admit; & from & after the debt & legacies should be paid & discharged, A. devised the lands to Z., in fee. A. died on May 10, 1811. At the time of A.'s death, the lands were let to K. for £30 a year, under a lease for twenty-one years from Mar. 25, 1808. The trusts of the will were satisfied, & the debt & legacies paid, by B. & C., without any other letting of the lands:—**Held:** (1) as no greater estate was required to perform the trusts of the will, etc., B. & C. took only a chattel interest in the lands.

In covenant against L., the surviving extrix. of K., for a breach of one of the covenants in the indenture of lease, the declaration alleged, that on the death of K. all his estate & interest in the lands came to & vested in L. & one M., since deceased;

which said L. & M. were extrixes. of the last will & testament of K.; by reason whereof L. & M., as extrixes. as aforesaid, became & were possessed, etc.:—**Held:** (2) a sufficient averment that the term vested in L. & M. as extrixes. (3) it was unnecessary to aver that the term had vested in L. & M. as extrixes.; as the vesting of a term in the lessee's personal representatives, together with the liability of such personal representatives to be sued upon the covenants of the lessee, is, in effect a conclusion of law.—ACKLAND v. PRING (1841), 2 Man. & G. 937; 3 Scott, N. R. 297; Drinkwater, 189; 10 L. J. C. P. 231; 133 E. R. 1024.

3683. — **Whether title made to purchaser— Without joining beneficiaries.]**—Testator bequeathed his leaseholds to exors. & trustees upon trust for his nephews & nieces, with a power of sale. All the trustees who survived testator renounced the probate, & refused to accept the trusts. Administration with the will annexed was granted to another person, who paid all the debts & assented to the bequests. By the decree in a suit for the administration of testator's estate, a sale of the leaseholds was ordered:—**Held:** the administrator alone, without the beneficiaries, could make a title to the leaseholds, & had the same power to sell them as if he had been a trustee of the will.—WYMAN v. CARTER (1871), L. R. 12 Eq. 309; 40 L. J. Ch. 559.

3684. — **—**—**]**—A lease of land contained a covenant by the lessor with the lessee, his exors., administrators, or assigns, that if the lessee, his exors., administrators, or assigns, should at any time thereafter be desirous of purchasing the fee simple of the demised land & should give notice in writing to the lessor, his heirs or assigns, then the lessor, his heirs or assigns, would accept £1,200 for the purchase of the fee simple, & on the receipt thereof would convey the fee simple to the lessee his heirs or assigns or as he or they should direct. The lessee died intestate, & nearly twenty years after his death, but before the expiration of the term, his heir, who was also administrator of his personal estate, called on the devisee of the lessor to convey the fee simple to him in accordance with the covenant, & a conveyance was executed accordingly. The heir afterwards contracted to sell part of the property thus conveyed to him:—**Held:** on the true construction of the covenant the option to purchase was attached to the lease & passed with it; it consequently passed as part of the lessee's personal estate to the administrator, & the administrator could not make a good title to the purchaser unless the next of kin of the lessee concurred in the sale.—*Re ADAMS & KENSINGTON VENTRY* (1884), 27 Ch. D. 394; 54 L. J. Ch. 87; 51 L. T. 382; 32 W. R. 883, C. A.

Annotations:—**Refd.** *Re Isaac, Isaac v. Reginald*, [1894] 3 Ch. 506; *Frilary Holroyd & Healey's Breweries v. Singleton*, [1899] 2 Ch. 261; *Woodall v. Clifton*, [1905] 2 Ch. 257; *County Hotel & Wine Co. v. L. & N. W. Ity.*, [1918] 2 K. B. 251. **Mentd.** *Re Martineau* (1884), 48 J. P. 295; *Re Diggle, Gregory v. Edmondson* (1888), 39 Ch. D. 253; *Cochrane v. Dundonald* (1894), 10 T. L. R. 262; *Re Hamilton, Trench v. Hamilton*, [1895] 2 Ch. 370; *Hill v. Hill*, [1897] 1 Q. B. 483; *Re Williams, Williams v. Williams*, [1897] 2 Ch. 12; *Re Atkinson, Atkinson v. Atkinson* (1911), 80 L. J. Ch. 370.

See, generally, SALE OF LAND.

3685. — **Of interesse termini.]**—The *interesse termini* which a reversionary lease, for a term to commence more than twenty-one years after its

after expiration of term.]—H. leased to deft. for ten years, & died nine months after the expiration of the term, leaving rent for two years unpaid, &

deft. still in possession:—**Held:** his exor. might recover for the nine months' use & occupation as well as

the rent due under the lease.—*SEYMOUR v. GRAHAM* (1864), 23 U. C. R. 272.—CAN.

Sect. 1.—Personal estate and chattels real: Sub-sect. 2, K. (a), (b) & (c), & L.]

date, confers on the lessee is not an executory but an immediate vested interest, a right *in rem* capable of alienation & which passes to the exor. It is not an estate in the land, but an absolute proprietary right to take possession of the land when the stipulated time for the commencement of the term arrives. Such a reversionary lease, therefore, does not offend the rule against perpetuities, & the lessee is entitled, where the Land Registry Acts apply, to be registered as the proprietor of the lease with a good leasehold title.—*MANN, CROSSMAN & PAULIN v. LAND REGISTRY, REGISTRAR*, [1918] 1 Ch. 202; 87 L. J. Ch. 81; 117 L. T. 705; 62 Sol. Jo. 54; *sub nom.* *MANN, CROSSMAN & PAULIN v. HIND*, 34 T. L. R. 39.

See, now, Law of Property Act, 1925 (c. 20), s. 149.

3686. Devolution on representative of representative—Of equity of redemption—In term mortgaged by representative—Though administrator *de bonis non* appointed.]—*Semble*: where the personal representative of intestate has mortgaged part of intestate's estate & died, an administrator *de bonis non* of intestate can maintain a suit for redemption of the mortgaged estate.—*SKEFFINGTON v. BUDD* (1842), 9 Cl. & Fin. 219; 6 Jur. 809; 8 E. R. 399, 11 L.; *doubting but affg.* on other grounds, *S. C. sub nom.* *SKEFFINGTON v. WHITEHURST* (1837), 3 Y. & C. Ex. 1.

3687. Recovery of rent in arrears—Accrued before & after death of deceased.]—WADE v. MARSH (1625), Benl. 159; Lat. 211; 73 E. R. 1024. *Annotation*:—*Mentd.* Prescott v. Boucher (1832), 3 B. & Ad. 849.

3688. — On under lease granted by deceased—For term greater than his own.]—Lessee for a term of years underleased for a term longer than his own, the under-lessee covenanting to pay rent to lessee:—Held: the exor. of lessee might sue the under-lessee for rent accruing during the continuance of lessee's term.—*BAKER v. GOSTLING* (1834), 1 Bing. N. C. 19; 4 Moo. & S. 539; 3 L. J. C. P. 292; 131 E. R. 1024.

Annotations:—*Mentd.* Pollock v. Stacy (1847), 9 Q. B. 1033; Williams v. Hayward (1859), 1 E. & E. 1040; Baynton v. Morgan (1888), 21 Q. B. D. 101.

Compare Nos. 3693, 3695, post.

3689. Rent of lands contracted to be sold—Death of vendor before completion—Whether representative or heir entitled.]—An agreement was made for the sale of an estate at a future time. Before that time arrived the vendor died intestate:—Held: the rents accrued between the vendor's death & time for completing the contract belonged to the vendor's heir & not to his exor.—*LUMSDEN v. FRASER* (1841), 12 Sim. 263; 10 L. J. Ch. 362; 59 E. R. 1132.

See, generally, SALE OF LAND.

3690. Whether representative may enter—To remove fixtures.]—An exor. cannot enter to take away fixtures, without being a trespasser.—Ex p. QUINCY (1750), 1 Atk. 477; 26 E. R. 304, L. C. *Annotations*:—*Mentd.* Elwes v. Maw (1802), 3 East, 38; Winn v. Ingilby (1822), 5 B. & Ald. 625; *Re Maberly*, *Ex p. Belcher* (1835), 4 Deac. & Ch. 703; *Re Gyo & Hughes*, *Ex p. Reynal* (1841), 2 Mont. D. & De G. 443; *Re Walsh*, *Ex p. King* (1849), 4 Jur. 610; Bishop v. Elliott (1855), 11 Exch. 113; Elliott v. Bishop (1855), 25 L. T. O. S. 150.

3691. Rights of representative under Rent Restriction Acts—When not in actual occupation—Whether entitled to protection.]—The tenant of a dwelling house, which came within the scope of above Acts, died. By her will she appointed deft. F. her exor., & deft. O., who had resided in the

house with her, residuary legatee. After the death of the tenant, O. continued to reside in the house. The landlord by notice to quit served upon F. required possession to be given up, & as possession was not given on the expiration of the notice, proceedings were commenced against both defts., who claimed the protection of above Acts:—*Held*: F. as exor., was tenant of the house within the meaning, & was entitled to the protection of above Acts, although he was not in the occupation of the house.—*COLLIS v. FLOWER*, [1921] 1 K. B. 409; 90 L. J. K. B. 282; 124 L. T. 510; 19 L. G. R. 193, D. C.

Annotations:—*Apld.* Mellows v. Low, [1923] 1 K. B. 522. *Mentd.* Parkinson v. Noel, [1923] 1 K. B. 117; Keeves v. Dean, Nunn v. Pellegrini, [1924] 1 K. B. 685.

3692. — — — — —.]—A single woman was the weekly tenant & sole occupier of a house which as regards rental came within the scope of the above Acts. During her tenancy she died intestate. Some months later her sister was appointed administratrix but she never resided in deceased's house which had been sublet to another person. The landlord claimed that on the death of the tenant intestate with no member of her family residing with her in the house, the tenancy lapsed, & that he was entitled to recover possession of the house:—Held: (1) the administratrix was a person who derived title under the original tenant within Increase of Rent & Mortgage Interest (Restrictions) Act, 1920 (c. 17), s. 12 (1) (f), & her right as tenant was not affected by the provisions of paragraph (g) of the above sub-sect.; (2) paragraph (g) must be taken as applying only to cases where there is no exor. or administrator, in other words, to cases not falling within paragraph (f).—*MELLOWS v. LOW*, [1923] 1 K. B. 522; 92 L. J. K. B. 363; 128 L. T. 667; 39 T. L. R. 190; 67 Sol. Jo. 261; 21 L. G. R. 180, D. C. *Annotations*:—*Generally*, *Mentd.* Keeves v. Dean, Nunn v. Pellegrini, [1924] 1 K. B. 685; Queen's Club Gardens Estates v. Bignell, [1924] 1 K. B. 117.

See, generally, LANDLORD & TENANT.

(b) *Yearly Tenancies, Tenancies at Will, etc.*

3693. Devolution on representative—Extent of interest.]—In the case of a tenancy from year to year as long as both parties please, if the tenant die intestate, his administrator has the same interest in the land which his intestate had. The lessee of such an administrator may declare in an ejectment on a term for seven years.—DOE d. SHORE v. PORTER (1789), 3 Term Rep. 13; 100 E. R. 429.

Annotations:—*Consd.* James v. Dean (1805), 11 Ves. 383. *Refd.* It. v. Stone (1795), 6 Term Rep. 295; Croft v. Blay, [1919] 1 Ch. 277. *Mentd.* Wilkinson v. Calvert (1878), 3 C. P. D. 360; Slidebotham v. Holland, [1895] 1 Q. B. 378.

3694. — Tenancy at will—In waste lands of manor.]—Re MANSER, KILLICK v. MANSER, [1910] W. N. 61.

3695. Grant by deceased of underlease—For term greater than his own—Whether representative may sue for breach of covenant.]—An exor. of a lessor, tenant from year to year, may declare for a breach of covenant in a lease for twenty-one years, granted by the lessor, though the breach was committed after the lessor's death.—MACKAY v. MACKRETH (1785), 2 Chit. 461; 4 Doug. K. B. 213; 99 E. R. 846.

3696. Notice to representative to quit—Length of notice to which entitled.]—A month's notice not sufficient to quit a lease from year to year. If the party die, it is not sufficient to the exor.—GULLIVER d. TASKER v. EYRE (1766), 1 Wm. Bl. 596; 96 E. R. 345.

3697. — — — — —.]—Half a year's notice must

be given to a tenant at will or his exor. to quit, or ejectment does not lie.—*PARKER d. WALKER v. CONSTABLE* (1769), 3 Wils. 25; 95 E. R. 913.

(c) *Operation of Statutes of Limitation.*

3698. Against administrator—From date of death of deceased—Real Property Limitation Act, 1833 (c. 27), s. 6.]—Under above sect. time begins to run as against an administrator claiming a chattel interest in land from the date of the death of intestate, & not from the date of the grant of administration.—*Re WILLIAMS, DAVIES v. WILLIAMS* (1886), 34 Ch. D. 558; 56 L. J. Ch. 123; 55 L. T. 633; 35 W. R. 182; 3 T. L. R. 99.

See, generally, LIMITATION OF ACTIONS.

L. Property of Married Women.

See, generally, HUSBAND & WIFE.

3699. Administrator of wife—Becomes trustee for husband's representative.]—*SQUIB v. WYN* (1717), 1 P. Wms. 378; 24 E. R. 432, L. C.

Annotations:—Expld. Betts v. Kimpton (1831), 2 R. & Ad. 273. *Consd. Smart v. Tranter* (1890), 43 Ch. D. 587. *Reid. Blennerhasset v. Monsell* (1852), 19 L. T. O. S. 36; *Re Lambert's Estate, Stanton v. Lambert* (1888), 39 Ch. D. 626; *Elliot v. North*, [1901] 1 Ch. 424. *Mentd. Forbes v. Phipps* (1760), 1 Eden, 502.

3700. ———.]—A. survives her first husband, who left her a legacy; she dies, the legacy being unreceived by the second husband during her life, but after her death he administers, & dies before the legacy came to his hands; his administrator gets it in, & the administrator *de bonis non* of the wife brings this bill for the legacy. *Equity* considers the administrator *de bonis non* as a trustee for the administrator of the husband, who having an absolute right by surviving his wife, his administrator ought to have the benefit of it.—*HUMPHREY v. BULLEN* (1737), 1 Atk. 458; 2 Eq. Cas. Abr. 425, 445; *West temp. Hard.* 66; 26 E. R. 291, L. C.

Annotations:—Reid. Re Lambert's Estate, Stanton v. Lambert (1888), 39 Ch. D. 626; *Elliot v. North*, [1901] 1 Ch. 424.

3701. Representative becomes trustee for husband—Of property not disposed of.]—The Married Women's Property Act, 1882 (c. 75), does not affect the right of the husband to succeed, on the death of the wife, to her undisposed of separate personality.

A married woman who died on Sept. 13, 1887, leaving a husband & three children surviving, made a will on Sept. 7, 1887, in exercise of a power of appointment, & appointed exors. The will did not purport to dispose of any other property. At her death she was entitled to separate personal estate not included in the power. Probate of the will was granted under Amended Probate Rules of Apr. 1887, in the ordinary form, without any exception or limitation:—*Held*: the exors. were trustees for the husband of the undisposed of property.

The [Married Women's Property Act, 1882] simply confers on married women the capacity to acquire, to hold, & to dispose of, by will or otherwise, property as if they were *femes sole*. . . . The dispute is as to the devolution of property which the married woman has not effectually disposed of. Now with this the Act does not purport to deal (*STIRLING, J.*).—*Re LAMBERT'S*

ESTATE, STANTON v. LAMBERT (1888), 39 Ch. D. 626; 57 L. J. Ch. 927; 59 L. T. 429.

Annotation:—Reid. Surman v. Wharton, [1891] 1 Q. B. 491.

3702. ———. Of property not in wife's disposition.]—A woman, married before Married Women's Property Act, 1882 (c. 75), who was entitled to choses in action, but had no separate property nor any property of which she could dispose by will, made, without the assent of her husband, a will, by which she appointed exors., & gave all her property away from her husband. After her death probate of her will, which pursuant to R. S. C., 1887, was in general form, was granted to one of the exors. The husband brought an action in the Ch. Div. against the exor. to recover the choses in action:—*Held*: the effect of the general probate was only to enable the exor. to get in all the assets of the wife, whether she had power to dispose of them by will or not, & that it did not affect the beneficial title to them; the husband was beneficially entitled to the choses in action, the exor. was a trustee of them for him, & the husband was entitled to have them transferred to him by the exor. subject to the same deductions as they would have been subject to if the husband had taken out administration under the old practice.

As regards the choses in action of the wife not reduced into possession during the coverture, if the husband survives he is beneficially entitled to them. If he takes out letters of administration he is entitled to them at law & in equity; but if he does not take out letters of administration the legal personal representative of the wife is the person to get them in, but, having got them in, he holds them in trust for the husband (*LINDLEY, L.J.*).—*SMART v. TRANTER* (1890), 43 Ch. D. 587; 59 L. J. Ch. 363; 62 L. T. 356; 38 W. R. 530, C. A.

Annotations:—Reid. Re Parsons, Stockley v. Parsons (1890), 59 L. J. Ch. 666; *Re Atkinson, Waller v. Atkinson*, [1898] 1 Ch. 637; *Elliot v. North*, [1901] 1 Ch. 424.

3703. ———.]—When a married woman dies entitled to a reversionary interest in personal estate, it vests beneficially in her surviving husband immediately upon her death, & whether he takes administration to her estate or not; & if some one else becomes administrator, this latter holds the interest upon trust for the husband. This is so, even if the wife has made a will not dealing with the reversionary interest, & the husband has assented to a grant of administration with the will annexed being made in general terms to the exors. named in the wife's will.

It is not necessary for the validity of the assent that it should have been given before the death of the wife.

As regards this reversionary interest, was it property which she could dispose of by her will? I answer No. The husband had given no consent in her lifetime to her disposing of it (*BUCKLEY, J.*).—*ELLIOT v. NORTH*, [1901] 1 Ch. 424; 70 L. J. Ch. 217; 49 W. R. 247.

3704. Reversionary interest in fund—Vesting in wife before divorce—Effect of divorce.]—By a decree of the Ct. of Divorce a marriage between a husband & wife was declared to be dissolved. At the date of the decree the wife was entitled to a reversionary interest in a sum of stock which was

PART III. SECT. 1, SUB-SECT. 2.—L.

a. *Value of widow's dower—In land sold by widow—Right to dower or share of husband's estate reserved.]*—The owner of land died intestate leaving a widow & an infant child. The widow administered, & with the

consent of the official guardian, sold & conveyed the land in Mar. 1899, barring her dower in the deed of grant, & the whole of the purchase-money was paid into ct. to the joint credit of herself & of the official guardian, she reserving her right to elect between receiving the value of her dower or a

distributive share of the estate, one of which it was clearly understood she would be entitled to be paid out of the fund in ct. In Sept. 1900, the widow executed a document wherein she elected to take the value of her dower in lieu of any other interest she might have in her husband's undisposed

Sect. 1.—Personal estate and chattels real: Sub-sect. 2, L., M. (a), (b), (c) & (d), N. & O.; sub-sect. 3. Sect. 2: Sub-sect. 1.]

not settled before her marriage, & had been the subject of a post-nuptial settlement. After the decree, the fund fell into possession, & the divorced wife took steps to realise the fund, but before it was recovered she died:—*Held*: the same consequences as to property must follow the declaration of dissolution by the Divorce Court, as if the marriage contract had been annihilated & the marriage tie broken on that date: those rights of the divorced husband which depended upon the contract ceased at the same date; & the exors. of the divorced wife were entitled to the fund.—*WILKINSON v. GIBSON* (1867), L. R. 4 Eq. 162; 36 L. J. Ch. 646; 16 L. T. 733; 15 W. R. 983.

Annotations:—Expld. Codrington v. Lindsay (1872), 21 W. R. 182. *Distd. Fitzgerald v. Chapman* (1875), 1 Ch. D. 563. *Reid. Allcard v. Walker*, [1896] 2 Ch. 369.

3705. Separate property acquired before 1883—Administration by husband to perfect title—Whether necessary.]—A wife entitled to a term subject to a life estate therein predeceased her husband during the subsistence of the life estate:—*Held*: it was not necessary for the husband to take out letters of administration to her in order to complete his title to the leaseholds.—*Re BELLAMY, ELDER v. PEARSON* (1883), 25 Ch. D. 620; 53 L. J. Ch. 174; 49 L. T. 708; 32 W. R. 358.

3706. ———.]—A., by deed of gift, gave property to his wife for her "own proper use & benefit." A. died & the wife subsequently married deft., & after 1882 borrowed money of pltf. She died intestate, & pltf. sued her husband, who had taken possession of the property:—*Held*: (1) the property was separate property, & bound by the wife's contract; (2) it passed to her husband *jure mariti*, & administration was unnecessary; (3) the husband was the personal representative of his wife within Married Women's Property Act, 1882 (c. 75), s. 23, & liable to the extent of the property.—*SURMAN v. WHARTON*, [1891] 1 Q. B. 491; 60 L. J. Q. B. 233; 64 L. T. 866; 30 W. R. 416; 7 T. L. R. 196, D. C.

Annotations:—As to (2) Reid. Re Wheeler's Settlement, Trusts, Briggs v. Ryan, [1899] 2 Ch. 717. *As to (3) Reid. Pelton*

See No. 3701, ante, & see, now, Married Women's Property Act, 1882 (c. 75), ss. 1, 2, 5.

Compare Part II., Sect. 11, sub-sect. 4.

3707. Undisposed of property—Husband administrator a bankrupt—Devolution on husband notwithstanding.]—Fund settled upon wife to her separate & absolute use, she dying intestate, leaving her husband a certificated bankrupt, goes to husband as her administrator, not to his assignee.—*WHITLEY v. WATSON, Re HARTLEY* (1838), 2 Jur. 45.

See, now, Bankruptcy Act, 1914 (c. 50), s. 36, & generally, BANKRUPTCY, Vol. V., pp. 675 et seq., Nos. 5974 et seq.

3708. Death of husband before administering—By whom assets recoverable—Wife's representative.]—The administrator of a husband who survived his wife, & died without taking out administration of her effects, cannot recover her choses in action. For that purpose administration must be taken out to the wife.—*BETTS v. KIMPTON* (1831), 2 B. & Ad. 273; 9 L. J. O. S. K. B. 192; 109 E. R. 1144.

Annotations:—Reid. Richards v. Richards (1831), 2 B. & Ad. 447; *Taverner v. Lagor* (1831), 9 L. J. O. S. K. B. 196; *A.-G. v. Partington* (1864), 3 H. & C. 193. *Mentd. Fleet v. Perrins* (1869), L. R. 4 Q. B. 500.

of real estate. She died in Apr. 1901:—*Held*: the administrator of the widow's estate was entitled to receive

out of the moneys in ct. the value of the widow's dower, computed according to the annuity tables.—*Re PARTIT*

3709. ———.]—Where there was a fund in ct. standing to the separate account of a married woman, whose husband survived her, & died before administering to her estate, the fund was ordered to be paid to the wife's legal personal representative, although such representative had not also obtained administration to the husband's estate.—*GUTTERIDGE v. STILWELL* (1833), 1 My. & K. 486; 39 E. R. 765.

Annotations:—Consd. Loy v. Duckett (1841), Cr. & Ph. 305; *Partington v. A.-G.* (1869), L. R. 4 H. L. 100.

M. Death of Party to Action.

(a) In General.

See, generally, R. S. C., Ord. 17.

Death of party before judgment.]—*See PRACTICE.*

Death of party while appeal pending.]—*See PRACTICE.*

(b) Payment out of Court.

3710. Effect of abatement of action—Payment into court without denial of liability—Death of defendant.]—In an action of libel deft. paid money into ct. in satisfaction of the claim, without denying liability. Pltf. did not take the money out of ct. & proceeded with the action. The action being yet untried, deft. died & the action therefore abated. Deft.'s exors. thereupon applied for an order that the money in ct. should be paid out to them:—*Held*: their application should be refused & the money paid out to pltf.—*BROWN v. FEENEY*, [1906] 1 K. B. 563; 75 L. J. K. B. 494; 94 L. T. 460; 54 W. R. 445; 22 T. L. R. 393; 50 Sol. Jo. 358, C. A.

Annotations:—Apld. Maxwell v. Wolseley, [1907] 1 K. B. 274. *Consd. Chiverton v. Ede*, [1921] 2 K. B. 30. *Reid. Maconochie v. Maconochie, Maconochie v. Maconochie & Blake*, [1916] P. 326.

3711. ——— Death of plaintiff.]—In an action of libel deft. pleaded an apology & payment of money into ct. Pltf. did not take the money out of ct.; & he died before the action came on for trial. An order was made by a judge at chambers that the money should be paid out to the exor. of pltf. On appeal:—*Held*: the judge had power in his discretion to make the order.—*MAXWELL v. WOLSELEY (VISCOUNT)*, [1907] 1 K. B. 274; 76 L. J. K. B. 163; 96 L. T. 4; 23 T. L. R. 157; 51 Sol. Jo. 130, C. A.

(c) Matrimonial Proceedings.

See HUSBAND & WIFE.

(d) Costs.

See Attorneys & Solicitors Act, 1870 (c. 28), s. 19; R. S. C., Ord. 17, rr. 1–10.

Costs payable in respect of criminal information.]

—*See CRIMINAL LAW, Vol. XV., p. 615, No. 6442.*

In ecclesiastical courts.]—*See ECCLESIASTICAL LAW, Vol. XIX., p. 335, Nos. 1467–1469.*

N. Trust Estates.

See TRUSTS & TRUSTEES.

O. Mortgage Estates.

See MORTGAGE.

SUB-SECT. 3.—BANKRUPTCY OF REPRESENTATIVE.

Bankruptcy generally, see BANKRUPTCY, Vols. IV., V.

(1902), 22 C. L. T. 300; 4 O. L. R. 506; 1 O. W. R. 464.—*CAN.*

3712. Goods in possession of bankrupt—Person entitled to take out administration—Consent of "true owner."—Where a person, entitled to take out letters of administration, neglected to do so, but remained in possession of the goods of intestate, & being so in possession, became bkpt., & a creditor of intestate, afterwards took out letters of administration, & claimed the goods from the assignees:—*Held*: these goods were within 21 Jac. 1, c. 19, being property in the possession, order, & disposition of bkpt., with the consent of the true owner, & the assignees were therefore entitled to them.—*FOX v. FISHER* (1819), 3 B. & Ald. 135; 106 E. R. 612.

Annotations:—*Consd.* *Cooper v. De Tastot* (1833), 2 Moo. & S. 714. *Apld.* *Re Thomas, Ex p. Thomas* (1842), 3 Mont. D. & De G. 40. *Consd.* *Kitchen v. Ibbetson* (1873), L. R. 17 Eq. 46. *Mentd.* *Re Marshall, Re Marshall* (1846), De G. 273.

3713. — — — — —.]—An innkeeper, who was a widow, having died intestate, two of her children, a son & daughter, took possession of her furniture & stock-in-trade, & carried on her business in their own names for two years after her death, during which time they paid her funeral expenses & some of her debts, but without taking out administration to her estate, & at the end of that time, became bkpts., the daughter having a few months previously retired from the business, & sold her share of it to the son. Another of the children then took out administration to intestate, & claimed that part of her furniture & stock-in-trade which still remained in specie:—*Held*: it belonged to the assignees, as having been in the order & disposition of the son at the time of his bkcpy.—*Re THOMAS* (1842), 1 Ph. 159; 12 L. J. Ch. 59; 41 E. R. 591; *sub nom.* *Re THOMAS, Ex p. THOMAS*, 3 Mont. D. & De G. 40; 6 Jur. 979, L. C.

Annotation:—*Mentd.* *Re Marshall, Re Marshall* (1846), De G. 273.

3714. — — — — —.]—**Retention of possession by administratrix—With consent of creditors.**—The holders for value of an unregistered bill of sale of certain goods supplied to an innkeeper for use in his business allowed them to remain in the hands of his administratrix after his death. She continued the business & remained in possession of the goods for fifteen months after taking out letters of administration to him, at the end of which time she became bkpt.:—*Held*: (1) the goods were in the order & disposition of bkpt. with the consent of the true owners; (2) independently of the bill of sale the lapse of more than a year, during which the goods were in the hands of the administratrix & used by her for the purposes of her business, precluded any claim as against her creditors by the creditors of the estate of which she was administratrix.—*KITCHEN v. IBBETSON* (1873), L. R. 17 Eq. 46; 43 L. J. Ch. 52; 29 L. T. 450; 38 J. P. 212; 22 W. R. 68.

3715. Business carried on by bankrupt—With consent of creditors—Effect of lapse of time.—*KITCHEN v. IBBETSON*, No. 3714, *ante*.

3716. — — — — —.]—**Property earmarked as trust property.**—A., who at the time of his death in 1807 was carrying on the business of a farmer, gave his residuary personal estate to his widow & a co-trustee upon trust to permit his widow to have the use & enjoyment of his household furniture, & the dividends, interest, & annual income & produce

of his other residuary estate for life, & then upon trusts in favour of testator's two sons. Testator's residuary estate consisted almost entirely of the household furniture & farm stock, & the widow, with the consent of her co-trustee, carried on the business of the farm. She took a new lease of the farm in her own name, & painted her own name upon the carts; but the financial part of the business was carried on through a joint banking account opened in the names of "the exors. of the late A." In 1879, the widow presented her petition for liquidation. All the property in her possession consisted of the furniture & farm stock bequeathed by testator, or of stock which had replaced the original stock in the ordinary course of business. Upon being sold it realised a sum of £2,003 15s. 6d., with produce estimated at £250 still to be realised. Testator's residuary account had been passed at £1,917 7s. 6d.:—*Held*: the farming stock in the hands of the widow was well earmarked as trust property, & only the life interest of the widow in the proceeds of the realisation passed to the trustees in the liquidation.—*Re ANSLOW, Ex p. BARBER* (1880), 42 L. T. 411; 28 W. R. 522.

3717. — — — — —.]—Testator directed his debts to be paid, & gave the residue of his estate to his wife, whom he appointed extrix. The widow proved the will, paid some of the debts, & for four years carried on, ostensibly on her own account, her late husband's business. At the end of that period she married a second husband, who shortly afterwards became bkpt. There were then creditors of testator still unsatisfied, who had been throughout aware of the widow's dealings in relation to the business:—*Held*: they had no interest in the stock & property of the business as against the trustee in bkcpy.—*Re FELLIS, Ex p. ANDREWS* (1870), 4 Ch. D. 509; 40 L. J. Bcy. 23; 25 W. R. 382.

3718. Forfeiture of lease—Bankruptcy of executor or lessee.—A lease contained a proviso that if the lessee, his exor., administrator or assign, should become bkpt. or insolvent, it should determine. The lessee having died, his exor. became a bkpt. in his own business:—*Held*: the forfeiture accrued & the proviso was not to be limited to the case where the exor. should carry on the business of the lessee & become bkpt. in that character.—*DOE d. WILLIAMS v. DAVIES, & C. & P. 614.* (1834), 1 Cr. M. & R. 405; 5 Tyr. 125; 4 L. J. Ex. 10; 140 E. R. 1137; *previous proceedings, sub nom.* *DOE d. WILLIAMS v. DAVIES, & C. & P. 614.*

Annotations:—*Mentd.* *Baylis v. Le Gros* (1858), 31 L. T. O. S. 215; *Stevens v. Copp* (1868), L. R. 4 Exch. 20; *Horsey Estate v. Steigler*, [1899] 2 Q. B. 79.

—.]—*See, generally, LANDLORD & TENANT.*

3719. Proceedings by representative—Not supported by co-representatives—Whether maintainable.—*Re TALLERMAN, JOSEPH v. TALLERMAN*, [1886] W. N. 125.

SECT. 2.—REAL ESTATE.

SUB-SECT. 1.—IN GENERAL.

3720. Deceased must have interest—Before representatives take interest.—*ANON.* (1587), Gouldsb. 64; 75 E. R. 997.

PART III. SECT. 2, SUB-SECT. 1.

d. Under Real Estates of Intestates Distribution Act, 1862 (No. 20).—26 Vict., No. 20 (Colonial Act), s. 1. provided that all land which by opera-

tion of law would, upon the death of the owner intestate, pass to his heir, should pass to, & be vested in, his personal representative in like manner as chattels real:—*Held*: the Act introduced a new rule of succession

to real estate, which in cases of intestacy should be administered as chattels real.—*WENTWORTH v. HENRIK* (1886), 55 L. J. P. O. 66.—*AUS.*

e. — Whether really converted into personally.—The above Act does not

Sect. 2.—Real estate: Sub-sects. 1 & 2, A. (a).]

3721. Managing power over estate—Given to executor—Passes no interest.—Pltf. took no interest in the land by the will, for the oversight &

doing of his land shall be intended, but in right of the heir & to his use, because testator thought not his son of discretion & government, until the age of twenty-four years, & in the meantime appointed his exor. to oversee & order the land to

operate to convert realty into personality.—*Re LYON'S ESTATE* (1900), 21 N. S. W. L. R. 282.—AUS.

1. *Heir also personal representative—Whether heir-at-law within Statute of Distributions, s. 5.*—The exemption in Statute of Distributions, s. 5, does not apply to the case of the eldest son of the intestate, who is also his personal representative, since, owing to Real Estate of Intestates Distribution Act, 1862, the land of the intestate is now held by his personal representative on trust for his next of kin. Such "heir trustee" cannot be regarded as "heir-at-law" within sect. 5.—*COLEMAN v. LAKE* (1903), 3 S. R. N. S. W. 603; 20 N. S. W. L. R. 191.—AUS.

2. *Effect of rule that heir traced by descent from purchaser.*—The rule of succession imposed by Real Estate of Intestates Distribution Act, 1862, applies to all cases where the owner of land dies intestate, & is not excluded by reason of the fact that the heir-at-law of intestate is traced by descent from the purchaser.—*Re HEARLE* (1903), 3 S. R. N. S. W. 406; 20 N. S. W. L. R. 189.—AUS.

3. *Adverse possession of intestate—Possession continued by next of kin—Letters of administration taken out.*—Where a person dies intestate having been in adverse possession of land for less than twenty years his next of kin cannot continue the possession so as to complete the twenty years even though he was on the land at the time of intestate's death, & remained there with the object of continuing such possession & afterwards took out letters of administration.—*Re WINTER* (1893), 14 N. S. W. L. R. 389; 10 N. S. W. L. R. 116.—AUS.

4. *Right to registration as proprietor—Transfer of Land Act, 1890—Claim by administrator of administrator.*—The administrator of an administrator is not entitled to be registered as proprietor of land belonging to the original intestate. The administrator of an administrator claiming to be entitled to be registered as proprietor of land belonging to the original intestate is entitled to proceed under Transfer of Land Act, 1890 (No. 1149), s. 209, & to call upon the Registrar to substantiate the grounds of his refusal to register.—*Re O'CONNOR* (1899), 24 V. L. R. 896.—AUS.

5. *Administration & Probate Act, 1890.*—Real estate of a deceased owner, to whose will or estate there has been grant of probate or letters of administration, thereafter vests in his representative for the time being & therefore, it vests in the exor. of an exor., but not in the exor. of an administrator. Only the representative of a person, who was registered in his own right as proprietor of an estate in land under Transfer of Land Act, 1890, is entitled to be registered under s. 193 of that Act & Administration & Probate Act, 1890, s. 12. The exor. of a person who was registered as exor. of a deceased proprietor is not entitled to be registered unless he shows that the first exor. was the sole exor. or that any other exor. of such deceased proprietor predeceased appt., or did not appear after citation, or renounced probate. The exor. of a person who was registered as administrator of a deceased proprietor is not entitled to be registered.—*It. v. TITLES REGISTRAR, Ex p. MADDOCK, Ex p. MILLER*, [1915] V. L. R. 152.—AUS.

6. *Contingent remainders—Estate to*

support—Wills, Probate & Administration Act, 1898.—The statutory legal estate, vested in exors. by Wills, Probate & Administration Act, 1898, s. 44, is sufficient to support contingent remainders created by the testator's will, even when the devisees are in form legal devisees.—*Re BEAVIS, BEAVIS v. BEAVIS* (1906), 7 S. R. N. S. W. 66.—AUS.

7. *Real Property Act, 1886.*—The rule that contingent remainders must have a particular estate of freehold to support them has no application to land under Real Property Act, 1886, which upon the death of the registered proprietor becomes at once vested in his exors. or administrators by virtue of ss. 175, 178, 179 of that Act.—*Re CAMPION*, [1908] S. A. L. R. 1.—AUS.

8. *Under Probate Act, 1890, ss. 15, 20.*—The intention of Probate Act, 1890, ss. 15, 20, was to place real & personal estate upon the same footing as regards actions for the recovery of debts due by testator.—*UNION BANK OF AUSTRALIA v. HARRISON, JONES & DEVLIN, LTD.* (1910), 11 C. L. R. 492.—AUS.

9. *Real estate held in autre droit.*—Real estate held in *autre droit* does not, on the holder's death, vest, under Administration & Probate Act, 1890, s. 6, in his exor., as such, nor in his administrator.—*R. v. TITLES REGISTRAR, Ex p. MADDOCK, Ex p. MILLER*, [1915] V. L. R. 152.—AUS.

10. *Deceased holding under defective title—Acts of representative to support title—Benefit of.*—The acts of a near relative & personal representative of a deceased person done on behalf of his minor children & heirs upon & in regard to land which was claimed by deceased, but under a defective title, will enure to the benefit of such heirs, to show possession in them, as against a mere wrongdoer.—*HADDEN v. WHITE* (1845), 4 N. B. R. (2 Kerr) 634.—CAN.

11. *Direction to sell—To pay debts—Estate of executor.*—Where testator directs his exors., as soon as convenient, to make sale to the best advantage of his estate, first for the payment of his debts, & then to divide the surplus proceeds among his children the exor. takes no estate but merely a naked power to sell, the fee in the meantime descending to the children.—*GREGORY v. CONNOLLY* (1850), 7 U. C. R. 500.—CAN.

12. *Pltf., administrators of lt., sued debts, exors. of M., on their covenants for seisin in their own right contained in a conveyance of land by them to lt. It appeared that debts, only claim to the land was as exors., under a power to sell for payment of debts, contained in M.'s will.*—*Held*: (1) if the power was well exercised the estate passed to lt.'s heir, who must sue on the covenant, not pltf.; (2) there would be a breach of the covenant, debts not being seized, for which, however, only nominal damages would be recoverable.—*MACDOUGALL v. MACDONELL* (1855), 5 C. P. 355.—CAN.

13. *Executors not acting—Right of administrator with will annexed.*—B. bequeathed to his wife the land in question to be at her disposal, if agreeable to the exors., of whom she was not one, so long as she remained a widow, adding, "I wish & desire the farm to be sold for the discharge of my debts." He then directed that his two eldest sons should have the property when they came of age, after his wife's death, if she should

remain a widow, & if she should marry they were to come into possession when of age, & that these two sons were to pay to the other children a proportion equal to their part of the property, adding, "all the above to be done to the wishes of the exors." None of the exors. proved or acted, & in 1851 letters of administration, with the will annexed, were granted to the widow, who in the same year conveyed to deft., describing herself in the deed as "sole devisee, with power of sale for purposes set forth, under the will of," etc. She married again about 1853. This sale she swore was made in order to pay testator's debts, & the purchase-money was so applied.—*Held*: the sale directed by the will being for the payment of debts, the power to sell was vested by implication in the exors., & she did not take it as administrator.—*BANTING v. GUMMERSON* (1865), 24 U. C. R. 287.—CAN.

14. *Only one executor proving will—Power to make good title.*—Testator by his will directed that his debts should be paid & that his property, which included real estate, should be sold by his exors. One of the exors. alone proved the will, the other having renounced probate.—*Held*: the acting exor. could make a good title to the real estate, & that he had power to sell & convey it.—*Re FISHER* (1884), 13 L. R. Ir. 546.—IR.

15. *Whether approval of court or guardian required.*—Where a will devised lands to the exors. on trust to sell same.—*Held*: the case was not within Devolution of Estates Acts, s. 8, & the approval of the official guardian or an order of the ct. was not necessary to a sale.—*Re BOOTH'S TRUSTS* (1888), 16 O. R. 429.—CAN.

16. *Ejectment—Right of reversion—Title to freehold involved.*—In ejectment where the title to the freehold is involved the administrator of deceased pltf. is not entitled to revive the action.—*HENRY v. McNEIL* (1858), 2 Thom. 337.—CAN.

17. *Right to bring action.*—One F. mortgaged land in fee to A. with a proviso for possession until default. Upon his death his heir-at-law brought ejectment to recover possession from a tenant, no default having been made in the mtgo.—*Held*: the proviso would entitle the mtgor. to bring ejectment but that the right of action descended to the exors. & not to the heirs.—*FORD v. JONES* (1862), 12 C. P. 358.—CAN.

18. *Right to receive rent.*—An exor. or administrator has no right as such to receive the rents of real estate. As to them he is merely an intermeddler, & will not be entitled to any commission thereon.—*DAGG v. DAGG* (1878), 25 Gr. 542.—CAN.

19. *Under Devolution of Estates Act, 1887, c. 108.*—On a sale of lands the purchaser objected to the title on the ground that the title being deduced through the devise of a person who had died since the coming into force of the Devolution of Estates Act, R. S. O. 1887, c. 108, the legal estate was outstanding in the executor of such person. It appeared that all debts of testator had been paid.—*Held*: under Devolution of Estates Act the legal estate in deceased's land vested in his legal personal representative, & the beneficial owner, whether the debts of the deceased were paid or not, could make a good title without a conveyance from the

the profits of the heir that wanted discretion (per CUR.).—CARPENTER v. COLLINS (1605), 1 Brownl. 88; Moore, K. B. 774; Yelv. 73; 123 E. R. 683.

Annotation.—Mentd. Pinhorn v. Souster (1853), 8 Exch. 763.

Executor as tenant for life—Under Settled Land Act, 1882 (c. 38).—See SETTLEMENTS.

SUB-SECT. 2.—IN CASE OF PERSONS DYING BEFORE 1898.

A. Where Testator directs Realty to be sold.

(a) In General.

See 21 Hen. 8, c. 4.

3722. Common law power of sale.—ANON. (1502), Keil. 40; 72 E. R. 198.

3723. —[WARD v. DEVON (1805), cited in 11 Sim. p. 160; 9 L. J. Ch. 308, n.; 59 E. R. 835. *Annotations*.—Folld. Forbes v. Peacock (1840), 11 Sim. 152; Curtis v. Fulbrook (1849), 8 Hare, 25. *Consd.* Doe d. Jones v. Hughes (1851), 6 Exch. 223. *Reid.* Forbes v. Peacock (1843), 12 Sim. 528.

—[See, also, Nos. 3731, 3740, 3733, *post*.

3724. — Consent of third party required—Death of party—Power determined.—[Devise that exors. shall sell with the assent of A.; if A. die before assent, the power of the exors. is determined.—DANNE v. ANNAS & JOHNSON (1561), 2 Dyer, 219 a; 73 E. R. 484; *sub nom.* ANON., Dal. 45.

3725. — Bare power—Carrying no interest in land.—[A devise to his wife for life, & after her decease the lands to be sold by his exors., is a naked authority not coupled with any interest & survives on the death of one of them, but he cannot sell till the death of the tenant for life.—HOUELL v. BARNES (1634), Cro. Car. 382; 70 E. R. 933.

Annotations.—*Consd.* Brassey v. Chalmers, Seacombe v. Holme (1853), 4 De G. M. & G. 528. *Mentd.* Grange v. Tiving (1865), O'Brig. 107; Bull v. Holby (1873), L. R. 15 Eq. 178.

3726. — — — — ——[Devise that exors. shall & may absolutely sell, mtge., or otherwise dispose of his freehold estate, for the payment of testator's debts, legacies, & funeral expenses, as his leasehold estate, should not be sufficient to discharge, is only a power to sell, & no estate passes to the exors.—LANCASTER v. THORNTON (1760), 2 Burr. 1027; 97 E. R. 689.

3727. — — — — ——[Devise of freehold to testator's wife, during her life; &, after her decease, "my will is that my said freehold," "shall be then sold by my exors. in trust," parties before named, " & all the money to be equally divided between all my children or their heirs," "by my exors."—*Held*: the exors. took a power, not a legal estate.—DOE d. HAMPTON v. SHOTTER (1838), 8 Ad. & El. 905; 1 Per. & Dav. 124; 1 Will. Woll. & H. 683; 8 L. J. Q. B. 152; 112 E. R. 1081.

Annotation.—*Mentd.* Richardson v. Harrison (1885), 16 Q. B. D. 85.

3728. — — — — ——[DEVISOR, BY HIS WILL, appointed & ordered all his real estate to be sold

for the payment of his just debts, & gave directions as to the investing of the surplus, & paying the interest to his wife for life, & as to the mode of distributing the principal to his daughters after his death; & further ordered, that a particular farm should be carried on for the benefit of his daughters, until the youngest arrived at the age of twenty-one, when he directed the stock, etc., to be sold; & he appointed A. & D. his exors., "to see the will & testament carried into effect":—*Held*: the exors. did not take the legal estate in the realty.—DOE d. JONES v. HARRISON (1843), 13 L. J. Q. B. 97; 2 L. T. O. S. 207.

3729. — After death of tenant for life—No power until tenant dead.—HOUELL v. BARNES, No. 3725, *ante*.

3730. — Whether affected by debts remaining unpaid.—[Testator, after directing all his just debts to be paid, & bequeathing certain personal estate to his wife for life, devised a freehold house to her "for her natural life, with liberty to sell it in case a good offer is made, & invest the proceeds of it in the 45 per cent. stock, for her benefit during her life." In a subsequent part of the will he desired that, "at the death of his wife, the residue of his estate might then be collected, including the proceeds of the house & lot, if not previously sold, to be then disposed of to good advantage, to be divided as follows," etc. He appointed his wife, plff., & one C., to be extrix. & exors. of his will. Plff. & the widow proved the will. C., the other exor., died in the lifetime of the widow. After the death of the widow, plff., the surviving exor., entered into a contract with deft. for the sale of the house:—*Held*: whether there were or were not debts unpaid, & whether it was or was not uncertain whether any debts remained unpaid, plff. had a power to sell & convey the house in fee simple.

Qu.: whether the widow could have sold the house in her lifetime, without the concurrence of the exors.—FORBES v. PEACOCK (1843), 11 M. & W. 630; 12 L. J. Ex. 460; 1 L. T. O. S. 233; 152 E. R. 957; *subsequent proceedings*, 12 Sim. 528; (1846), 1 Ph. 717, L. C.

Annotation.—*Mentd.* R. v. Burgate (1854), 23 L. T. O. S. 155.

3731. Whether implied Proceeds passing through hands of executors.—[Exors. have only power to sell real estate where expressly given or necessarily to be implied from the produce being to pass through their hands in the execution of their office.—v. WILTSHIRE (1819), 4 Madd. 44; 56 E. R. 625.

Annotations.—*Folld.* Patton v. Randall (1820), 1 Jac. & W. 189. *Consd.* Forbes v. Peacock (1843), 12 Sim. 528. *N.F.* Curtis v. Fulbrook (1849), 8 Hare, 25. *Folld.* Robinson v. Lowater (1854), 17 Beav. 592. *Mentd.* Allum v. Fryer (1842), 3 Q. B. 442.

3732. — — — — ——[PATTON v. RANDALL, No. 3740, *post*.

3733. — — — — ——[A general devise & bequest of testator's real & personal estate to A. for life, & after the decease of A., a devise of certain copyholds to B., & a direction that, on the decease of B., the copyholds should be sold, with a gift of

legal personal representative.—MARTIN v. MAGEE (1891), 18 A. R. 384.—CAN.

G. Trespass—Right to bring action.—[Even where one of the next of kin has entered thirteen years before the trespass complained of was committed, & held possession under a partition verbally made of the *locus in quo*, this does not constitute the right to sue for trespass, the action must be taken in the name of the administrator.—WEBBER v. MANSFIELD (1873), 5 Nfld. L. R. 513.—NFLD.

h. Administration Act, 1879—Whether really converted into personalty.—[Administration Act, 1879, has not abolished for all purposes the distinction between real & personal estate.—STAPLES v. JOSEPH (1883), 2 N. Z. L. R. 21 (S. C.).—N.Z.

k. — — — — — Death of testator before passing of Act—Right to bring action after Act.—[The right of action with regard to real estate belonging to a person who died before the coming into operation of Administration Act,

remains in his heir-at-law or devisee, & does not pass to his administrator.—SAUNDERS v. CAROT (1885), 4 N. Z. L. R. C. A. 19.—N.Z.

l. Position of representative—Holding as registered proprietor.—[An exor. or administrator, registered proprietor of land by transmission, takes & holds same with the same title & subject to the same equities & obligations as did the person whose representative he is.—KIMICK v. BLACK (1892), 10 N. Z. L. R. 519.—N.Z.

Sect. 2.—Real estate: Sub sect. 2, A. (a), (b) & (c), & B. (a) & i.]

the moneys arising by such sale amongst persons of certain classes who should be living at the death of B., share & share alike:—*Held*: to create a power of sale of the copyholds, by implication, in the exors. of testator.

Semble: apart from the power of sale, the exors. would not be necessary parties on the mere ground that the copyhold estate is by statute made assets to be administered in equity for the payment of debts.—*CURTIS v. FULBROOK* (1849), 8 Hare, 25, 278; 19 L. J. Ch. 65; 14 L. T. O. S. 414; 13 Jur. 1044; 68 E. R. 259.

3734. Refusal of administration—By one of several executors—Cannot become purchaser of estate.]—*ANON.* (1535), Benl. 14; 73 E. R. 941.

3735. Death of executor—Survivorship to co-executors.]—*HOUELL v. BARNES*, No. 3725, *ante*.

3736. ———.]—*FORBES v. PEACOCK*, No. 3730, *ante*.

3737. ———.]—Action by beneficiaries—Against heir-at-law.]—Lands were devised to the *feme* for life, afterwards to be sold by the exor. for younger children's portions; the exor. dies, the *feme* dies; the younger children prefer their bill against the heir; he demurs, because but an authority in the exor., which is dead with them; but the demurrer was overruled.—*GARFOOT v. GARFOOT* (1603), 1 Cas. in Ch. 35; Freem. Ch. 176; 22 E. R. 681.

3738. Sale directed for payment of portions—Death of portioner before sale—Conversion of property to personality.]—Lands devised to be sold for payment of portions, one of the children dies after the portion becomes due, & before the land sold, the administrator is entitled to the money.—*BARTHOLEMUE v. MEREDITH (OR MOOREHEAD)* (1684), 1 Vern. 276; 23 E. R. 468.
Annotation:—*Mentd. Henty v. Wrey* (1882), 21 Ch. D. 332.

3739. Legal estate before & after sale—Before sale in heir—After sale in purchaser.]—Purchaser decreed to take a title under an obscure will, amounting to a power to sell: the legal estate not being given, descends to the heir till execution of the power; & then passes to the vendee.—*WARNEFORD v. THOMPSON* (1797), 3 Ves. 513; 30 E. R. 1132.

3740. Power to sell in given event—Disapproval by beneficiaries of executors' management—Notification to executors.]—Direction for the sale, in a given event, of an estate devised by the will, without expressing by whom it was to be sold, does not give a power of sale to the exors. by implication.

Power of sale, in the event of two of testator's children disapproving of the manner of managing his lands & houses, does not arise upon their notifying their opinion that the exors. are inadequate to the management.

On the death of testator the realty vested in all his children, it was not given to any other persons (*per Cur.*).—*PATTON v. RANDALL* (1820), 1 Jac. & W. 189; 37 E. R. 347.

Annotations:—*Distd. Sissons v. Chichester-Constable*, [1916] 2 Ch. 75. *Reid. Allum v. Fryer* (1842), 3 Q. B. 442.

3741. Several executors—Consent of all to sale—Whether necessary.]—*FORBES v. PEACOCK*, No. 3730, *ante*.

3742. Administration with will annexed—No power of sale.]—*Re CLAY & TETLEY*, No. 3770, *post*.
Copyholds.]—*See Sub-sect. 2, D., post*.

(b) *No Specific Person directed to sell.*

3743. Power exercisable by executors—Distribution of proceeds of sale—Direction to executors.]

—A man devised his lands to his wife for life, & if he should not have any issue after the death of his wife, the lands should be sold, & the money distributed to three of his blood, & made his wife & another his exors., & died. The exors. proved the will, the other exor. died, & the wife sold the lands.

The sale was good, although it be not expressed in the will, by whom the lands should be sold, for the moneys coming of the sale are to be distributed by his exors., to persons certain, as legacies, & it appertains to exors. to pay the legacies, & therefore they shall sell (*per Cur.*).—*ANON.* (1574), 2 Leon. 220; 74 E. R. 494.

3744. ———.]—Testator after directing all his just debts to be paid, gave his personal estate & a freehold house, of which he was seized in fee, to his wife for life, with liberty to sell it, in case a good offer should be made, & to invest the proceeds, in the funds, for her benefit during her life; & he directed that, at his wife's death, the house, if not previously sold, should be sold, but without saying by whom, & that the proceeds, together with his personal estate, should be divided amongst the children of his brother & sister: & he appointed his wife, his extrix., & requested F. & C., jointly with her, to become the exors. & trustees of his will. F. & testator's widow, proved the will. C. died in the lifetime of F. & the widow, without having proved it. The widow died twenty-five years after testator:—*Held*: F. had power to sell the house, & to give a receipt for the purchase-money.—*FORBES v. PEACOCK* (1840), 11 Sim. 152; 9 L. J. Ch. 367; 59 E. R. 832; *subsequent proceedings* (1843), 12 Sim. 528; (1846), 1 Ph. 717, L. C.

Annotation:—*Consd. Stroughill v. Anstey* (1852), 1 De G. M. & G. 635.

3745. ———.]—Testator by his will appointed exors. & directed that his debts should be paid. He then gave & bequeathed all his real & personal estate, which included certain copyhold hereditaments, to seven named persons, & directed that everything should be sold, without saying by whom, & divided among the seven persons. He also directed that each of his exors. should receive the sum of £10 for his trouble. The exors. contracted to sell the copyhold hereditaments to a purchaser, but the lord of the manor objected to the proposed conveyance by way of bargain & sale on the ground that they had no power of sale under the will:—*Held*: (1) the exors. had a power of sale by virtue of the charge of debts upon the copyholds which resulted from the direction that the debts should be paid; (2) the exors. were the persons to sell by virtue of the direction that everything should be sold addressed, on construction, to them.—*SISSONS v. CHICHESTER-CONSTABLE*, [1916] 2 Ch. 75; 85 L. J. Ch. 489; 114 L. T. 1163; 60 Sol. Jo. 605.

3746. ———.]—Direction to third parties.]—Power of sale vested in exors., where others are appointed to divide the proceeds.

The exors. are not certainly to divide it, but it appears to me that these gentlemen named, are to superintend the division of the fund which the exors. are to constitute. The exors. may sell the estate, & join the produce with the stock, & the two friends named by testatrix are to see it divided (*SIR L. SHADWELL, V.-C.*).—*DANIEL v. USTICHE* (1838), 2 Jur. 987.

3747. ———.]—Testator devises all his real & personal estate to be sold for payment of his debts, & appoints deft. exor.; the personal estate not being sufficient, a bill brought by bond & note creditors of testator to be paid their

demands out of the real estate. The exor. can sell the same, as testator had given it generally to be sold, without directing who should sell.—**BLATCH v. WILDER** (1738), 1 Atk. 420; *West temp. Hard.* 322; 26 E. R. 267, L. C.

Annotations.—**Refd.** *White v. Vitty* (1826), 2 Russ. 484. **Mentd.** *Morris v. Clarkson* (1819), 3 Swan. 558.

3748. —[—]—Testator directed his real & personal property to be sold & divided amongst his sisters; a power to the exors. to sell the real property was implied.—**TYLDEN v. HYDE** (1825), 2 Sim. & St. 238; 57 E. R. 337.

Annotations.—**Consd.** *Sissons v. Chichester-Constable*, [1916] 2 Ch. 75. **Refd.** *Doe d. Jones v. Hughes* (1851), 20 L. J. Ex. 148.

3749. — **Not where realty not devised—To executors.**—**PATTON v. RANDALL**, No. 3740, *ante*.

3750. — **Vesting order by court.**—There being a direction in a will to sell real estate without naming the persons to sell, & no devise of the real estate, & it not being clear that there was a sufficient legal power of sale, implied, in the exor., or a sufficient charge of debts to enable him to convey the legal estate to a purchaser, the ct., at the hearing, directed a sale, declaring the heir-at-law, who was out of the jurisdiction, a trustee within the meaning of the Trustee Act, 1850 (c. 60), & made a vesting order under sect. 9.—**HOOPER v. STRUTTON** (1864), 12 W. R. 367.

(c) *Inquiry by Purchaser as to Application of Purchase-Money.*

See Sub-sect. 2, C. (c), *post*.

B. Where Really charged with Payment of Debts or Legacies.

(a) *Specific Charge.*
i. *In General.*

3751. Devise to executors to pay debts & legacies—Estate taken by executors—Chattel interest.—Devise of lands to exors. for the payment of debts & when they are paid to A. for life, remainder in tail; the exors. have but a chattel & no freehold; & the estate tail remains unexecuted & disjoined during the life of A.—**CORDAL'S CASE** (1594), Cro. Eliz. 316; cited 8 Co. Rep. 90 a; 78 E. R. 506.

Annotations.—**Consd.** *Manning's Case* (1609), 8 Co. Rep. 96 a; *Bagshaw v. Spencer* (1748), 1 Ves. Sen. 142; *Doe d. White v. Simpson* (1804), 5 East, 162. **Fold.** *Ackland v. Pring* (1841), 2 Man. & G. 937. **Refd.** *Standen v. Oxon University*, Whitton (1623), W. Jo. 25; *Jennet v. Cooles* (1664), 1 Sid. 224; *Boyse v. Rosborough* (1853), Kay, 71; *Spence v. Spence* (1862), 12 C. B. N. S. 199. **Mentd.** *Leech v. Cole* (1599), Cro. Eliz. 670; *Simpson v. Southerno* (1614), 2 Bulst. 273; *Hooker v. Hooker* (1733), 2 Barn. K. B. 379; *Haigh v. Jaggard* (1847), 16 M. & W. 525.

3752. —[—]—A devise to exors. for payment of debts, & until they are paid, remainder over, gives the exors. but a chattel interest. But if such estate be given by grant or conveyance at common law, the law will adjudge it an estate of freehold.—**MANNING'S CASE** (1609), 8 Co. Rep. 94 b; 77 E. R. 618.

Annotations.—**Refd.** *Young v. Holmes* (1717), 1 Stra. 70. **Mentd.** *Lampet's Case* (1612), 10 Co. Rep. 46 b; *Price v. Almory* (1612), Moore, K. B. 831; *Roberts v. Roberts* (1613), 2 Bulst. 123; *Blamford v. Blamford* (1615), 3 Bulst. 98; *Haverhill v. Hare* (1618), Cro. Jac. 510; *Pills v. Brown* (1621), Palm. 131; *Child v. Baylie* (1623), Cro. Jac. 459; *Goring v. Bickerstaffe* (1633), Freeman. C. 163; *Alford's Case* (1662), O. Bridg. App. 584; *Bate v. Amherst* (1662), T. Raym. 82; *Jemmot v. Cooley* (1665), 1 Lev. 170; *Burgis v. Burgis* (1674), 1 Mod. Rep. 114; *Warman v. Seaman* (1675), 1 Freeman. C. 306; *Howard v. Norfolk* (1682), 3 Cas. in Ch. 1; *Smith v. Clever* (1688), 2 Vern. 59; *Jerrman v. Orchard* (1694), Skin. 528; *Ayres v. Falkland* (1697), 1 Ld. Raym. 325; *Scattergood v. Edge* (1699), 12 Mod. Rep. 278; *Gower v. Grosvenor* (1740), 9 Mod. Rep. 249; *Beaucherk v. Dormer* (1742), 2 Atk. 308; *Bagshaw v. Spencer* (1748), 1 Ves. Sen. 142; *Cooper v. Chitty & Blackinton* (1756), 1 Burr. 20; *Goodtitle d. Hayward v. Whitby* (1757), 1 Burr. 228; *Haigh v. Jaggard* (1847), 16 M. & W. 525; *Johns v. Pink*, [1900] 1 Ch. 296.

3753. — **Estate in fee simple.**—Testator, after several bequests of personalty, & also after devising certain lands to G. devised as follows: "Also, I give & bequeath unto G. & S. his wife, all my messuage, etc., at B.; also, all my messuage, etc., in W.; also, all & singular my goods, chattels, rights, credits, ready money, & personal estate, of what nature & kind soever as I shall die seised & possessed of, interested in, & entitled unto, after having thereout first paid & discharged all my just debts & funeral expenses. Also, subject to the payment thereof, all the aforesaid legacies; & I nominate G. to be sole exor., whom I charge with the payment of all my just debts, funeral expenses, & legacies":—**Held**: by virtue of the personal charge, for payment of debts, etc., on G. in the latter clause of the devise, he took an estate in fee in the messuages, etc., in B. & W.—**DOE d. STEVENS v. SNELLING** (1804), 5 East, 87; 1 Smith, K. B. 313; 102 E. R. 1002.

Annotations.—**Consd.** *Doe v. Clarke* (1806), 2 Bos. & P. N. R. 343; *Doe d. Sams v. Garlick* (1845), 14 M. & W. 698; *Matthews v. Windross* (1856), 2 K. & J. 406. **Refd.** *Gully v. Exeter (Dp.)* (1827), 4 Bing. 290; *Doe d. Clarke v. Clarke* (1832), 1 Cr. & M. 39.

[—]—Testator devised that his debts & funeral expenses should be paid by his exor. He then bequeathed two annuities, & gave five shillings to his heir-at-law; & then followed these words: "I appoint P. my whole & sole exor. of all my houses & land situate at P.":—**Held**: an estate in fee passed by this devise to P.—**DOE d. PRATT v. PRATT** (1837), 6 Ad. & El. 180; 1 Nev. & P. K. B. 366; Will. Woll. & Dav. 113; 6 L. J. K. B. 101; 112 E. R. 68.

3755. — **Sale by executor—Joinder of heir.**—S. seized in fee devises the lands to his exors. to sell, & pay debts. The heir shall be compelled to join in the sale.—**POWELL v. GREEN** (1675), 1 Cas. in Ch. 262; 22 E. R. 791.

[—]—personal estate to pay debts, the personal estate fell short:—**Held**: the heir-at-law shall join with the exors. in the sale of the real estate.—**STUBBS v. STUBBS** (1679), Cas. temp. Finch, 415; 23 E. R. 227.

Heir an infant.—[—]

are devised to be sold for payment of debts. The lands may be decreed to be sold without giving the heir, who is an infant, a day to show cause, when he comes of age. Otherwise if he is decreed to join in the sale.—**COOKE v. PARSONS** (1701), 2 Vern. 420; 1 Eq. Cas. Abr. 280, pl. 4; Prec. Ch. 184; 23 E. R. 875.

Annotations.—**Mentd.** *Gryle v. Gryle* (1741), 2 Atk. 177; *Ellis v. Smith* (1754), 1 Ves. 11.

3758. — **Not to executor renouncing probate.**—**ANON.** (1530), Benl. 14; 73 E. R. 941.

3759. Realty expressed to be charged—Interest of executor—Estate in fee.—A. devised his real & personal estates to his wife for life, & directed part of the personalty to be sold after his wife's death by the exor., & divided between C., D., E., F., & G.; he then gave two annuities to H. & I. to be paid by his exors. out of his whole estate, & to commence after his wife's death; & he then devised "the remainder of the profits, after his wife's death, & after the yearly payments to the annuitants, out of his whole estate, to B., C. & D. equally, share & share alike":—**Held**: the exor. took a fee.—**DOE d. BEEZLEY v. WOODHOUSE** (1790), 4 Term Rep. 89; 100 E. R. 910.

Annotations.—**Consd.** *Fenwick v. Potts* (1856), 8 De G. M. & G. 506. **Refd.** *Anthony v. Ross* (1831), 2 Cr. & J. 75. **Mentd.** *Re Wynch's Trusts*, Ez p. Wynch (1854), 5 De G. M. & G. 188.

Sect. 2.—Real estate: Sub-sect. 2, B. (a) i. & ii., & (b) i.]

3760. — Executors power of sale—Or mortgage.]—A testamentary charge of real estates with the payment of debts, generally, authorises a trustee, to whom, after imposing the charge, testator has devised the estates upon trust for other persons, to sell or mtge. the estates charged, & exempts the purchaser or mtgee. from liability to see to the application of the purchase or mtge. money.—*BALL v. HARRIS* (1839), 4 My. & Cr. 264; 8 L. J. Ch. 114; 3 Jur. 140; 41 E. R. 103, L. C.

*Annotations:—***Consd.** *Gosling v. Carter* (1845), 1 Coll. 644. **Distd.** *Stroughill v. Anstey* (1852), 1 De G. M. & G. 635. **Consd.** *Re Jones, Dutton v. Brookfield* (1889), 59 L. J. Ch. 31. **Refd.** *Robinson v. Lowater* (1854), 17 Beav. 592; *Barrow v. Griffith* (1864), 5 New Rep. 6.

3761. ——*]*—An exor. has no implied power to sell or mortgage land which descends to the heir charged *simpliciter* with the payment of debts.

Therefore where testator, after charging all his real & personal estate with his debts, funeral & testamentary expenses, & a certain legacy, devised the rents & profits of all his messuages & lands, except his Bala houses, to his wife, for life with remainder in fee to H.; & also bequeathed to his wife the whole of his personal estate, & appointed her sole extrix:—*Held*: the Bala houses descended to the heir, subject to a charge which could only be enforced in equity; & the extrix. had no implied power to sell or mortgage them for the payment either of the debts, funeral or testamentary expenses, or legacy.—*DOE d. JONES v. HUGHES* (1851), 6 Exch. 223; 20 L. J. Ex. 148; 17 L. T. O. S. 5; 155 E. R. 523.

*Annotations:—***Fold.** *Walton v. Shalcross* (1853), 21 L. T. O. S. 154. **Consd.** *Robinson v. Lowater* (1854), 5 De G. M. & G. 272; *Re Tanqueray-Willaine & Landau* (1882), 20 Ch. D. 465. **Refd.** *Hodkinson v. Quinn* (1860), 30 L. J. Ch. 118; *Groetham v. Colton* (1865), 34 Beav. 615. **Mentd.** *Wright v. Wilkin* (1860), 2 B. & S. 232.

3762. ——*]*—*WALTON v. SHALCROSS* (1853), 21 L. T. O. S. 154.

3763. ——*]*—*WRIGLEY v. SYKES*, No. 3785, *post*.

3764. —— **During lifetime of tenant for life.]—**Testator, after charging his real estate with payment of debts, devised it to trustees upon trust for B. for life, & after her death to the use of her appointees by will, & in default of appointment to the use of her right heirs. The real estate was further charged with £700 for C.:—*Held*: the trustees had power to sell the estate in the lifetime of B. before her appointees could be ascertained for the purpose of raising the charge.—*EDSWORTH v. ARMSTEAD* (1850), 2 K. & J. 333; 25 L. J. Ch. 237; 26 L. T. O. S. 323; 69 E. R. 809; *sub nom.* *WITTESFORD v. ARMSTEAD*, 4 W. R. 279.

3765. —— **Devise to separate trustees to sell—Concurrence of executors.]—**The concurrence of exors. having under a will an implied power of sale for payment of debts, is not necessary to a conveyance by a devisee in trust for sale under the same will. Where testator devised real estate after his just debts etc. should be first paid thereout, to trustees upon trust to sell after the decease of certain tenants for life:—*Held*: the implied power of sale given to the exors. did not make necessary their concurrence in the exercise by the trustees of their trust for sale.—*HODKINSON v. QUINN* (1860), 1 John. & H. 303; 30 L. J. Ch. 118; 3 L. T. 804; 7 Jur. N. S. 65; 9 W. R. 197; 70 E. R. 763.

3766. ——*]*—Testator directed his debts to be paid by his extrix., & he devised his real

estate to her for life, with power to mortgage it as far as should be needful for her maintenance & comfort:—*Held*: the extrix. had no power of sale for payment of the debts.

It is clearly established that, where there is a general charge of debts on the real estate, an exor. has power to sell it for that purpose, & that the purchaser is not bound to see to the application of the purchase-money.

Where testator gives a general direction that his debts shall be paid, this amounts to a charge of the debts generally upon the real estate, at least where the real estate is afterwards disposed of by the will. But an exception obtains, where the direction that the debts shall be paid is coupled with a direction that they must be paid by the exor. In that case it is assumed that testator meant that the debts should be paid only out of the property which by law passes to the exor.—*COOK v. DAWSON* (1861), 29 Beav. 123; 30 L. J. Ch. 311; 3 L. T. 801; 7 Jur. N. S. 130; 9 W. R. 305; 54 E. R. 573; *affd.*, 3 De G. F. & J. 127. *Annotations:—***Refd.** *Re Chawner's Will* (1869), L. R. 8 Eq. 569; *Re Bailey, Bailey v. Bailey* (1879), 12 Ch. D. 268.

3767. —— **Whole realty sold—For sum much in excess of debt.]—***Re OCOCK, PALMER v. ANDERSON* (1896), 40 Sol. Jo. 210.

Copyholds.]—*See* Sub-sect. 2, D., *post*.

ii. *Under Law of Property Amendment Act, 1859.*

See Law of Property Amendment Act, 1859 (c. 35), ss. 16–18.

3768. Power of sale—Of creditor—Devise in fee or in tail.]—A charge of a legacy on lands devised beneficially in fee or in tail does not give the exors. a power of sale.—*Re REBBECK, BENNETT v. REBBECK* (1894), 63 L. J. Ch. 596; 71 L. T. 74; 42 W. R. 473; 38 Sol. Jo. 399; 8 R. 376.

*Annotations:—***Distd.** *Re Henson, Chester v. Henson*, [1908] 2 Ch. 356. **Refd.** *Re Barrow-in-Furness Corp. & Rawlinson's Contract*, [1903] 1 Ch. 339.

3769. —— **Devise not taking effect on testator's death.]—**Testator appointed an extrix., charged his real estate with the payment of his debts & legacies, & devised his real estate in fee to his first son who should attain the age of twenty-five. Thirteen years after testator's death his eldest son attained twenty-five:—*Held*: (1) the devise to the son was not a devise to any person in fee or in tail within Law of Property Amendment Act, 1859 (c. 35), s. 18; (2) that sect. did not apply, & under sect. 76 the extrix. had power to sell the real estate.—*Re BARROW-IN-FURNESS CORPN. & RAWLINSON'S CONTRACT*, [1903] 1 Ch. 339; 72 L. J. Ch. 233; 87 L. T. 724; 51 W. R. 248.

3770. —— **Administrator with will annexed.]—**Testator directed that his debts should be paid by his exors. thereafter named, & in case his personal estate should be insufficient, he charged his real estate with the deficiency: & he appointed two persons his exors. Both the exors. renounced probate, & an administrator with the will annexed was appointed:—*Held*: the administrator with the will annexed had no power to sell the real estate, either under the terms of the will or by virtue of Law of Property Amendment Act, 1859 (c. 35), s. 16.—*Re CLAY & TETLEY* (1880), 16 Ch. D. 3; 50 L. J. Ch. 164; 43 L. T. 402; 29 W. R. 5, C. A.

3771. Power to mortgage—Of executor—Devise by way of settlement.]—Sect. 18 of Law of Property Amendment Act, 1859 (c. 35), does not apply to a case where testator has devised his real estate, by way of settlement, to a person or persons for life with remainders over. The meaning of

that sect. is, that where testator has devised his whole estate & interest directly to A. or to A. & B., or any number of persons as tenants in common, or joint tenants in fee or in tail, so that the devisee or devisees can themselves mortgage the property, then the exors. are not to have the power. But where the estate is devised by way of settlement, so that there is no individual or individuals able to make a title to a mtge., then that is a case to which sect. 16, whereby exors. are empowered to mortgage testator's real estate for payment of debts or legacies, was intended to apply.

Testator, by his will, appointed certain persons therein named exors. & trustees thereof, & after making certain specific devises & bequests, devised & bequeathed all the residue of his real & personal estate, subject to his debts, funeral & testamentary expenses, & to the legacies thereinbefore bequeathed, unto & equally between his two sons for life, with remainders over. The exors. mortgaged a portion of the residuary real estate:—*Held*: this was a case in which sect. 16 was applicable, & the mtge. was a perfectly valid one.—*Re WILSON, PENNINGTON v. PAYNE* (1880), 54 L. T. 600; 34 W. R. 512; 2 T. L. R. 443.

Annotation:—*Consd.* *Re Barrow-in-Furness Corp'n. & Rawlinson's Contract*, [1903] 1 Ch. 339.

3772. — Devise to joint tenant or tenants in common—In fee or tail.]—*Re WILSON, PENNINGTON v. PAYNE*, No. 3771, *ante*.

(b) Implied Charge.

i. General Directions to pay Debts or Legacies.

3773. Sufficient to charge realty.—As to my worldly estate, I give it in manner following: *Imprimis*, I will that all my debts shall be discharged. This is a good devise to charge the land.—*WARRINGTON (LORD) v. LEE* (1732), Kel. W. 39; 2 Eq. Cas. Abr. 372; 25 E. R. 485, L. C. *Annotation*:—*Reid*. *O'Brien v. Inchiquin* (1744), Ridg. temp. H. 230.

3774. —]—Devise after payment of debts: the debts are charged.

"After payment of his debts" means that, until his debts are paid, he gives nothing; that everything he has, shall be subject to his debts. To give those words any effect they must charge the real estate (*SIR R. P. ARDEN, M.R.*).—*SHALLCROSS v. FINDEN* (1798), 3 Ves. 738; 30 E. R. 1247.

Annotations:—*Reid*. *Powell v. Robins* (1802), 7 Ves. 209; *Spong v. Spong* (1829), 3 Bl. N. S. 84. *Mentd.* *Mirchouse v. Scalfs* (1837), Donnelly, 204.

3775. — Although particular part only charged with debts.]—Testator directed all his debts, legacies & funeral expenses to be paid as soon as conveniently might be after his decease. Afterwards he devoted a particular estate to the payment of his debts, legacies & funeral expenses in aid of his personal estate, & devised the rest of his estates to his children in strict settlement:—*Held*: all his real estates were charged with his debts.—*GRAVES v. GRAVES* (1836), 8 Sim. 43; 5 L. J. Ch. 270; 59 E. R. 18.

Annotations:—*Consd.* *Cook v. Dawson* (1861), 29 Beav. 123. *Mentd.* *Jones v. Williams* (1844), 1 Coll. 156.

3776. — Unless imperative direction that executor must pay debts.]—*COOK v. DAWSON*, No. 3766, *ante*.

3777. Gives executor power to sell.—A. devises lands to B. in tail, remainder to C. & gives his exor. power to raise out of his estate £500 for his next heir, & desires him to see his debts paid. This gives the exor. a power to sell the lands to pay the debts.—*WAREHAM v. BROWN* (1690), 2 Vern. 153; 1 Eq. Cas. Abr. 202; 23 E. R. 706. *Annotation*:—*Mentd.* *Bull v. Vardy* (1791), 1 Ves. 270.

3778. —]—K. being seized of a freehold farm & estate in his own occupation, by his will gave & bequeathed to his two brothers all his goods, chattels, estate, & effects, of what nature or quality soever, & wheresoever, not thereby otherwise disposed of, upon trust, first, that all testator's debts should be paid & satisfied, & that whatsoever remained after such discharge, of his personal effects, should be appropriated to the use of his family; secondly, that testator's family should be placed in the farm until his youngest son should attain the age of twenty-one; & lastly, that, on his attaining that age, the estate should be sold, & the produce divided among testator's family; & he appointed his brothers his exors. Testator being seized of a freehold estate, independently of the farm he occupied, & his personal effects being insufficient to satisfy his debts:—*Held*: his exors. were entitled to sell such freehold estate for the payment of his debts.—*KING v. SHRIVES* (1834), 10 Bing. 238; 4 Moo. & S. 149; 2 L. J. C. P. 241; 131 E. R. 895; *previous proceedings* (1832), 5 Sim. 461.

3779. —]—Testator devised lands for life, with contingent remainders over, & then devised other lands to another tenant for life, with contingent remainders over, & charged the latter lands with the payment of a mtge. on the former lands, & also with his debts generally, but gave no express power of sale:—*Held*: the exor. took a power of sale by implication, & after a sale of the latter lands by the exor., the devisees of the former had no equity against the purchaser in respect of the charge of the mtge. debt.—*ROBINSON v. LOWATER* (1854), 5 De G. M. & G. 272; 2 Eq. Rep. 1070; 23 L. J. Ch. 641; 23 L. T. O. S. 85; 18 Jur. 363; 2 W. R. 394; 43 E. R. 875, L. JJ.

Annotations:—*Apld.* *Eldsforth v. Armstead* (1856), 2 K. & J. 333; *Hodkinson v. Quinn* (1860), 1 John. & H. 303. *Consd.* *Cook v. Dawson* (1861), 30 L. J. Ch. 359; *Greetham v. Colton* (1865), 34 Beav. 615; *Corser v. Cartwright* (1875), L. R. 7 H. L. 731. *Reid*. *Storry v. Walsh* (1854), 18 Beav. 559; *Re Langmead's Trusts* (1855), 20 Beav. 20; *Wrigley v. Sykes* (1856), 21 Beav. 337; *Hamilton v. Buckmaster* (1866), L. R. 3 Eq. 323.

3780. — Although outstanding debts unsatisfied.]—*FORBES v. PEACOCK*, No. 3730, *ante*.

3781. — Concurrence in sale by heir-at-law.]—Testator, after giving a general direction for payment of his debts, gave & bequeathed all his real & personal estate to his wife for life & after her decease, he directed all his real & personal estate to be sold, & the produce to be divided between the children of certain persons named in the will. He directed that the purchaser or purchasers of any part of his real or personal estate should not be liable to see to the application of the purchase money, & that the receipt or receipts of his exor., his heirs, exors. & administrators should be a sufficient discharge or sufficient discharges to the purchasers; & he appointed his wife & A. his extrix. & exor.:—*Held*: (1) the extrix. & exor. or one of them had an implied power, in case testator died indebted, to sell the real estate for payment of the debts; (2) the extrix. & exor. having entered into a contract for the sale of parts of the estate & it being shown that at the time of the contract there were unsatisfied debts of testator, the contract was valid; (3) the purchaser was not bound to take the title without the concurrence of the heir-at-law.—*GOSLING v. CARTER* (1845), 1 Coll. 644; 14 L. J. Ch. 218; 4 L. T. O. S. 491; 63 E. R. 580; *sub nom.* *GOSLING v. CARTER*, 9 Jur. 324.

Annotation:—*As to* (1) *Reid*. *Robinson v. Lowater* (1854), 17 Beav. 592.

Sect. 2.—Real estate: Sub-sect. 2, B. (b) i., ii. & iii.]

3782. — [—]—Testator, by his will appointed A., B. & C. to be his exors., in trust to dispose of his property in the following way; he then directed that all his debts should be discharged by his exors., & that the residue of his property, real & personal, should be disposed of by them at the time therein mentioned, save & except his estate at M., which he gave to A. for life, & at A.'s death to be disposed of as aforesaid:—*Held*: A., B. & C. had a power of sale of the estate at M.; & it was not necessary for them to show that there were any of testator's debts left unpaid.—*MATHER v. NORTON* (1851), 21 L. J. Ch. 15; 18 L. T. O. S. 182; 10 Jur. 309.

3783. — *Foreclosure of mortgaged estate.*—An implied power of sale in the exor. of a mtgor., arising from a direction in the will to pay debts, will not enable the ct. to direct the sale of the mortgaged estate if it cannot make a decree for foreclosure. Such a decree can only be made in a creditors' suit. An extrix. directed to pay debts cannot be considered to represent third parties within 15 & 16 Vict. c. 86.—*BOLTON v. STANNARD* (1858), 27 L. J. Ch. 845; 31 L. T. O. S. 310; 4 Jur. N. S. 576; 6 W. R. 570.

3784. — [—]—Testator, after directing his debts to be paid, & setting apart certain sums to provide annuities for his two sons, devised & bequeathed all his real & personal estate to his wife & his four daughters, to be equally divided between them: Provided as follows—that the share of his wife should be divided after her death between his four daughters or the survivors & their children; & testator appointed his wife & T., his exors., to act jointly in carrying out all the intentions of his will, & to invest his daughters' shares for their benefit & the benefit of their children:—*Held*: upon an application under Vendor & Purchaser Act, 1874 (c. 78), the legal estate in the freeholds was vested in the exors. who could make a good title to a purchaser.—*DAVIES TO JONES & EVANS* (1883), 24 Ch. D. 190; 52 L. J. Ch. 720; 49 L. T. 024; 32 W. R. 460.

Annotation.—*Reid. Sissons v. Chichester-Constable*, [1916] 2 Ch. 75.

3785. *Mere devise expressed for payment of debts—Creates a charge.*—A mere desire expressed by testator in his will that his debts shall be paid, creates a charge on his real estate for their payment. A general charge of debts on the real estate gives to the exors. an implied power of sale. Distinction between the expression of a desire that all debts shall be paid, followed by a gift of a particular estate for their payment, & a general charge of the real estate with the debts, followed by a particular provision for their payment. In the former, the general charge is qualified & limited to the particular estate, but in the latter it is not.

Testator ordered his debts & legacies to be paid & discharged out of his real & personal estate. He subsequently devised his real estates to trustees for five hundred years, & subject thereto, to his five sons as tenants in common in fee upon condition that they should pay, in equal shares, certain legacies, & his debts; & in case any son should neglect to pay his portion, the trustees of the term were, out of the rents of his share, to raise the amount. He appointed the five sons exors. Thirty-three years after the death of testator, the surviving exors. sold the estate, as they alleged, to pay the debts:—*Held*: they had power to sell.—*WRIGLEY v. SYKES* (1856), 21 Beav.

337; 25 L. J. Ch. 458; 26 L. T. O. S. 252; 2 Jur. N. S. 78; 4 W. R. 228; 52 E. R. 889.

Annotations.—*Reid. Poad v. Watson* (1856), 6 E. & B. 618. *Mentl. Re Whistler* (1887), 35 Ch. D. 561.

3786. *Authority to pay debts—Creates no charge—No power of sale.*—Testator devised & bequeathed his real & personal estate to trustees upon trust to pay the rents of the real estate, & the income of the personal estate to his wife for life, & after her death to sell & convert & to divide the proceeds among his children. He then proceeded to authorise his trustees or trustee to adjust & pay all claims made upon my estate, & generally to act in the premises as my trustees or trustee shall in their or his discretion think fit. He appointed his trustees exors. of his will:—*Held*: this authority did not, like a direction to pay debts, make it the duty of the trustees to pay debts out of whatever property of testator was vested in them, & did not charge the debts on the real estate, & the trustees therefore had not during the life of the widow any power to sell the real estate.—*Re HEAD'S TRUSTEES & MACDONALD* (1890), 45 Ch. D. 310; 59 L. J. Ch. 604; 63 L. T. 21; 38 W. R. 657, C. A.

Annotations.—*Reid. Bricks v. Snell*, [1916] 2 A. C. 599. *Mentl. Bellamy v. Debenham*, [1891] 1 Ch. 412; *London & Scottish Ice Co. v. Adams* (1893), 9 T. L. R. 396; *Re Baker & Selmon's Contract*, [1907] 1 Ch. 238; *Re Hailes & Hutchinson's Contract*, [1920] 1 Ch. 233.

Copyholds.—*See* Sub-sect. 2, D., *post*.

ii. *General Direction to pay Debts or Legacies coupled with Devise of all Realty.*

3787. *Creates a charge on realty.*—Testator directs all his debts to be paid by his exor. therein-after named: then, after giving some legacies & an annuity, he devises all his real, personal, & copyhold estates to A., & appoints him his exor.: testator's debts are a charge on all the property which A. takes under the will.—*HENVELL v. WHITAKER* (1827), 3 Russ. 343; 5 L. J. O. S. Ch. 158; 38 E. R. 605.

Annotations.—*Expld. Wasse v. Heslington* (1834), 3 L. J. Ch. 221. *Distd. Graves v. Graves* (1836), 8 Sim. 43. *Consd Symons v. James* (1843), 2 Y. & C. Ch. Cas. 301; *Harri v. Watkins* (1854), Kay, 438. *Reid. Dover v. Gregor* (1839), 10 Sim. 393; *Farnam v. Wiggins* (1847), L. T. O. S. 243; *Preston v. Preston* (1856), 2 Jur. N. S. 1040; *Re Bailey, Bailey v. Bailey* (1879), 12 Ch. D. 268. *Re Tanqueray-Willame & Landau* (1882), 20 Ch. D. 465; *Re Stokes, Parsons v. Miller* (1892), 67 L. T. 223.

3788. — *Devise to executors jointly—Unequal interests.*—When a will contains a direction to the exor. to pay testator's debts, & then a devise of real estate to that exor., it is considered that testator has imposed upon the exor. the duty of paying the debts to the extent of the property given to him, & accordingly, that property is held to be charged with the debts; an exception has been made to this rule, where there are two or more exors., to whom unequal benefits are given by the will, because, in such a case, it cannot be supposed to be testator's intention that the should be equally subjected to the burden of his debts, & therefore the property given to them not considered to be charged.—*HARRIS v. WATKIN* (1854), Kay, 438; 23 L. J. Ch. 540; 2 W. R. 35; 69 E. R. 186.

Annotations.—*Consd. Re Bailey, Bailey v. Bailey* (1879), Ch. D. 268; *Re Tanqueray-Willame & Landau* (1882), 20 Ch. D. 465.

3789. — [—]—Where there is a direction that the exors. shall pay the testator's debts, followed by a gift of all his real estate to them jointly, either beneficially or on trust, the debts will be payable out of all the estate given them, whether the exors. take the whole beneficial interest, or only a life interest, or

beneficial interest at all. Where there is a direction to the exors. to pay testator's debts, followed by a devise to them of all the realty in fee, vesting the legal estate in them jointly, the fact that one of them takes an equitable estate for life & the other an equitable estate in remainder will not prevent the exors. having a charge of debts on the real estate. Unless twenty years have elapsed since the death of a testator who has charged his real estate with the payment of his debts, the vendor selling under the power given by the charge is not bound to answer the purchaser's inquiry whether any debts of the testator still remain unpaid, & the purchaser ought not to make the inquiry, as he will get a good title even if there are no debts.—*Re TANQUERAY-WILLAUME & LANDAU* (1882), 20 Ch. D. 465; 51 L. J. Ch. 434; 46 L. T. 542; 30 W. R. 801, C. A.

Annotations.—*Consd. Re Whistler* (1887), 35 Ch. D. 561. *Apld. Re De Burgh Lawson, De Burgh Lawson v. De Burgh Lawson* (1889), 41 Ch. D. 568. *Consd. Re Venn & Furze's Contract*, [1894] 2 Ch. 101. *Refd. Marshall v. Gingell* (1882), 21 Ch. D. 790; *Re Stokes, Parsons v. Miller* (1892), 67 L. T. 223; *Re Verrell's Contract*, [1903] 1 Ch. 65; *Solomon v. Attenborough*, [1912] 1 Ch. 451; *Mentd. Re Lashmar, Moody v. Penfold* (1890), 60 L. J. Ch. 143; *Re Brooke, Brooke v. Brooke* (1893), 63 L. J. Ch. 159; *Re Adams & Perry's Contract* (1899), 80 L. T. 149.

3790. ———. **Beneficial interest—Or upon trust.**—*Re TANQUERAY-WILLAUME & LANDAU*, No. 3789, *ante*.

3791. ———. *—*—*—*.—A married woman who died in 1880 entitled for her life for her separate use, without power of anticipation, to the income of certain estate, with a general testamentary power of appointing the same estate, by her will directed her extrixes, thereafter named to pay her just debts, & by virtue of the power appointed, devised, & gave the same estate unto two daughters, whom she appointed extrixes, upon certain trusts for the benefit of her children equally for life, & after the death of the survivor for the benefit of her grandchildren equally. The testatrix was indebted at the time of her death to several persons:—*Held*: the debts, so called, were a charge upon the appointed property.—*Re DE BURGH LAWSON, DE BURGH LAWSON v. DE BURGH LAWSON* (1889), 41 Ch. D. 568; 58 L. J. Ch. 501; 37 W. R. 797.

3792. Power of sale in executor.—*FINCH v. HATTERSLEY* (1775), 3 Russ. 345, n.; 5 L. J. O. S. Ch. 160; 38 E. R. 606.

Annotations.—*Expld. & Distd. Powell v. Robins* (1802), 7 Ves. 209. *Apld. Henvell v. Whitaker* (1827), 3 Russ. 343. *Consd. Harris v. Watkins* (1854), Kay, 438. *Refd. Clifford v. Lewis* (1821), 6 Madd. 33; *Graves v. Graves* (1836), 8 Sim. 43; *Symons v. James* (1843), 2 Y. & C. Ch. Cas. 301; *Cook v. Dawson* (1861), 3 De G. F. & J. 127; *Re Bailey, Bailey v. Bailey* (1879), 12 Ch. D. 268; *Re Tanqueray-Williame & Landau* (1882), 20 Ch. D. 465; *Re Stokes, Parsons v. Miller* (1892), 67 L. T. 223. *Mentd. Marshall v. Gingell* (1882), 21 Ch. D. 790.

3793. ———. *—*—*—*.—Testator gave his real & personal estate to A., subject to the payment of his debts & certain annuities, & appointed him exor.:—*Held*: A. could make a good title to the real estate, without the concurrence of the annuitants, & a purchaser from A. was not bound to see to the application of the purchase-money.—*PAGE v. ADAM* (1841), 4 Beav. 269; 10 L. J. Ch. 407; 5 Jur. 793; 49 E. R. 342.

Annotations.—*Consd. Stroughill v. Anstey* (1852), 1 De G. M. & G. 635. *Refd. Forbes v. Peacock* (1846), 1 Ph. 717. *Mentd. Morley v. Cook* (1842), 2 Hare, 106; *Wood v. Machu* (1846), 8 L. T. O. S. 210; *Greaves v. Wilson* (1858), 25 Beav. 290.

3794. ———. **Executor having life interest only.**—*COOK v. DAWSON*, No. 3768, *ante*.

3795. ———. *—*—*—*.—An exor., who is also a devisee of an estate charged with the payment of debts, may be presumed by a *bond fide* purchaser or mtgee. of that estate to be dealing with it for the

purposes of the administration, & may give a valid title to it. Such purchaser or mtgee., therefore, will not be bound to look to the application of the money.—*CORSER v. CARTWRIGHT* (1875), L. R. 7 H. L. 731; 45 L. J. Ch. 605, H. L.

Annotations.—*Consd. West of England & South Wales District Bank v. Murch* (1883), 23 Ch. D. 138; *Re Venn & Furze's Contract*, [1894] 2 Ch. 101. *Apld. Re Henson, Chester v. Henson*, [1908] 2 Ch. 356. *Refd. Rickotta v. Lewis* (1882), 46 L. T. 368. *Mentd. Re Major, Taylor v. Major*, [1914] 1 Ch. 278.

3796. ———. *—*—*—*.—A beneficial devise of land in fee to a devisee who is also an exor., subject to a general charge of debts & legacies empowers that exor.-devisee to sell or mortgage the land & to give a good receipt to the purchaser or mtgee., who is not bound to see to the application of the purchase or mtge. money even if it is expressed to be raised for the payment of legacies only. It is not necessary that the exor.-devisee should expressly purport to execute the conveyance or mtge. in his capacity as exor.—*Re HENSON, CHESTER v. HENSON*, [1908] 2 Ch. 356; 77 L. J. Ch. 598; 99 L. T. 336.

3797. Power to mortgage.—*FINCH v. HATTERSLEY* (1775), 3 Russ. 345, n.; 5 L. J. O. S. Ch. 160; 38 E. R. 606.

Annotations.—*Expld. Powell v. Robins* (1802), 7 Ves. 209. *Dbtd. Cook v. Dawson* (1861), 3 De G. F. & J. 127. *Refd. Clifford v. Lewis* (1821), 6 Madd. 33; *Henvell v. Whitaker* (1827), 3 Russ. 343; *Symons v. James* (1843), 2 Y. & C. Ch. Cas. 301; *Harris v. Watkins* (1854), Kay, 438; *Re Bailey, Bailey v. Bailey* (1879), 12 Ch. D. 268. *Mentd. Graves v. Graves* (1836), 8 Sim. 43; *Marshall v. Gingell* (1882), 21 Ch. D. 790; *Re Tanqueray-Williame & Landau* (1882), 20 Ch. D. 465; *Re Stokes, Parsons v. Miller* (1892), 67 L. T. 223.

3798. ———. *—*—*—*.—Under a will containing a direction to the exors. to pay debts, & a devise of all realty to them upon trusts for the benefit of the widow & family:—*Held*: the exors. had power to mortgage the real estate for payment of debts.—*HARTLAND v. MURRIEL* (1859), 27 Beav. 204; 7 W. R. 650; 54 E. R. 79.

Annotations.—*Consd. Re Tanqueray-Williame & Landau* (1882), 20 Ch. D. 465. *Refd. Re Bailey, Bailey v. Bailey* (1879), 12 Ch. D. 268; *Re Stokes, Parsons v. Miller* (1892), 67 L. T. 223.

3799. ———. *—*—*—*.—*Re HENSON, CHESTER v. HENSON*, No. 3796, *ante*.

3800. Contract for sale or mortgage—Execution by executor as such—Necessity for.—Where a person who fills the position of an exor. is found selling or mortgaging part of his testator's estate, he is to be presumed to be acting in the discharge of the duties imposed on him as exor., unless there is something in the transaction which shows the contrary, & the contrary is not made out merely from the circumstance that the conveyance or mtge. does not purport to be executed by him in that capacity (*STIRLING, J.*).—*Re VENN & FURZE'S CONTRACT*, [1894] 2 Ch. 101; 63 L. J. Ch. 303; 70 L. T. 312; 42 W. R. 440; 38 Sol. Jo. 273; 8 R. 220.

Annotations.—*Apld. Re Henson, Chester v. Henson*, [1908] 2 Ch. 356. *Consd. Solomon v. Attenborough*, [1912] 1 Ch. 451. *Refd. Re Scott & Alvarez's Contract, Scott v. Alvarez*, [1895] 1 Ch. 596; *Re Verrell's Contract*, [1903] 1 Ch. 65; *Re Wells & Hopkinson's Contract* (1916), 114 L. T. 940.

—————. *—*—*—*.—*Re HENSON, CHESTER v. HENSON*, No. 3796, *ante*.

Copyholds.—*See* Sub-sect. 2, D., *post*.

iii. **General Direction to pay Debts or Legacies coupled with Devise of Portion of Realty.**

3802. Whether parts devised to executors charged.—Testator in the first place directs the payment of his debts & legacies by his exors. after named. He afterwards devises a real estate to his son T. in fee; & in a subsequent part of his

Sect. 2.—Real estate: Sub-sect. 2, B. (b) iii., & (c), C., D., E., F. & G.; sub-sects. 3, 4 & 5.]

will names T. & another person his exors., who both prove the will. The estate devised to T., not being a devise to the exors. after named, is not charged with debts & legacies.—*WARREN v. DAVIES* (1833), 2 My. & K. 49; 2 L. J. Ch. 203; 39 E. R. 803.

Annotations:—Apld. Braithwaite v. Britain (1836), 1 Keen, 206. *Expld.* Re Bailey, Bailey v. Bailey (1879), 12 Ch. D. 268.

3803. — A question of intention.]—Where testator directs that all his debts, etc., shall be paid by his exors. after-named, & devises parts of his real estates to the persons whom he afterwards names his exors., & devises the undisposed residue of his real & personal estates to H., one of the exors., beneficially; this is not sufficient to show an intention to make the debts a charge on the real estates devised to the exors.—*WASSE v. HESLINGTON* (1834), 3 My. & K. 495; 3 L. J. Ch. 221; 40 E. R. 188.

Annotations:—Consd. Symons v. James (1843), 2 Y. & C. Ch. Cas. 301; Harris v. Watkins (1854), Kay, 438; Re Bailey, Bailey v. Bailey (1879), 12 Ch. D. 268; Re Tanqueray-Willaume & Landau (1882), 20 Ch. D. 465. *Refd.* Re De Burgh Lawson, De Burgh Lawson v. De Burgh Lawson (1889), 58 L. J. Ch. 501.

3804. — To be gathered from will.]—When testator directs that his debts shall be paid by his exors., & also devises real estate to them, either beneficially or on trust, it is a question of intention to be collected from the whole will, whether the estate so devised is charged with the payment of the debts.—*Re BAILEY, BAILEY v. BAILEY* (1879), 12 Ch. D. 268; 48 L. J. Ch. 628; 41 L. T. 157; 27 W. R. 909.

Annotations:—Consd. Re Tanqueray-Willaume & Landau (1882), 20 Ch. D. 465. *Refd.* Re De Burgh Lawson, De Burgh Lawson v. De Burgh Lawson (1889), 41 Ch. D. 568; Re Stokes, Parsons v. Miller (1892), 67 L. T. 223.

(c) Inquiry by Purchaser as to Application of Purchase-Money.

3805. Purchaser not bound to inquire.]—Where an estate is charged generally with the payment of debts & legacies, & the debts had been paid, but not the legacies, the purchaser will not be bound to see to the application of the purchase-money, unless it be proved that he knew of the payment of the debts; & the taking of a general bond of indemnity, or of a bond of indemnity, or of a bond of indemnity against the legacies only, will not raise the inference that he knew of such payment.—*JOHNSON v. KENNETT* (1835), 3 My. & K. 624; 6 Sim. 384; 40 E. R. 238.

Annotations:—Expld. Spaekman v. Timbrell (1836), Donnelly, 171. *Consd.* Eland v. Eland (1839), 4 My. & Cr. 420; Stroughill v. Anstey (1852), 1 De G. M. & G. 635. *Apld.* Re Henson, Chester v. Henson, [1908] 2 Ch. 356. *Refd.* Page v. Adam (1841), 4 Beav. 269; Forbes v. Peacock (1846), 1 Ph. 717; Howard v. Chaffer, Howard v. Robinson (1863), 2 New Rep. 381; Re Robbeek, Bennett v. Robbeek (1894), 63 L. J. Ch. 596.

3806. — In a suit for specific performance by plffs., trustees of an advowson & exors., against the purchaser:]—*Held:* the charge being in effect a devise of the real estate in trust for the payment of debts a good title could be made by plffs., without the institution of a suit to ascertain the deficiency of the personal estate & the purchaser was not bound either to inquire whether other sufficient property ought first to be applied in payment of debts, or to see to the application of the purchase-money.—*SHAW v. BORRER* (1836), 1 Keen, 559; Donnelly, 150; 5 L. J. Ch. 364; 48 E. R. 422.

Annotations:—Foll. Ball v. Harris (1839), 4 My. & Cr. 264. *Consd.* Gosling v. Carter (1845), 1 Coll. 644. *Refd.* Doe d. Jones v. Hughes (1851), 6 Exch. 223; Robinson v. Lowther (1854), 5 De G. M. & G. 272.

3807. ——*BALL v. HARRIS*, No. 3760, *ante*.

3808. ——*PAGE v. ADAM*, No. 3793, *ante*.

3809. ——The estate being charged in the first instance with payment of debts, debt. was not bound, according to the general rule, to see to the application of the purchase-money (LORD COTTENHAM, C.).—*FORBES v. PEACOCK* (1846), 1 Ph. 717; 15 L. J. Ch. 371; 41 E. R. 805, L. C.; *revg.* (1843), 12 Sim. 528.

Annotations:—Consd. Doe d. Jones v. Hughes (1851), 6 Exch. 223; Stroughill v. Anstey (1852), 1 De G. M. & G. 635. *Apld.* Re Henson, Chester v. Henson, [1908] 2 Ch. 356. *Refd.* Curtis v. Fulbrook (1849), 19 L. J. Ch. 65; Robinson v. Lowther (1854), 17 Beav. 592; Sabin v. Heape (1859), 27 Beav. 553; Carlyon v. Truscott (1875), L. R. 20 Eq. 348; Re Tanqueray-Willaume & Landau (1882), 20 Ch. D. 465; Re Venn & Furze's Contract, [1894] 2 Ch. 101.

3810. ——When a testator by his will charges his estate with debts & legacies he shows that he means to entrust his trustees with the power of receiving the money, anticipating that there will be debts & thus providing for the payment of them. It is by implication a declaration by the testator that he intends to entrust the trustees with the receipt & application of the money & not to throw any obligation at all upon the purchaser or mtgee. (LORD ST. LEONARDS, C.).—*STROUGHILL v. ANSTAY* (1852), 1 De G. M. & G. 635; 22 L. J. Ch. 130; 19 L. T. O. S. 367; 16 Jur. 671; 42 E. R. 700, L. C.

Annotations:—Apld. Re Henson, Chester v. Henson, [1908] 2 Ch. 356. *Refd.* Wigley v. Sykes (1856), 21 Beav. 337; Sabin v. Heape (1859), 29 L. J. Ch. 79; Re Tanqueray-Willaume & Landau (1882), 20 Ch. D. 465; Re Venn & Furze's Contract, [1894] 2 Ch. 101. *Mentd.* McNeillie v. Acton (1853), 22 L. T. O. S. 111; Page v. Cooper (1853), 20 L. T. O. S. 287; Devaynes v. Robinson (1857), 24 Beav. 86; Darke v. Williamson (1858), 22 J. P. 705; Re Dimmock, Dimmock v. Dimmock (1885), 52 L. T. 494.

3811. ——Testator ordered his debts to be paid by his exors., & after giving legacies, he gave the residue of his real & personal estate, subject as aforesaid, to A., & he appointed A. & B. exors.:—*Held:* if the legacies were charged on the real estate, the debts must also be charged thereon, & therefore A. was able to give valid receipts for the purchase-money of the real estate, which relieved a purchaser from the necessity of seeing to its application.—*DOWLING v. HUDSON* (1853), 17 Beav. 248; 51 E. R. 1028.

3812. ——*COOK v. DAWSON*, No. 3766, *ante*.

3813. ——*CORSER v. CARTWRIGHT*, No. 3795, *ante*.

3814. ——*Re HENSON, CHESTER v. HENSON*, No. 3790, *ante*.

3815. Sale after long period—After testator's death—Twenty-seven years.]—Under a direction to pay debts, the exors. of the original exor. sold the testator's real estate twenty-seven years after the testator's death, & nine years after the death of the exor.:—*Held:* a good title could be made under the implied power of sale, & the vendors were not bound to state whether there existed any debts which made a sale necessary.—*SABIN v. HEAPE* (1859), 27 Beav. 553; 29 L. J. Ch. 79; 1 L. T. 51; 5 Jur. N. S. 1146; 8 W. R. 120; 54 E. R. 218.

Annotations:—Dtd. Re Tanqueray-Willaume & Landau (1882), 20 Ch. D. 465. *Consd.* Re Venn & Furze's Contract, [1894] 2 Ch. 101. *Refd.* Hodgkinson v. Quinn (1860), 30 L. J. Ch. 118; Re Whistler (1887), 35 Ch. D. 561.

3816. — Twenty years.]—*Re TANQUERAY-WILLAUME & LANDAU*, No. 3789, *ante*.

C. Advowsons and Next Presentations.

See ECCLESIASTICAL LAW, Vol. XIX., p. 374, No. 1942; p. 384, Nos. 2078-2080

D. Copyholds.

See, generally, COPYHOLDS, Vol. XIII., pp. 9 et seq.

3817. Copyholds subject to marriage settlement—In trust for settlor's representatives—Administration taken out by wife—Title of wife as against trustees.]—By a settlement made previous to marriage, the husband surrendered copyholds to trustees upon trust, in a certain event, & after various preceding limitations, to the use of his exors. or administrators, if not exceeding two, for the term of their lives, & of their assigns, for ever; but if he should leave more than two exors. or administration should be granted to more than two, then to the use of the two who should be first named in his will as his exors., or, in the administration, as his administrators, for the term of their lives, & of the life of the longest liver of them, & of his or her assigns for ever. The wife surrendered other copyholds to similar uses, her exors. or administrators being substituted, in the ultimate limitation, for those of her husband: by the custom of the manors of which the copyholds were held, the largest estate to which tenants could be admitted was to two for their joint lives & the life of the longest liver of them; but tenants so admitted, or a tenant for life according to the custom of the manor, had the absolute power of disposition over the property; the event, on which the ultimate limitation was to take effect having happened upon the death of the husband intestate, the wife took out administration to him, but, the trustees not having been admitted, the legal estate vested in the heir:—*Held*: (1) the widow, as administratrix of her husband, was entitled to the copyhold; (2) she was not a trustee for the heir; (3) she was entitled to the assistance of a ct. of equity against the heir.—*WELLMAN v. BOWRING* (1826), 2 Russ. 374; 38 E. R. 376, L. C.; *subsequent proceedings* (1830), 3 Sim. 328.

Annotation:—Generally, Mentid. Holloway v. Clarkson (1843), 2 Hare, 521.

Estate for life of tenant & successive lives.]—*See COPYHOLDS, Vol. XIII., p. 64, Nos. 788, 789.*

Estates pur autre vie.]—*See COPYHOLDS, Vol. XIII., pp. 65, 66, Nos. 805, 810, 811.*

Estate for years.]—*See COPYHOLDS, Vol. XIII., p. 67, No. 828.*

Trust estates.]—*See COPYHOLDS, Vol. XIII., p. 78, Nos. 991, 992; p. 84, Nos. 1052, 1054.*

Mortgaged estates.]—*See COPYHOLDS, Vol. XIII., p. 115, No. 1457.*

Admittance—Of tenant for life—Includes executors on trust for sale.]—*See COPYHOLDS, Vol. XIII., p. 139, No. 1754.*

Purchaser.]—*See COPYHOLDS, Vol. XIII., p. 135, Nos. 1685–1689.*

Direction by deceased to sell.]—*See COPYHOLDS, Vol. XIII., pp. 119, 120, Nos. 1495–1496, 1502.*

Copyholds charged with debts or legacies.]—*See COPYHOLDS, Vol. XIII., pp. 121, 122, Nos. 1518–1536.*

E. Estates pur autre vie.

See COPYHOLDS, Vol. XIII., pp. 65, 66, Nos. 803–818; DESCENT, Vol. XVIII., p. 13, No. 117; p. 14, Nos. 123–133; REAL PROPERTY.

F. Mortgage Estates.

See MORTGAGE.

G. Trust Estates.

See TRUSTS & TRUSTEES.

Trust estates in copyholds.]—*See COPYHOLDS, Vol. XIII., pp. 78, 84, Nos. 991, 992, 1052, 1054.*

SUB-SECT. 3.—IN CASE OF PERSONS DYING SINCE 1897 AND BEFORE 1926.

See Land Transfer Act, 1897 (c. 65), ss. 1, 2, 24, repealed by Law of Property Act, 1922 (c. 23), s. 156 (11); Land Registration Act, 1925 (c. 21), s. 147; DESCENT, Vol. XVIII., pp. 4–5.

3818. General rule.]—*Re HARROWBY & PAINE'S CONTRACT, [1902] W. N. 137.*

3819. Estate of devisee—Primarily equitable.]—Testator who died after Jan. 1, 1898, when Land Transfer Act, 1897 (c. 65), came into operation, devised a freehold house to the use of his daughter for life, with remainder to the use of such of her children as should attain twenty-one in equal shares as tenants in common. The daughter died in 1915, having had & leaving four children two of whom had attained twenty-one during her life, & two were still infants. The exors. had assented to the devise during the life tenancy:—*Held*: (1) having regard to the initial vesting of the estate in the exors. under Land Transfer Act, 1897 (c. 65), the devisees originally took equitable estates only, so that the contingent remainders were originally immune from destruction; (2) the contingent remainders retained their original immunity, though subsequently clothed with the legal estate on the exors.' assent. *Re ROBSON, DOUGLASS v. DOUGLASS, [1916] 1 Ch. 116; 85 L. J. Ch. 137; 114 L. T. 134; 60 Sol. Jo. 222.*

Copyholds.]—*See COPYHOLDS, Vol. XIII., p. 103, No. 1314.*

Estates pur autre vie.]—*See Sub-sect. 2, E., ante.*

Mortgage estate.]—*See MORTGAGE.*

Trust estates.]—*See Sub-sect. 2, G., ante.*

SUB-SECT. 4.—IN CASE OF PERSONS DYING SINCE 1925.

See Administration of Estates Act, 1925 (c. 23), ss. 1–3, 33, 39.

SUB-SECT. 5.—REAL ESTATE CONTRACTED TO BE SOLD OR PURCHASED.

Contract to sell land—Liability of representatives.]—*See Part VI., Sect. 1, sub-sect. 6, post.*

Devolution of proceeds of sale.]—*See EQUITY, Vol. XX., Part IX., Sect. 1; Sect. 2, sub-sect. 3, A.*

Option of purchase.]—*See EQUITY, Vol. XX., Part IX., Sect. 2, sub-sect. 3, C.*

Lands taken under compulsory purchase.]—*See EQUITY, Vol. XX., Part IX., Sect. 2, sub-sect. 4.*

Sale decreed by court.]—*See EQUITY, Vol. XX., Part IX., Sect. 2, sub-sect. 6.*

Contract to purchase land—Liability of representative.]—*See Part VI., Sect. 1 (b), post.*

Devolution of purchase money.]—*See EQUITY, Vol. XX., Part IX., Sect. 2, sub-sect. 3, B.*

Part IV.—Duties of Representative.

SECT. 1.—FIRST DUTIES.

SUB-SECT. 1.—THE FUNERAL.

Disposal of body.—See BURIAL, Vol. VII., pp. 520–522, 563.

3820. Funeral expenses—What are.—For strictness no funeral expenses are allowable against a creditor, except for the coffin, ringing the bell, parson, clerk, & bearers' fees, but not for pall or ornaments (HOLT, C.J.).—SHELLY'S CASE (1693), 1 Salk. 296; 91 E. R. 262.

Annotations.—*Reid*. Hancock v. Podmore (1830), 1 B. & Ad. 260; Edwards v. Edwards (1834), 2 Cr. & M. 612. *Mentd.* Young v. Cawdrey (1819), 8 Taunt. 734.

3821. ——— Mourning rings—Discretionary clause in will.—Under a will, with this residuary clause: "all the remainders of my different bequests," to trustees for charitable purposes; "& any thing not specified I commit to the discretion of my exors.;" a payment for mourning rings, though not directed by the will, was allowed under the discretion given to the exors.—PAICE v. CANTERBURY (ARCHBP.) (1807), 14 Ves. 364; 33 E. R. 560.

Annotations.—*Reid*. Bridge v. Brown (1843), 2 Y. & C. Ch. Cas. 181. *Mentd.* Doo d. Crutchfield v. Pearce (1815), 1 Price, 353; Pocock v. Lincoln (Bp.) (1821), 3 Brod. & Bing. 27; Mapp v. Elcock (1849), 2 Ph. 793; *Re* Payne, Lilley v. A.-G., [1903] 1 Ch. 83.

3822. ——— Mourning supplied to widow & family.—A demand for mourning furnished to the widow & family of a deceased person, is not a funeral expense, & cannot be claimed against his estate by the exor. if he gives the order.—JOHNSON v. BAKER (1825), 2 C. & P. 207, N. P.

Annotation.—*Reid*. Goldstein v. Salvation Army Assce. Soc., [1917] 2 K. B. 291.

3823. ——— Tombstone.—Pltf. effected an insurance with defts. on the life of his mother for the purpose of providing money to be paid for her funeral expenses. Among the funeral expenses which he alleged he had incurred was a sum of £16 8s. 9d. for a tombstone. Part of these expenses having been paid by other societies, he claimed the balance of £14 16s. from defts. :—*Held*: funeral expenses could not be taken as matter of law to exclude the cost of a tombstone, & whether in a particular case they properly included such an item was a question of fact.—GOLDSTEIN v.

SALVATION ARMY ASSURANCE SOCIETY, [1917] 2 K. B. 291; 86 L. J. K. B. 793; 117 L. T. 63.

— **Fund or person liable.**—See BURIAL, Vol. VII., pp. 523–525.

— **Amount allowed.**—See BURIAL, Vol. VII., pp. 525, 526.

— **Erection & maintenance of tombstones.**—See CHARITIES, Vol. VIII., pp. 260, 261.

SUB-SECT. 2.—MAKING INVENTORY.

A. In General.

See 21 Hen. 8, c. 5, ss. 4, 8; Administration of Estates Act, 1925 (c. 23), s. 25.

3824. Jurisdiction to order—Inherent in Courts of Probate—21 Hen. 8, c. 5.—A creditor, or legatee, may object to an inventory given in by an exor. or administrator; & may file an allegation pleading *omissa*, in order to take the answers of the exor. or other administrator, though he may not go on to examine witnesses to falsify the inventory. The ct. is plainly not merely ministerial in the matter of inventories, under above statute, although there are two cases in the Ct. of K. B., seemingly to the effect, one, at least, of them, as reported, that it is so, merely ministerial. Accordingly it will go on to entertain objections to inventories as above until it is more fully assured, that the advised judgment of the Ct. of K. B. is, to the effect of those cases as reported.—TELFORD v. MORISON (1824), 2 Add. 319; 162 E. R. 311.

— **Effect of lapse of time.**—See Nos. 3855–3861, *post*.

3825. ——— Ex mero motu.—ACASTER v. ANDERSON, No. 3839, *post*.

— **Fuller inventory.**—See Sub-sect. 2, F., *post*.

3826. Duty of court to enter into questions of construction.—It is no part of the jurisdiction of this ct. to enter into questions of construction, but the ct. may, incidentally, be compelled to do so; e.g., in deciding whether to compel an exor. to exhibit an inventory at the suit of a party claiming to be entitled in distribution to a residue

PART IV. SECT. 1, SUB-SECT. 1.

3822 i. Funeral expenses—What are—Mourning supplied to next of kin.—In an action by a linen-draper against the administrator of a deceased person in respect of mourning clothes ordered by some of the next of kin for their own wearing :—*Held*: these were not funeral expenses, & the ct. could not grant in respect of anything, which was not actually used for burying the dead man.—NOWLIN v. RADCLIFFE (ADMINISTRATOR OF KENNAUGH) (1839), Bluet, 162.—I. of M.

3823 i. ——— Tombstone.—The cost of erecting a tombstone is not chargeable against the estate of the deceased.—*Re* EATON'S ESTATE (1902), 23 N. L. R. 249.—S. AF.

3823 ii. ————Where an exor. had spent money in placing tombstones on the graves of testator & his predeceased wife, & where two of the heirs applied for the expunging of the amount from the liquidation account :—*Held*: the order must be refused, the expense being not unnecessary nor the amount unreasonable.—TREURNICH v. DE VILLIER'S

EXECUTORS (1904), 21 S. C. 354.—S. AF.

m. — **Person liable—Administrator as such.**—Payment for the funeral is the first charge upon the deceased's assets, & his administratrix as such is liable to be sued therefor.—*Re* DEAN'S ESTATE (1885), 11 V. L. R. 761.—AUS.

n. — **Order given by third party.**—If the funeral of a deceased person is ordered by a person who is not the administrator of the estate, & credit is given by the person supplying the things required to the person who ordered the funeral, the administrator is not liable, either personally or in his representative capacity, to the person fulfilling the order, but the remedy of the person fulfilling the order is against the person giving the order, who in his turn can recover the amount he has had to pay from the administrator in his personal capacity, if the administrator has sufficient assets of the deceased person in his hands.—PUBLIC TRUSTEE v. LONSBY (1908), 27 N. Z. L. R. 801.—N.Z.

o. — **Curator of intestate estates.**—The Curator of Intestate estate, is not liable in his representative capacity, to pay the funeral expenses of an intestate, whose estate he has obtained a rule to administer.—*Re* SULLIVAN (1889), 15 V. L. R. 462.—AUS.

p. — **Fund liable—Club money.**—On a question being raised whether the widow or the administrator was the person entitled to the club money of a deceased member of a friendly society, it was directed that £4 10s. 0d., out of the £10 due, should be paid to the administrator for funeral expenses paid by him & that the widow should be paid the balance of £5 10s. 0d.—RADCLIFFE v. ARTIFICERS' FRIENDLY SOCIETY & QUINNEY (1846), Bluet, 311.—I. of M.

q. — **Estate of woman married out of community.**—The estate of a woman married out of community, not the husband, is liable for her funeral expenses, but the husband is liable for the expenses of her last illness.—GRIFFITHS v. WILLIAMSON (1913), S. R. 89.—S. AF.

undisposed of by a will. Inventory not ordered, the exor. admitting assets.—*BURGESS v. MARRIOTT* (1843), 3 Curt. 424; 2 Notes of Cases, 171; 7 Jur. 473; 163 E. R. 779.

3827. Obligation to make—Executor of deceased executor—Executor of original testator surviving.]—The exors. of deceased exor., though not the personal representatives of original testator, there being an exor. of original testator still living, are compellable to bring in an inventory of the effects of original testator.

The ct. will compel an exor. to bring in an inventory, etc., at the suit of a creditor by bond of testator, notwithstanding its alleged invalidity, & a suit as to this, actually commenced, & then depending at common law.—*GALE v. LUTTRELL* (1824), 2 Add. 234; 162 E. R. 279.

Annotation:—Expld. Holland v. Prior (1834), Coop. temp. Brough. 426.

3828. — Attorney.]—*DORMOY v. HUTCHON, Re DORMOY, Re BAILEY* (1831), cited 2 Rob. Eccl. at p. 148, n.; 163 E. R. 1273, n.

Annotation:—Folld. Bailey v. Bristowe (1850), 2 Rob. Eccl. 145.

3829. — —.]—The attorney, to whom administration had been granted on behalf of the relict of deceased, having been cited at the instance of the relict residing abroad to exhibit an inventory & account, appeared under protest, alleging that the ct. had not jurisdiction to require an account between a principal & agent:—*Held*: the attorney was bound to comply with the citation.—*BAILEY v. BRISTOWE* (1850), 2 Rob. Eccl. 115; 7 Notes of Cases, 386; 15 L. T. O. S. 71; 14 Jur. 208; 163 E. R. 1272.

3830. — —.]—*Re HORREX* (1910), *Times*, Mar. 9.

3831. To what court returnable—Court of Probate Act, 1857 (c. 77), s. 87.]—The ct. has no jurisdiction to compel administrators, who have taken out administration in an Ecclesiastical Ct., to file inventories & accounts in the registry of the ct. Such inventories & accounts are still, by virtue of above sect. returnable only into the Ct. of Ch. But the ct. will grant a rule *nisi* to show cause why a bond given in the Ecclesiastical Ct. should not be assigned for breach of the condition without further proceedings, on being satisfied on affidavit that no inventory & account has been returned into the Ecclesiastical Ct. or into the Ct. of Ch.—*BOUVIERIE v. MAXWELL* (1866), L. R. 1 P. & D. 272; 36 L. J. P. & M. 3; 15 L. T. 295; 15 W. R. 89.

B. Application for Inventory.

(a) Who may apply.

3832. General rule.]—In an interest cause, a party who has given in an admissible allegation has a right to a constat of the effects.

A commission of appraisal decreed in preference to an inventory.—*STOTE v. TYNDALL* (1757), 2 Lee, 405; 161 E. R. 385.

3833. —.]—*HASELFOOT v. HASELFOOT* (1757), 2 Lee, 477; 161 E. R. 411.

3834. — Contingent interest sufficient.]—A contingent interest in the residue, entitles a party to call for an inventory & to have notice of the sureties.—*ROBERTS v. ROBERTS* (1757), 2 Lee, 399; 161 E. R. 383.

3835. — —.]—*SALTER v. SLADEN* (1792), cited 1 Phillim. at p. 241; 161 E. R. 972.

Annotation:—Refd. Phillips v. Bignell (1811), 1 Phillim. 239.

3836. — —.]—*SNOW v. STRUTT* (1793), cited 1 Phillim. at p. 241; 161 E. R. 972.

Annotation:—Refd. Phillips v. Bignell (1811), 1 Phillim. 239.

3837. — —.]—An exor. bound to exhibit an inventory & account, at the suit of a party having an interest in the property for which he is exor.—*MYDDLETON v. RUSHOUT* (1797), 1 Phillim. 244; 161 E. R. 973.

Annotation:—Refd. Phillips v. Bignell (1811), 1 Phillim. 239.

3838. — —.]—An exor. bound to exhibit an inventory & account, at the suit of a party interested in the property for which he is exor.—*PHILLIPS v. BIGNELL* (1811), 1 Phillim. 239; 161 E. R. 972.

3839. — —.]—A release in general terms, given to an exor., is no bar to a claim for an inventory & account. The ct. has power of itself, though it seldom exercises the right, to call for an inventory & account.

It is the duty of an exor. to exhibit an inventory & an account . . . the ct. has power to require them at the instance of a party duly interested, unless great delay intervene so as to render it a matter of impossibility to furnish them . . . it has the power to do so *ex mero motu*, though it does not often exercise that power (*SIR H. JENNER FUST*).—*ACASTER v. ANDERSON* (1818), 1 Rob. Eccl. 672; 12 L. T. O. S. 203; 13 Jur. 44; 163 E. R. 1171.

3840. Next of kin.]—Administratrix having an equitable demand against the personal estate of her intestate, the ct. will enjoin the next of kin from proceeding in the Spiritual Ct. to compel a distribution; but they may proceed to compel the administratrix to exhibit an inventory.—*BACKHOUSE v. HUNTER* (1787), 1 Cox, Eq. Cas. 342; 29 E. R. 1195, L. C.

3841. Co-executor.]—A co-exor., before probate, may call for an inventory; & he is then as much an exor. as afterwards (*DR. BERTTESWORTH*).—*HUGGINS v. ALEXANDER* (1736), 2 Add. 238, n.; 162 E. R. 281, n.

3842. — Also beneficiary.]—An exor., at least one who has a special interest, may call upon his co-exor. for an inventory.

I see no ground in principle . . . by which a residuary legatee, though also possessing the character of exor., is deprived of the right of calling upon the other exor. for an inventory (*SIR JOHN NICHOLL*).—*PAUL v. NETTLEFOLD* (1824), 2 Add. 227; 162 E. R. 281.

3843. Creditor—Physician.]—A physician not entitled to call for an inventory, as a creditor, for fees due from deceased.—*VON SOLENDHAL v. HAMPE* (1752), 1 Lee, 102; 161 E. R. 38.

3844. —.]—A creditor entitled to an inventory of the effects of an intestate.—*TIMBRELL v. RICE & WELCH* (1753), 1 Lee, 471; 161 E. R. 174.

3845. —.]—A creditor has a right to call for an inventory, but the Prerogative Ct. has no jurisdiction at the suit of a creditor to examine the particulars of an account.—*BROWN v. ATKINS* (1754), 2 Lee, 1; 161 E. R. 213.

3846. — Mere allegation of defendant sufficient.]—If a creditor swears to a certain sum due

PART IV. SECT. 1, SUB-SECT. 2.—A.

3830 i. Obligation to make.]—It is not only the duty of an exor. or administrator to file an inventory & render an account when duly called upon to do

so, but it is his privilege to do so voluntarily in any case in which he is liable to be called upon, & this privilege in case of his death extends to his personal representative, though not at the same time the representative

of the original testator, & even though there is a surviving representative of the original testator.—*CUNNINGTON v. CUNNINGTON* (1901), 21 C. L. T. 552; 2 D. L. R. 511.—*CAN.*

Sect. 1.—First duties: Sub-sect. 2, B. (a) & (b), C. (a) & (b), D., E. & F.; sub-sect. 3, A.]

to him, he is entitled to an inventory of the estate of an intestate.—*SMITH v. PRYCE* (1754), 1 Lee, 569; 161 E. R. 209.

3847. —.]—A creditor has a right to call for an inventory, but has no right to interfere in an administration bond.—*HACKMAN v. BLACK* (1755), 2 Lee, 251; 161 E. R. 331.

Annotation:—Mentd. John v. Bradbury (1806), L. R. 1 P. & D. 245.

3848. —. *Though debt disputed.*—]—Extrix. in custody under a writ *de excommunicato capiendi* for not appearing to a citation by a creditor to exhibit an inventory, moved for a *supersedeas*, disputing the debt upon equitable grounds; motion refused.—*R. v. BLATCH* (1799), 5 Ves. 113; 31 E. R. 499, L. C.

3849. —. —.]—*GALE v. LUTTRELL*, No. 3827, *ante*.

3850. —. —.]—Inventory & account, ordered, at the suit of a creditor, whose debt was the subject of an action at law, twenty-four years after the death of testator.—*JICKLING v. BIRCHAM* (1843), 2 Notes of Cases, 463.

3851. —.]—A creditor is entitled to a statement of the effects which have come into the possession of the exor.—*BARCLAY v. MARSHALL* (1814), 2 Phillim. 188; 161 E. R. 1116.

(b) *Grounds for Granting or Refusing Application.*

3852. *Application by judgment creditor—Judgment not signed or enrolled.*—]—Decree against debts. to pay money out of assets in their hands, they having denied assets, a bill was exhibited to discover assets. Debts. demurred for that it did not appear the decree was signed & enrolled & therefore not to answer any suit grounded on such a decree.—*BRAITHWAIT v. DAVIS* (1673), Cas. temp. Finch, 33; 23 E. R. 18.

3853. *Deceased possessed of no effects at time of death.*—]—An inventory refused to the widow of a legatee, where a testator has no effects at the time of his death, he having during his life conveyed all his personal estate by a bill of sale in consideration of a debt.—*LEIGHTON v. LEIGHTON* (1757), 2 Lee, 356; 161 E. R. 368.

3854. *Commission of appraisement ordered.*—]—*STOTE v. TYNDALL*, No. 3832, *ante*.

3855. *Effect of lapse of time—Presumption of full administration.*—]—An inventory & account may be dispensed with if not applied for till after so long a period that in conjunction with circumstances it affords a reasonable presumption of the estate's having been fully administered.—*RITCHIE v. REES & REES* (1822), 1 Add. 144; 102 E. R. 51.

Annotation:—Refd. Holland v. Prior (1834), 1 My. & K. 237.

3856. —. *Inventory made shortly after death—Evidence that beneficiary fully paid.*—]—The ct. will not, at the instance of the assignee of an insolvent, & on a suggestion that the insolvent had not received his distributive share, call upon the widow & administratrix of the father of the insolvent for an inventory & account, after a long acquiescence of the insolvent & his assignee; & when it is shown that a valuation & inventory of deceased's effects were made shortly after his death & facts are proved from which it may fairly

be presumed, that the insolvent had received considerably more than his full share.

This ct. can only require, that all deceased died possessed of should be included in the inventory; it cannot call for an account of the subsequent profits on his business.—*PITT v. WOODHAM* (1828), 1 Hag. Ecc. 247; 162 E. R. 573.

3857. —. *Estate insolvent—Effect of acceptance by creditors of composition.*—]—*BOWLES v. HARVEY* (1832), 4 Hag. Ecc. 241; 162 E. R. 1434.

3858. —.]—An application to compel an administratrix to exhibit an inventory & account after a lapse of eighteen years rejected & the party making the application, under the circumstances, condemned in costs.—*SCURRAH v. SCURRAH* (1841), 2 Curt. 919; 1 Notes of Cases, 248; 163 E. R. 630.

Annotation:—Refd. Burgess v. Marriott (1843), 3 Curt 424.

3859. —.]—*JICKLING v. BIRCHAM*, No. 3850, *ante*.

3860. —. *Impossibility of furnishing inventory—Effect of release.*—]—*ACASTER v. ANDERSON*, No. 3839, *ante*.

3861. —. *Delay not justified.*—]—Motion for inventory & account, & to allot portions, rejected, the circumstances of the case not being sufficient to justify the delay in making the application to the ct.—*In the Goods of PERKINS* (1850), 14 Jur. 1032.

3862. *Effect of admission of assets—Whether court will enter into questions of construction.*—]—*BURGESS v. MARRIOTT*, No. 3826, *ante*.

C. *Requisites of Inventory.*

(a) *In General.*

3863. *In discretion of court.*—]—The ct. exercises a discretion as to the sort of inventory it requires from an administrator.—*REEVES v. FREELING* (1812), 2 Phillim. 56; 161 E. R. 1077.

3864. *Fullness.*—]—When the ct. decrees an inventory, it expects a full & satisfactory one to be given in.—*PLUNKET v. SHARPE* (1754), 1 Lee, 623; 161 E. R. 228.

— *Power of court to order fuller inventory.*—]—*See Sub-sect. 2, F., post.*

(b) *What Property must be Included.*

3865. *Goods devised to executrix for life—Whether security required.*—]—An extrix. shall sign an inventory of goods, the use of which is devised to her for life, but shall not give security for them.—*ANON.* (1726), Mos. 15; 25 E. R. 242, L. C.

3866. *Personal estate abroad.*—]—It is not competent to the Prerogative Ct. to require an inventory of a personal estate situated in Germany.—*RAYMOND v. VON WATTEVILLE* (1758), 2 Lee, 551; 161 E. R. 436.

3867. —.]—*WILSON v. OGLE* (1737), cited 2 Lee, 555; 161 E. R. 438.

Annotation:—Refd. Raymond v. Von Watteville (1758), 2 Lee, 551.

3868. *Leasehold estate held on mortgage.*—]—The ct. has no jurisdiction to direct an inventory of a leasehold estate under lives which was held on a mortgage. An inventory ordered as to the other effects.—*SAVILLE v. MORGAN* (1753), 1 Lee, 431; 161 E. R. 160.

3869. *Only property of which deceased died possessed—Not subsequent profits of his business.*—]—*PITT v. WOODHAM*, No. 3856, *ante*.

PART IV. SECT. 1, SUB-SECT. 2.— C. (a).

r. *Omission of unimportant formalities—Effect of.*—]—*ARCHAMBAULT v. CITIZENS INSURANCE CO.* (1880), 3 L. N. 416; 24 L. C. J. 293.—*CAN.*

PART IV. SECT. 1, SUB-SECT. 2.— C. (b).

s. *Property claimed by other parties—Inventory made under order of court.*—]—The Judge of Probate has the power after hearing evidence on the facts, to order an exor. or administrator to in-

clude in the inventory, as property of deceased, articles claimed by other parties, but he cannot require the exor. or administrator to swear to an inventory thus amended by order of the ct.—*Re RALSTON'S ESTATE* (1857), 1 Thom. 195.—*CAN.*

D. Effect of Inventory.

3870. General rule.]—After letters of administration have issued, the value of an estate can only be known from the inventory.

The ct. will be regulated by the inventory in ascertaining whether further security may be necessary.—*ALLEN v. ALLEN* (1755), 2 Lee, 244; 161 E. R. 328.

3871. On cause in which inventory ordered.]—Where the ct. has decreed a commission of appraisement & inventory, & afterwards granted an administration, the cause is not at an end till the inventory has been accepted & allowed to be complete.—*WATSON v. MILWARD* (1750), 2 Lee, 332; 161 E. R. 359.

3872. On executor—How far binding.]—In what case an exor. shall be bound by the inventory exhibited on proving the will.—*ANON.* (1709), 11 Mod. Rep. 225; 88 E. R. 1005.

3873. —Admission of subsequent varying affidavit.]—Subsequent affidavit by a pltf. exor., "that he believes the debt sworn to be due," which before was only sworn "to appear by accounts," admitted.—*ROCHE v. CAREY* (1772), 2 Wm. Bl. 850; 96 E. R. 501.

3874. ——*]*—All sums stated by an exor. in his inventory given in to the Ecclesiastical Ct. as supposed to be recoverable, are assets in his hands, unless he prove a demand & refusal.—*YOUNG v. CAWDREY* (1819), 8 Taunt. 731; 3 Moore, C. P. 66; 129 E. R. 570.

3875. ——*]*—Upon *plene administravit* pleaded, the exor. is not concluded by the amount of assets in the inventory exhibited to the ecclesiastical officer. *Qu.*: whether such inventory is *prima facie* evidence of assets.—*STEARNS v. MILLS* (1833), 4 B. & Ad. 657; 1 Nev. & M. K. B. 436; 110 E. R. 603; *sub nom.* *STEEN v. MILLS*, 2 L. J. K. B. 106.

Annotation:—*Reid*, Mann v. Lang (1835), 3 Ad. & El. 699.

E. Neglect or Refusal to make Inventory.

3876. Executor about to go abroad—Injunction.]—Bill against an exor. to enjoin him to exhibit an inventory & to give security to account before he go beyond sea. Demurrer, for that this bill is to make an injunction in the nature of the writ, *Nec creat regnum*, etc.—*BRIDGE v. HINDALL* (1676), Cas. temp. Finch, 257; 23 E. R. 141.

3877. Mandamus—To compel representative to make inventory.]—*R. v. BETTESWORTH* (1733), Kel. W. 156; 25 E. R. 543; *sub nom.* *SUFFOLK'S (LORD) CASE*, Lee temp. Hard. 9.

Annotation:—*Mentz*, R. v. Surry JJ. (1734), 2 Barn. K. B. 410.

3878. Liability for costs—Of application for inventory.]—*SNOW v. STRUTT* (1793), cited in 1 Phillim. at p. 241; 161 E. R. 972.

Annotation:—*Reid*, Phillips v. Bignell (1811), 1 Phillim. 239.

3879. Liability for contempt.]—Extrices, pronounced contumacious for not bringing in an inventory.—*GRIFFITHS & THUNDER v. BENNETT & TAYLOR* (1816), 2 Phillim. 364; 161 E. R. 1170.

PART IV. SECT. 1, SUB-SECT. 2.—D.

t. On parties to the proceeding—How far binding.]—The inventory & appraisement are binding upon the parties to the proceeding to prove the value of the estate.—*Re CHISHOLM'S ESTATE* (1917), 50 N. S. R. 341.—*CAN.*

a. Omission of part of estate—Fraud not proved.]—*SHAW v. COOPER* (1861), 6 L. C. J. 38.—*CAN.*

b. Fraud proved.]—An exor. omitted from the inventory a sum of £25, taken by him out of the desk of deceased.—*Held*: such omission was fraudulent, & rendered the

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exor. liable to the full amount of deceased's debts.—*JACKSON v. WILSON* (1838), 3 Moo. P. C. C. 177; 13 E. R. 75.—I. of M.

PART IV. SECT. 1, SUB-SECT. 2. F.

c. When ordered—Newly assets.]—*Re RALTON'S ESTATE* (1857), 2 Thom. 195.—*CAN.*

d. —Dispute as to valuation—Motion for inquiry—Time limit.]—The time limited by Court Fees Amendment Act, 1899, s. 2 (4), for moving the ct. to hold an inquiry into the true value of an estate only runs from the

3880. ——*]*—An exor. being called upon by a citation to do certain acts, appeared & complied with the citation in part only; for not complying with all the requisites he was, after notice given to him, pronounced in contempt, & the contempt directed to be signified; notwithstanding it was suggested that a decree ought, in the first instance, to have been issued, & not a citation.—*EDWARDS v. MARTYN* (1850), 2 Rob. Eccl. 285; 163 E. R. 1320.

Annotation:—*Reid*, Crosby v. Noton (1867), 36 L. J. P. & M. 55.

3881. ——*]*—An attachment will be granted against a married woman for non-compliance with a citation, calling upon her to file an inventory in the registry of an estate of which she is administratrix.—*BAKER v. BAKER* (1860), 2 Sw. & Tr. 380; 29 L. J. P. M. & A. 138; 21 J. P. 150; 161 E. R. 1043.

3882. ——*]*—An administrator, who is in prison under an attachment for not filing his inventory & account, will not be discharged from custody upon filing a sufficient inventory & account, except upon payment of costs.—*MARSHMAN v. BROOKES* (1863), 32 L. J. P. M. & A. 95; 11 W. R. 519.

3883. ——*]*—*Re HORREX* (1910), *Times*, Mar. 9.

F. Further Inventory.

3884. Jurisdiction of court to order.]—*SHACKLETON v. BARRYMORE (LORD)* (1798), cited 2 Add. 329; 162 E. R. 314.

Annotation:—*Reid*, Telford v. Morison (1824), 2 Add. 319.

3885. When ordered.]—An administratrix with the will annexed called upon for a more full inventory, & then held to have fully administered.—*HENDREN v. SHAW* (1752), 1 Lee, 51; 161 E. R. 20.

3886. ——*]*—Where objections to an inventory, given in on the oath of an exor., are taken by one only of various parties, her interest, too, only derivative, equally interested in the effects of testator, the rest apparently acquiescing; & where the disclosure of assets sought, refers back to transactions pretty remote in point of date, etc., under such circumstances the ct. will presume the inventory to be correct, & consequently, will dismiss the exor., without strong grounds laid to induce a contrary suspicion.—*HUNTER v. BYRN* (1824), 2 Add. 311; 162 E. R. 308.

SUB-SECT. 3.—GETTING IN AND INVESTMENT OF PROPERTY.

A. Getting in Property.

See Administration of Estates Act, 1925 (c. 23), s. 33.

3887. General rule.]—Upon the construction of a will:—*Held*: it was the duty of exors. to set apart a sum of £4,500 upon a particular trust, & for that purpose, if necessary, to make an

date of the lodging of the inventory required by law, & does not run from the depositing of a document which omits the details of a full & true estimate—only gives an estimated lump figure of the approximate value.—*MUSAMMAT HANSEHWAR KUMAR v. GUVA, COLLECTOR* (1913), 30 T. L. R. 65.—*IND.*

PART IV. SECT. 1, SUB-SECT. 3.—A.

3887 i. General rule.]—Exors. should proceed with promptitude to realise the assets; & the law presumes that, — general rule, a year should be sufficient for this purpose. They

Y

issue execution until a year after, when a bkpcy. ensued & the debt was lost. The extrix. was empowered "to compound or allow time for the payment of any debt":—*Held*: under the particular circumstances she was not liable for a *devastavit*.—*RATCLIFFE v. WINCH* (1853), 17 Beav. 217; 51 E. R. 1016.

Annotation:—*Reid. Re Brogden, Billing v. Brogden* (1888), 38 Ch. D. 546.

3897. ————*Reid.*—Even before the passing of Conveyancing Act, 1881 (c. 41), exors. had a fair discretion, whether they would or would not immediately sue a debtor of testator for the amount due to the estate, & their not doing so, although loss occurred by the delay, was not necessarily wilful neglect or default for which they were liable. *Semble*: the effect of Conveyancing Act (c. 41), s. 37, is, that an exor. is only liable for delay in suing for his testator's debt when he has not acted *bonâ fide*.

Testator died in Mar. 1878. W. then owed him money on promissory notes. Shortly afterwards the exors. applied to W. for payment. W. said he could only pay by selling his real estate, which according to valuation was sufficient to leave a surplus, after payment of mtge. debts, more than enough to pay testator's debt. In Mar. 1879, after further pressure, W. offered the real estate for sale, but withdrew it as an adequate price could not be obtained. W. afterwards obtained further advances from the mtgees. of the property but no money was paid to the exors. On Jan. 31, 1880, their solr. again pressed for payment, & on Feb. 10, W. filed a liquidation petition. He alleged that earlier pressure would only have resulted in his petition being immediately filed:—*Held*: the exors. were not liable for the loss of the money due from W.—*Re OWENS, JONES v. OWENS* (1882), 47 L. T. 61, C. A.

Annotation:—*Reid. Re Greenwood, Greenwood v. Firth* (1911), 105 L. T. 509.

3898. ———— *Although authorised by will to lend on personal security.*—Exors. authorised to lend upon personal security, not justified in leaving outstanding debts on such security.—*EVANS v. FLIGHT* (1838), 2 Jur. 818.

Power to lend generally, *see* Sect. 1, sub-sect. 3, B. (b), *post*.

Refusal to get in debts—*Right of residuary legatee to sue for debts.*—*See* Part VII., Sect. 1, sub-sect. 4, *post*.

3899. ———— *Debtor co-executor—Liability for neglect.*—(1) Where personal property is bequeathed to the exors., as trustees, the probate of the will is an acceptance of the trusts.

(2) The usual indemnity clause does not exonerate one of two trustees from a loss occasioned by a debt due from the other, having been suffered to remain outstanding.—*MUCKLOW v. FULLER* (1821), Jac. 198; 37 E. R. 821.

Annotations:—*As to (1) Reid. Bayley v. Rees* (1845), Holt, Eq. 80. *Reid. Paddon v. Richardson* (1855), 7 De G. M. & G. 563; *Re Lard & Fullerton* (1895), 65 L. J. Ch. 184. *As to (2) Reid. Stiles v. Guy* (1849), 1 H. & Tw. 523.

3900. ————*Reid.*—*STYLES v. GUY*, No. 911, *post*.

3901. ———— *Though deceased satisfied with security.*—It is no excuse that testator allowed this debt to remain as precarious security, it was

his own & any loss would be his only; but an exor.'s first duty is to collect all debts resting as personal security (LANGDALE, M.R.).—*GARDNER v. GARDNER* (1837), 1 Jur. 402.

3902. ———— *Belief that action for recovery of debt not maintainable.*—Where it is the duty of a trustee or exor. to obtain payment of a sum of money, he is exonerated & never required to make good any loss if he has done all he could to obtain payment but his efforts have not proved successful. Nay more, if he has taken no steps at all to obtain payment, but it appears, that if he had done so, they would have been, or there is reasonable ground for believing they would have been, ineffectual, he is exonerated from all liability.—*CLACK v. HOLLAND* (1851), 19 Beav. 262; 21 L. J. Ch. 13; 24 L. T. O. S. 49; 18 Jur. 1007; 2 W. R. 402; 52 E. R. 350.

Annotations:—*Consid. Re Roberts, Knight v. Roberts* (1897), 76 L. T. 479. *Apld. Re Greenwood, Greenwood v. Firth* (1911), 105 L. T. 509. *Reid. Williams v. Higgins* (1868), 17 L. T. 525; *Saunders v. Duman* (1878), 7 Ch. D. 825; *Re Leslie, Leslie v. French* (1883), 23 Ch. D. 552; *Re Brogden, Billing v. Brogden* (1888), 38 Ch. D. 546; *Re Hurst, Addison v. Topp* (1890), 63 L. T. 665. *Mentd. Ashwin v. Burton* (1862), 32 L. J. Ch. 196.

3903. ————*Reid.*—Where the exor. of a deceased solr. was *bonâ fide* & on reasonable grounds satisfied that he could not maintain an action against a client personally to recover costs incurred in an administration action & owing to the solr., there being an arrangement between the solr. & the client to the effect that the latter should not be personally liable to the solr. for the costs, except in the event of his being unable to recover same in the administration action:—*Held*: the exor. was not guilty of any wilful default; but that even if the exor. was technically liable for a breach of trust, then under Judicial Trustees Act, 1896 (c. 35), s. 3, he, having acted honestly & reasonably, ought fairly to be excused.—*Re ROBERTS, KNIGHT v. ROBERTS* (1897), 76 L. T. 479; 41 Sol. Jo. 468, C. A.

Annotation:—*Fold. Re Barker, Ravenshaw v. Barker* (1878), 46 W. R. 296.

3904. ———— *Contingent debt—Option created by testator exercised.*—By his will testator gave his sons in succession an option to purchase his leasehold mill property at a valuation, payable by half-yearly instalments with interest. In addition to giving a bond, the son purchasing was to execute a mtge. The sale moneys were to be invested upon some of the investments authorised by the will, & to be disposed of as thereby directed. The investment clause gave the trustees absolute discretion to invest in the securities named therein, or in case either of the sons should elect to carry on testator's business, then upon security of the land, mill, & premises whereon the business should be carried on. Testator died in 1875. The eldest son exercised the option. The mill property was valued at £50,000. The trustees & the son agreed for payment of this sum by half-yearly instalments of £2,000. In March, 1877, the son executed a mtge. of the mill property to secure the £50,000. It being necessary that the son should obtain some further capital, a limited liability co. was incorporated in March, 1877. It agreed to buy from the son the property

to an intestate was paid out to her administrator notwithstanding that infants might be or might become entitled to it or a share of it. *Semble*, if the money belonged specifically to infants, the disposition might be otherwise.—*STEWART v. WHITNEY* (1891), 14 P. R. 147.—*CAN.*

g. Property to be taken at valua-

tion—By one beneficiary—Right to appoint valuers.—Testator provided in his will that on the death of his widow, his exors. should have his farm valued, & gave permission to his son E. to take it at their valuation, after which the proceeds were to be divided amongst all his children, of whom the exors. were two. E. having made up his mind to take the farm, the exors.

called in his aid in nominating three valuers, & proceeded to value the farm, E. being present, without notifying the other children. There was no evidence that E. had attempted to influence the valuers, or that they had reached their conclusion in other than a legitimate & upright way, but certain of the children had impeached the valuation as being too low & asked for

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comprised in the mtge. at a slight advance in price & the equity of redemption was duly assigned to it. The co. having subsequently failed, it was sought to fix the trustees with liability, & to establish against them a case of wilful default. The default alleged was that they did not get from the son the instalments of £2,000 half-yearly as they became due, & also in not compelling the payment of the instalments by the co. as the owners of the equity of redemption by means of a foreclosure action or the exercise of their power of sale:—*Held*: (1) the trustees had done the best they could in the embarrassing position in which testator himself had placed them; (2) no imputation could be made upon their honesty; (3) they were not liable to make good the loss.

Trustees are not insurers, & if they have & retain in their hands assets which, fairly valued, are sufficient to meet legacies which are not payable, but have to be held in trust, they are justified in paying other legacies payable *pari passu* with them, but payable at once; & trustees making such payments are not personally responsible to the unpaid legatees if the assets retained for them should in the result prove insufficient to pay them in full.

The conduct of trustees ought to be regarded with reference to the facts & circumstances existing at the time when they had to act & which were known, or which ought to have been known, by them at that time.—*Re HURST, ADDISON v. TORR* (1892), 67 L. T. 96; 8 T. L. R. 528, C. A. *Annotation*:—*Reid*. *Re Greenwood, Greenwood v. Firth* (1911), 105 L. T. 509.

3905. Delivery of assets to co-executor—Validity as against other executor.—*PIEMBERTON v. CHAPMAN*, No. 3979, *post*.

3906. — Representative character of payee unknown to debtor.—Payment by debtor, for the express purpose of discharging his debt to an estate, to his own agent, who happens to be, but not to debtor's knowledge, one of the exors. of the estate, is not sufficient to discharge debtor.

Although a residuary account signed by an exor. is *prima facie* evidence of receipt of the moneys credited in the account, it is evidence which is open to explanation, & the acknowledgment is not conclusive against him in favour of a debtor to the estate.—*MILLER v. DOUGLAS* (1886), 56 L. J. Ch. 91; 55 L. T. 583; 35 W. R. 122.

3907. Power to employ agent.—Exors. held, under the circumstances, justified in appointing an agent to get in testator's debts, & in allowing him a salary for his trouble.—*HOPKINSON v. ROE* (1838), 1 Beav. 180; 48 E. R. 908.

Annotation:—*Reid*. *Jones v. Powell* (1813), 6 Beav. 488.

—*J*.—*See, generally*, Part VI., Sect. 6, sub-sect. 5, C., *post*.

3908. Right of debtor to control application of money paid to representative.—A debtor to testator cannot maintain a bill against the personal representative, to obtain the directions of the et. as to the disposal of the money due by him, & to restrain an action brought by the personal representative to recover the debt, on the ground that the debt had been appropriated by testator for a particular purpose, & that the personal representative intended to apply it for purposes not warranted by the will.—*DARTHEZ v. WINTER* (1826), 2 Sim. & St. 536; 4 L. J. O. S. Ch. 175; 57 E. R. 451.

administration:—*Held*: the exors., who were exercising, in some sense, judicial functions, should either have

excluded all interested, or should have invited all interested to take part in appointing valuers, & there should be

B. Investment of Property.

(a) *Duty to Realise Investments.*

i. *Where no Express Direction to Realise.*

See Administration of Estates Act, 1925 (c. 23), s. 33.

3909. General rule—To be strictly observed unless incompatible with testator's intention.]—Testator, after devising lands to uses in strict settlement, gave the residue of his personalty to be invested in lands to be settled to the same uses. The tenant for life is not entitled to the interest of the residue, till one year from testator's death. The general rule fixing the end of the first year as the period at which the enjoyment of the tenant for life is to commence, is not to be departed from unless it appears that testator's intention is incompatible with it.—*TAYLOR v. LEBBERT* (1820), 1 Jac. & W. 308; 37 E. R. 393.

Annotations:—*Consd.* *Angorstein v. Martin* (1823), Turn. & R. 232. *Dbtd.* *Douglas v. Congreve* (1836), 1 Keen, 410. *Consd.* *Bulkeley v. Stephens* (1863), 10 L. T. 225. *Reid.* *Hewitt v. Morris* (1824), Turn. & R. 241; *Taylor v. Clark* (1841), 1 Hare, 161. *Mentd.* *Knight v. Bowyer* (1857), 26 L. J. Ch. 769.

3910. —]—An exor., who allowed part of testator's assets to remain invested in Mexican bonds for a year & seven months after testator's death, & eventually sold the bonds at a lower price than might have been obtained by a sale at an earlier period, but who appeared to have acted throughout with diligence & good faith, was held, under the circumstances, not to be liable for the loss consequent on his not having sold them sooner. A difference of opinion between two exors., as to the propriety of converting the assets at a particular period, followed by a demand made by one of them upon the other to concur in effecting an immediate conversion, does not deprive the latter of the right to exercise his own discretion, or render him liable for the loss that may arise from the delay consequent on his declining to comply with the demand.—*BUXTON v. BUXTON* (1835), 1 My. & Cr. 80; 40 E. R. 307.

Annotations:—*Distd.* *Gardner v. Gardner* (1837), 1 Jur. 402; *Sculthorpe v. Tipper* (1871), L. R. 13 Eq. 232. *Fold.* *Marsden v. Kent* (1877), 5 Ch. D. 598. *Reid.* *Bullock v. Wheatley* (1844), 1 Coll. 139; *Paddon v. Richardson* (1855), 7 De G. M. & G. 563; *Hughes v. Empson* (1856), 22 Beav. 181; *Grayburn v. Clarkson* (1868), 18 L. T. 491; *Edwards v. Edmunds* (1876), 31 T. 522; *Re Owens, Jones v. Owens* (1882), 47 L. T. 61; *Re Chapman, Cocks v. Chapman*, [1896] 2 Ch. 763. *Mentd.* *Re German Mining Co., Ex p. Chippendale* (1854), 4 De G. M. & G. 19.

3911. —]—Two of three exors., with the knowledge that there were unsettled accounts subsisting at testator's death between testator & their co-exor. in respect of which they had reason to believe that the latter was considerably indebted to the estate, took no effectual steps to compel him to account & pay or secure the balance due for several years after the trustees' death, at the end of which he became bkpt. The solvent exors., being unable to prove that an attempt to recover the money at an earlier period would have been fruitless, were decreed to make good the loss, as having been occasioned by their wilful neglect & default. It is the duty of exors., no less than of trustees, to keep a check upon each other's conduct, & an exor. is equally chargeable with neglect in allowing a part of the estate to remain outstanding in an improper state of investment, whether the party in whose hands it is so outstanding be a co-exor. or a stranger.—*STYLES v. GUY* (1849), 1 Mac. & G. 422; 14 Jur. 355; 41

another valuation of the farm.—*Re KERR, KERR v. KERR* (1884), 8 O. R. 481.—*CAN.*

E. R. 1328; *sub nom.* STILES v. GUY, 1 H. & Tw. 523; 19 L. J. Ch. 185; 14 L. T. O. S. 305, L. C.

*Annotations:—*Reid, Paddon v. Richardson (1855), 7 De G. M. & G. 563; Tickner v. Smith (1855), 3 Sm. & G. 42; Re Stevens, Cooke v. Stevens, (1898) 1 Ch. 162. *Mentd.* Re Flower & Metropolitan Board of Works, Re Flower & Metropolitan Board of Works (1884), 27 Ch. D. 592.

3912. — Allowance of reasonable time for decision.—Where testator died in 1836, possessed of numerous railway shares, which the exor. did not sell until 1840 & 1841, & then at a loss, the ct. refused to vary the certificate, allowing the exor. certain payments in respect of such shares. An exor. must be allowed a reasonable time for deciding the course to be pursued in reference to testator's property, although the ct. will not allow him to speculate when the property is of fluctuating value. He must sell with all reasonable & convenient speed.—STREET v. STREET (1859), 33 L. T. O. S. 8; 7 W. R. 350.

3913. ——Plffs. were paid exors. & therefore were bound to show skill in their business. . . . The question was, can an exor. discharge himself from his duty to realise such shares when the only communication between him & the beneficiaries had led the beneficiaries to tell him, & make him understand, that he was to sell the shares? . . . The beneficiaries were not bound actually to interfere with the administration of the estate, & the exors. cannot conclude from the beneficiaries' non-interference that there was acquiescence by them in the non-sale of the shares. It was the duty of plff. to sell the shares, & it was a gross breach of duty to speculate in the state of the market. . . . The damages to which defts. were entitled would be estimated at the price at which the shares could have been sold, plus the guarantee commission, no guarantee having been given (WILLS, J.).—CURREY v. WATSON (1895), 11 T. L. R. 371.

3914. Discretion of executor—Effect of difference of opinion between executors.—BUXTON v. BUXTON, No. 3910, *ante*.

3915. — Likelihood of large profits if realisation delayed.—Exors. were allowed to retain for a limited period shares of a joint stock banking co., as great benefit to testator's estate might be derived if retained until a certain date.—Re HIRST'S TRUST (1864), 11 L. T. 533; 13 W. R. 225.

3916. — Property of uncertain & speculative character.—Testator bequeathed his personal estate to his exors. upon trust to divide it equally among four persons, all of whom were of age. A considerable part of the estate consisted of three foreign railway bonds of very uncertain value. At the time of testator's death they were worth about £150 each, but their value was declining rapidly, & at the end of a twelvemonth they were worth about £54 each. One of the legatees during the year repeatedly pressed the exors. to sell, but the others did not join in doing so, & the exors. thought it best to wait for the chance of a rise. Ultimately, fifteen months after the death, they sold two of the bonds for £54 each. The third, which remained unsold, had fallen far below that value.—*Held*: as the exors. had acted in the honest exercise of their discretion as to the time of selling property of a very uncertain & speculative character they ought not to be made personally responsible for the loss arising from their not

having sold within the twelvemonth.—MARSDEN v. KENT (1877), 5 Ch. D. 598; 46 L. J. Ch. 497; 37 L. T. 40; 25 W. R. 522, C. A.

*Annotations:—*Reid, Gainsborough v. Watcombe Terra Cotta Clay Co., Dunning v. Gainsborough (1885), 54 L. J. Ch. 991; Re Chapman, Cocks v. Chapman, [1896] 2 Ch. 763.

3917. — Onus on representative to prove reasonable exercise of discretion.—An exor.'s discretion is not that of an absolute owner: it is limited by the duty of bringing the assets into a proper state of investment within a reasonable time; the onus is upon him to show that he has acted *bonâ fide*, & has exercised a reasonable discretion: Where testator's assets were subject to trusts in favour of unborn persons & consisted in part of shares with unlimited liability, & the exors. delayed conversion after same was demanded by those beneficially interested:—*Held*: (1) they were liable for the value of the shares ascertained at a reasonable date from the death of testator, which in this case was fixed at six months; (2) according to the true construction of his will testator's gift of £500 to each of his exors. in full satisfaction did not preclude charges made by them in their character, also conferred by the will, of administrators of his fidei-commissary inheritance.—HIDDINGH (HEIRS) v. DE VILLIERS DENYSSSEN, HIDDINGH v. DENYSSSEN, DENYSSSEN v. HIDDINGH (1887), 12 App. Cas. 621; 56 L. J. P. C. 107; 57 L. T. 885, P. C.

3918. Extent of liability.—Where exors. have neglected to realise assets, which are outstanding upon an improper investment, there is no fixed period at which the loss is to be calculated. It depends on the particular nature of the property & the evidence affecting it.

Losses occurred by the non-sale of Crystal Palace shares, which were at a premium at testator's death, but subsequently fell to a discount. The exors. were charged by the certificate with the value at the end of two months, but the ct. varied the certificate to twelve months. HUGHES v. EMPSON (1856), 22 Beav. 181; 52 E. R. 1077. *Annotations:—*Reid, Devaynes v. Robinson (1857), 24 Beav. 86; Grayburn v. Clarkson (1868), 3 Ch. App. 605.

ii. Where Express Direction to Realise.

See Administration of Estates Act, 1925 (c. 23), s. 33 (7).

3919. Direction to convert with all convenient speed—Liability for loss through postponement.—KEYLINGE'S CASE (1702), 1 Eq. Cas. Abr. 239; 21 E. R. 1017.

3920. — — — — ——Exors. directed with all convenient speed to pay debts & lay out the residue in mtges. held not answerable for a loss by the insolvency of testator's banker, after selling negotiable securities deposited with him by testator.—ROWTH v. HOWELL (1797), 3 Ves. 565; 30 E. R. 1157, L. C.

3921. — — — — — Principle on which loss calculated.—Where testator directed a sale with all convenient speed after his death, & directed the produce to be invested & the dividends to be paid to one for life, & the land remained unsold, the ct. considered twelve months as a reasonable time within which the estates ought to have been sold & the produce invested, & gave to the tenant for life the rents of the unsold estate from that

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b. Direction to convert with all convenient speed—Property not presently realisable.—Testator directed that the residue of his real & personal estate should be converted into money as

soon after his decease as conveniently might be, & that his exor. should hold the proceeds on trust. Part of testator's real estate consisted of valuable hotel property. It appeared that the present time was most inopportune for the realisation of hotel property at all, & in any event such property could

only be realised with advantage if long terms were given for the payment of the purchase-money, & that it was impossible to let the property advantageously except upon a lease of not less than five years' duration.—*Held*: (1) the ct. should not sanction the postponement of the sale of the

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time.—*VICKERS v. SCOTT* (1834), 3 My. & K. 500; 3 L. J. Ch. 223; 40 E. R. 190.

3922. ————*J.*—Testator died in 1834, having directed his exors. & trustees, so soon as convenient after his decease, to sell his freehold inn. They attempted to sell in 1836, & were offered £900, which they refused. The property became greatly depreciated, by a railway opened in 1843, & it still remained unsold in 1859:—*Held*: the trustees were liable for the difference between £900 & the produce of a present sale.—*PURY v. PRY* (1859), 27 Beav. 144; 28 L. J. Ch. 591; 31 L. T. O. S. 51; 5 Jur. N. S. 1047; 54 E. R. 56. *Annotation*:—*Mentd. Re McEacharn, Gambles v. McEacharn* (1911), 103 L. T. 900.

3923. ————*J.*—Testator entitled to shares in a co. with unlimited liability, directed his exors. to convert his estate with all convenient speed. P., one of the three exors., died a year & five weeks after testator. The shares were not converted, & about fifteen years afterwards the co. was wound up, & the surviving exors. being placed on the list of contributories paid a large sum out of the estate for calls. A bill was filed against the surviving exors., & the exors. of P., to make them liable for the loss. P.'s exors. did not answer, nor did they in evidence give any reason why conversion had not taken place within twelve months from testator's death:—*Held*: P.'s estate was liable for all loss occasioned to testator's estate by the omission to sell the shares within twelve months; & as P.'s exors. had not suggested by answer or evidence any reason for the delay, no inquiry could be directed on the subject. *Qu.*: whether the calls were a loss thus occasioned to testator's estate.—*GRAYBURN v. CLARKSON* (1808), 3 Ch. App. 605; 37 L. J. Ch. 550; 18 L. T. 494; 16 W. R. 716, L. J. J. *Annotations*:—*Apld. Sculthorpe v. Tipper* (1871), L. R. 13 Eq. 232. *Distd. Gainsborough v. Watcombe Terra Cotta Clay Co., Dunning v. Gainsborough* (1885), 54 L. J. Ch. 901.

3924. ———— *Whether infancy of executor a defence.*—Testator devised & bequeathed his residuary estate to four trustees, whom he also appointed his exors., upon trust to sell same immediately after his decease, or so soon thereafter as the trustees might see fit so to do. Testator was, at the time of his death, entitled to shares in an unlimited co. then in high repute. The exors. did not convert the shares as directed by the will, & about two years after testator's death the co. suspended payment, the result being a heavy loss to testator's estate. Upon a bill filed by some of the *cestuis que trust* against the exors. to render them personally liable for the loss:—*Held*: they ought to have converted the shares within twelve months after testator's death, & they were liable for the loss occasioned by their omission to do so. No distinction was made in the case of one of the exors. who did not prove the will, & did not attain twenty-one until more than a year after testator's death.—*SCULTHORPE v. TIPPER* (1871),

L. R. 13 Eq. 232; 41 L. J. Ch. 266; 26 L. T. 119; 20 W. R. 276.

Annotations:—*Distd. Anderson v. Read* (1874), 22 W. R. 527; *Edwards v. Edmunds* (1876), 34 L. T. 522; *Re Norrington, Brindley v. Partridge* (1879), 13 Ch. D. 654. *Refd. Redman v. Rymer* (1889), 60 L. T. 385.

3925. ———— *Leasehold farm with stock.*—*GIBSON v. BOTT*, No. 4708, *post*.

3926. *Power conferred by will to change stock at discretion—Whether executors may alter relative interests of legatees.*—Testator bequeathed, subject to his debts, etc., all the stocks & funds standing in his name to trustees to pay the interest & dividends to testator's wife for life, for her sole & separate use, etc., & after her death, etc., to C.; & empowered his trustees, at their discretion, to change the stock as often as to them should seem fit & proper. At testator's death, there were long annuities standing in his name, producing £365 *per annum*. C. filed a bill for an account, & to have the long annuities sold, & 3 per cent. Consols. bought instead, as the long annuities were a perishable fund:—*Held*: the exors. could not change the fund so as to alter the relative interests of the legatees.—*LORD v. GODFREY* (1819), 4 Madd. 455; 56 E. R. 773.

Annotations:—*Apld. Marshall v. Bremner* (1854), 2 Sm. & G. 237. *Distd. Porter v. Baddeley* (1877), 5 Ch. D. 542. *Refd. Tickner v. Old* (1874), L. R. 18 Eq. 422.

iii. *Where Express Power to Retain or Postpone Conversion.*

3927. *Power to retain—Discretion of executor.*—The exors. of the will of the late Marquis of H. were directed to purchase an annuity of £500 on the life of A. in the Govt. Life Annuities, or to retain so much of his stock in the public funds as would yield her £500 a year:—*Held*: the exors. might exercise a discretion, & might elect to retain the stock; but the annuitant was entitled to have the funds to secure her annuity brought into ct.—*HERTFORD (MARQUIS) v. LOWTHER (LORD)* (1843), 1 L. T. O. S. 311.

3928. ————*J.*—Testator directed his exors. to get in his debts, & to invest the proceeds with the clear moneys she should die possessed of in consols, & to pay certain annuities out of the stocks standing in his name & those purchased by his exors., & out of the rents of the real estate, if necessary; & to accumulate the surplus during the lives of the annuitants, a period which turned out to be more than twenty-one years. Part of the personal estate consisted of long annuities, which the exors. did not convert, but accumulated with the other surplus income till the death of the annuitants. The income of the personal estate would have been more than sufficient to pay the annuitants if the long annuities had been converted:—*Held*: the exors. were not bound to convert the long annuities.—*HUGHES v. PERRINS* (1853), 1 Eq. Rep. 385.

3929. ———— *Liability for loss through postponement—Wilful default must be proved.*—Where a will authorises investments on mtge. of real estate, & part of testator's estate at his death consists of mtges. of freehold farms, there is no

hotel property for any definite period, nor sanction the granting of any lease, but the exor. might carry on the business of the hotel until the sale; (2) it was the exor.'s duty to sell the hotel as soon as possible, but not to sell at a sacrifice, & the sale might be postponed until such time as a good sale could be made; (3) the exor. might in his discretion sell the property for cash, or on such conditions as to payment of a deposit & extended terms for payment of the balance of the purchase-money, with interest, as

were usual in the sale of this class of property.—*Re KERRIGAN, NATIONAL TRUSTEES, EXECUTORS & AGENCY CO. OF AUSTRALARIA, LTD. v. KERRIGAN*, [1916] V. L. R. 516.—*AUS.*

k. ———— *Mortgages held by testator.*—Where testator directed his real & personal estate to be converted into money; the proceeds to be invested; such investments to be continued until the whole of his property should be realised; & from & out of the same, when so realised & invested in the

whole, & thus available for division, & not before, to pay certain legacies:—*Held*: mtges. properly secured, which testator held, should for the purposes of the will be deemed to be realised & invested immediately after testator's decease, & the period of payment was not to be extended beyond the time that the estate might, with due diligence, be realised & the trustee could not prolong the period by selling the real estate on time.—*SMITH v. SEATON* (1870), 17 Gr. 397.—*CAN.*

rule that his exors. & trustees are under an absolute duty, without exercising any judgment of their own in the matter, to call in the securities within twelve months from the death, unless realisation is required for payment of debts, funeral & testamentary expenses, & legacies, even though some of the securities may be of a risky nature, as where, owing to agricultural depression, they have apparently become insufficient to satisfy the mtge. debts. Nor is there any rule that trustees retaining a security authorised by their trust are liable to make good a loss sustained through the fall in value of the security, provided that in so doing they have acted honestly & prudently in the belief that they have taken the best course for all parties interested in the trust estate. To render trustees liable in such a case, wilful default, including want of ordinary prudence, must be proved.—*Re CHAPMAN, COCKS v. CHAPMAN*. [1896] 2 Ch. 763; 65 L. J. Ch. 892; 75 L. T. 196; 45 W. R. 67; 12 T. L. R. 625; 40 Sol. Jo. 715, A. C. *Annotations*:—*Consd.* *Rawthorne v. Rowley* (1907), 78 L. J. Ch. 235, n. *Reid.* *Re Roberts, Knight v. Roberts* (1897), 76 L. T. 479; *Jackson v. Dickinson*, [1903] 1 Ch. 947; *Shaw v. Cates* [1909] 1 Ch. 389.

3930. ———.]—What had been done was not only within the terms of the power [under the will] but was a reasonable exercise of discretion on the part of the executor who retained the shares not as a matter of speculation but because he thought that in a few years' time . . . the price would rise. The ct. ought not, therefore, to hold this executor liable for the loss when he had apparently exercised his discretion in the matter for the best, though in the result what he had done had turned out unfortunately for the estate (*per* CUR.).—*Re JOHNSON, JOHNSON v. HODGE* (1880), 2 T. L. R. 504, C. A.

3931. Power to postpone sale—Discretion of executor.—Where testator gives an absolute discretion to his exors. to postpone the sale & conversion of his estate, they are not bound by the ordinary rule to convert the property within a year, even though some of the property consists of shares in an unlimited co. Nor will they be liable in the absence of *mala fides* for loss arising to the estate from the non-conversion.—*Re NORRINGTON, BRINDLEY v. PARTRIDGE* (1879), 13 Ch. D. 654; 44 J. P. 474; 28 W. R. 711, C. A.

Annotations:—*Consd.* *Re Irwin, Barton v. Irwin* (1895), 39 Sol. Jo. 233. *Reid.* *Re Crowther, Midgley v. Crowther* (1895), 64 L. J. Ch. 337.

3932. ———.]—Testator had, at the time of his death, one hundred shares in a joint-stock bank with unlimited liability. By his will he directed his trustees & exors. to convert his personal estate at their sole discretion, & at such time or times as they should think fit, & to invest the proceeds in, amongst other things, shares in any public co. incorporated by Act of Parliament & paying a dividend. The shares, which were very profitable, were retained by the sole trustee who, subsequently, accepted twenty-five additional new shares allotted in respect of the old ones. The trustee then retired, & appointed two new trustees. Ultimately, the bank stopped payment:—*Held*: the original trustee had not committed a breach of trust in retaining the old shares, but had done so in accepting the new ones, & was liable to indemnify testator's estate for losses incurred thereby.—*EDWARDS v. EDMUNDS* (1870), 34 L. T. 522.

Annotations:—*Consd.* *Re Smith, Davidson v. Myrtle*, [1896] 2 Ch. 590. *Mentd.* *Bell v. Turner* (1877), 47 L. J. Ch. 75.

3933. ———.]—**Effect of provision against liability.**—*Re NORRINGTON, BRINDLEY v. PARTRIDGE*, No. 3931, *ante*.

3934. ———.]—Testator, who died in 1913, bequeathed certain life annuities & directed his trustees to carry on his business for not less than one year or more than two years from the date of his death, & gave directions for selling same, including an offer to be made to two nephews, with provisions for payment of the purchase-money by instalments extending over seven years. He gave his residuary real & personal estate to trustees on trust for sale & investment, & directed them to hold the residuary trust funds in trust to pay the annuities, & subject thereto as to five-sixteenth parts upon trust to invest the same & pay the income to his son S. during his life, with remainder to his children; & testator declared that certain advances made to his son should not be treated as a debt owing to testator, but should be brought into account by way of hotch-pot in the division of testator's residuary estate; & testator directed the trustees to hold the remaining sixteenth shares upon trusts in favour of other persons & their children, & empowered his trustees to postpone sale & conversion, & directed the income of the unconverted property, including the profits from his business, to be applied from the date of his death in the same way as the income would have been applicable if such property had been converted & the proceeds invested; & he especially directed his trustees to continue to hold as long as they should think fit his shares in certain cos., whether authorised or not under the investment clause contained in his will, without being responsible for any loss. Testator's estate consisted largely of shares in these cos., in which there was no free market & which were incapable of any accurate valuation. The average rate of interest earned by the estate since testator's death exceeded 9 per cent.:—*Held*: the case was not one for an immediate valuation of the residuary estate & pending the final division of the estate the advanced son ought to be charged with interest on the amount of his advance at the rate of 4 per cent. only.—*Re COOKE, RANDALL v. COOKE*, [1916] 1 Ch. 480; 85 L. J. Ch. 452; 114 L. T. 555; 60 Sol. Jo. 403.

(b) Lending Money.

3935. On personal security.—Trustees taking upon themselves to lend an infant's money on a private security must in all cases be responsible in case of failure of the security.—*HOLMES v. DRING* (1788), 2 Cox, Eq. Cas. 1; 30 E. R. 1. *Annotation*:—*Reid.* *Grimwade v. Mutual Soc.* (1884), 52 L. T. 409.

3936. ———.]—*WALKER v. SYMONDS* (1818), 3 Swan. 1; 36 E. R. 751.

Annotations:—*Reid.* *Munch v. Cockerell* (1836), 8 Sim. 219; *Perry v. Knott* (1841), 4 Beav. 179; *Burrows v. Walls* (1855), 5 De G. M. & G. 233; *Lloyd v. Attwood, Attwood v. Lloyd* (1859), 3 De G. & J. 614; *Farrant v. Blanchford* (1863), 1 De G. J. & Sm. 107; *Re Brogden, Billing v. Brogden* (1888), 38 Ch. D. 546; *Chillingworth v. Chambers*, [1896] 1 Ch. 685; *Plotcher v. Collis*, [1905] 2 Ch. 24. *Mentd.* *Varleton v. Hornby* (1835), 1 Y. & C. Ex. 333. *Shilton v. Rawlins* (1845), 4 Hare, 619; *Re Pratt, Ex p. James* (1853), 3 De G. M. & G. 493; *Thompson v. Finch* (1856), 22 Beav. 316; *London General Omnibus Co. v. Holloway*, [1912] 2 K. B. 72.

3937. ———.]—Testator bequeathed £500 to his exors., upon trust that they should lay out & invest the same in the public funds, or in such other security, or in such other manner as to them should seem expedient, at interest, & pay & apply the produce to a charitable purpose. One of the exors., who took the entire management of the estate, paid the debts & most of the legacies of testator, but neither specifically appropriated nor invested £500 for the charity. He paid interest, however, on £500 to the charity; at the same time

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receiving interest on the promissory note of a debtor to the estate who was in good credit, but whose debt was the only fund available for payment of the legacy. The exor. afterwards died. On the admission, by his representatives, that he had in his lifetime assented to the payment of the legacy to himself, as trustee:—*Held*: his estate was severally answerable, as for a breach of trust.—*A.-G. v. HIGHAM* (1843), 2 Y. & C. Ch. Cas. 634; 63 E. R. 284.

3938. — Power conferred by will.]—Exors. cannot lend money on personal security, though words which may imply a discretion so to do, are used by testator.—*WILKES v. STEWARD* (1801), Coop. G. 6; 35 E. R. 457.

Annotation:—Mentd. Bacchus v. Gilbee (1863), 2 New Rep. 310.

3939. — Power of executor to lend to co-executor.]—Where testator authorises his three exors. to lend money on personal security, it is a breach of trust, if two of the exors. lend it to the third.—*v. WALKER* (1828), 5 Russ. 7; 38 E. R. 929.

3940. On real security—Power conferred by will.]—Two trustees were empowered by will to lend money on Govt. real or personal security. One of them, in 1815, lent part of the fund to the other trustee & his partner in trade, upon mtge. The mtgors. became bkpt in 1831, & then the mortgaged property, which consisted, in part, of a windmill, a watermill, & a house in a town, being sold, produced considerably less than the sum advanced.

The exors. were held liable for the deficiency.

Semble: so much as two-thirds of the value should only be advanced upon property of a permanent value, as freehold land, & not upon houses or buildings; still less upon buildings used in a trade, & whose value depends upon the absence of competition in that trade.—*STICKNEY v. SEWELL* (1835), 1 My. & Cr. 8; 40 E. R. 280.

Annotations:—Consd. Phillipson v. Gatty, Gatty v. Phillipson (1848), 7 Haro, 516; Farrar v. Barraclough (1854), 2 Sm. & G. 231; *Re Olive*, Olive v. Westerman (1886), 34 Ch. D. 70. *Reid*, Budge v. Gummow (1872), 7 Ch. App. 719; Brinsden v. Williams, [1894] 3 Ch. 185.

3941. — Duty of executor to satisfy himself as to security—Extent of liability.]—Exors. directed to invest legacy money in their own names, on real securities or in the public funds, a year after testator's decease, may appropriate a mtge. security for that sum taken by testator himself; but they ought to satisfy themselves that it is a good security, & if they do not, & it fail, they are bound to make it good. If the mtge. security so appropriated be paid off & the exors. do not invest the money, they are liable for so much stock as the money would have purchased within a reasonable time after; but in neither case are they liable for so much stock as could have been purchased a year after testator's decease.—*AMES v. PARKINSON* (1844), 7 Beav. 379; 3 L. T. O. S. 199; 49 E. R. 1111.

Annotations:—Consd. Robinson v. Robinson (1851), 1 De G. M. & G. 247; *Re Chapman*, Cocks v. Chapman, [1896] 2 Ch. 763.

3942. — Failure of executor to carry out positive direction.]—*Qu.*: if it be a breach of a trust to sell & convert the proceeds of testator's estate, that the trustee did not invest it.

To make out a breach of trust, it is necessary to show that some person was ready to borrow the money, & that deft. knowing the fact, neglected to advance it.

By the will deft. had no choice. The invest-

ment was to be made in good freehold security. It was proved to his Honour's satisfaction that the endeavour had been properly made, & failed in consequence of the bkpy. of the party with whom the negotiation had taken place (*SHADWELL, V.-C.*).—*WYATT v. WALLACE* (1843), 1 Coop. temp. Cott. 155; 2 L. T. O. S. 146; 8 Jur. 117; 47 E. R. 792.

3943. On securities of insufficient value—Or on equitable mortgages.]—L. & E. were trustees, who had been parties to what the ct. has held to be a breach of trust in lending trust moneys upon improper securities, improper in these respects, that the value of the property, which was the subject of the securities, was insufficient, & that they were second mtges., the legal estate being outstanding (*LORD CRANWORTH, C.*).—*LOCKHART v. REILLY, REILLY v. LOCKHART* (1857), 1 De G. & J. 464; 27 L. J. Ch. 54; 44 E. R. 803, L. C.; *previous proceedings* (1856), 25 L. J. Ch. 697, L. C.

Annotations:—Reid. *Re Cochran's Estate*, De Wolf v. Lindsell (1868), L. R. 5 Eq. 209; *Babin v. Hughes* (1886), 31 Ch. D. 390; *Re Partington*, Partington v. Allen (1887), 57 L. T. 654; *Robinson v. Harkin*, [1896] 2 Ch. 415. *Mentd.* Wilson v. Thomson (1875), L. R. 20 Eq. 459.

3944. — What are securities of sufficient value.]—Testatrix directed her exors., who were also her residuary legatees, to invest such a sum in the stocks or on freehold security as would produce £150 a year, & she bequeathed the £150 to A. for life, & after his death, she gave the security on which the investment should have been made to B. The exors. invested £3,530 at four & a half per cent. on a mtge. for five years of freeholds, which were let for a long term on ground rents producing £176 *per annum*. The value of the freeholds was about £4,344, but the property on which the rents was secured was of much greater value:—*Held*: the investment was not improper. But if the payment to pltf. should be delayed, by the inability of the trustees to call in the mtge. for five years, pltf. was entitled to have the mtge. sold & the deficiency paid by the exors.—*VICKERY v. EVANS* (1863), 33 Beav. 376; 3 New Rep. 286; 33 L. J. Ch. 261; 9 L. T. 822; 10 Jur. N. S. 30; 12 W. R. 237; 55 E. R. 413.

3945. On second mortgage.]—An estate of the value of £80,000 was subject to a first mtge. of £40,000 & to two others, for £11,000 & £6,800, & between the second & third there was a dispute as to priority. A trustee advanced £1,908 trust money on the security of an assignment of an equal amount of the £6,800:—*Held*: this was a breach of trust.

I beg, that it may not be understood that I sanction the propriety of trustees lending money on a second mtge., when they do not get the legal estate. I do not know that that has ever been determined, & I do not mean to express an opinion, that a trustee is ever justified in lending money on real security when he does not get the legal estate (*ROMILLY, M.R.*).—*NORRIS v. WRIGHT* (1851), 14 Beav. 291; 51 E. R. 298.

Annotations:—Consd. Smithwick v. Smithwick (1861), 5 L. T. 23. *Mentd.* Macleod v. Annesley (1853), 17 Jur. 608.

3946. ——Trustees lent trust moneys on a second mtge. of house property greatly out of repair, & the principal part was lost:—*Held*: they were liable as for a breach of trust, notwithstanding a trustee indemnity clause declaring they should not be liable for the insufficiency or deficiency in value of any securities, except through their wilful default.—*DROSTER v. BRERETON* (1851), 15 Beav. 221; 51 E. R. 521.

3947. ——*LOCKHART v. REILLY, REILLY v. LOCKHART*, No. 3943, *ante*.

3948. —[—]—*Re* ROBERSON, CAMPKIN v. BARTON, [1883] W. N. 110.

Trust securities generally.—See *Trustee Act*, 1893 (c. 53), s. 1; **TRUSTS & TRUSTEES.**

(c) *Failure to Invest.*

See, generally, TRUSTS & TRUSTEES.

3949. Liability of representative.—A sum of £2,000 was bequeathed to an exor. who was also a trustee under the will, upon trust, for investment in the public funds. He retained it in his own hands, paying interest to the *cestuis que trust* for many years, under a representation that the legacy had been invested according to the trusts:—*Held*: this was such a breach of trust as entitled the *cestui que trust* to have purchased by the exor. so much stock as the sum of £2,000 would have purchased at the time he first had assets sufficient for investment.—*BYRCHALL v. BRADFORD* (1822), 6 Madd. 13, 235; 56 E. R. 1081.

Annotation:—*Reid*. Newman v. Williams (1840), 4 Jur. 1123.

3950. Money left with bankers—Liability for loss of money—Direction in will to invest.—

Testatrix directed her exor. to sell two houses & invest the produce, after payment of her debts, in real or govt. securities, & to pay the interest to her three nephews until they attained twenty-one; & as each attained that age, to have one-third of the principal. The exor. sold the houses & applied part in payment of funeral expenses, etc., & paid the rest into his bankers' hands, mixing it with his own money. The bankers failed:—*Held*: he was liable to pay the money to the legatees.—*FLETCHER v. WALKER* (1818), 3 Madd. 73; 56 E. R. 436.

3951. —[—]—[—]—*Trustees & exors. who, for upwards of a year after their testator's death, allowed a considerable portion of the assets to lie unproductive in the hands of a banker who failed, were, under the circumstances, charged with the loss.*—*MOYLE v. MOYLE* (1831), 2 Russ. & M. 710; 39 E. R. 565.

Annotations:—*Distd.* Johnson v. Newton (1853), 11 Hare, 160. *Consd.* Wilks v. Groom (1856), 25 L. J. Ch. 721.

3952. —[—]—[—]—*Testator died in Mar. 1823, & in Jan. 1824 & Jan. 1825 the exors. & trustees deposited part of the assets in the hands of bankers, on their notes carrying interest; the bankers failed in Nov. 1825, & no necessity having been shown for such deposit, the trustees were held personally responsible for the loss.*—*DARKE v. MARTYN* (1839), 1 Beav. 525; 48 E. R. 1044.

3953. —[—]—[—]—*Instructions to bankers to invest.*—Trustee depositing a trust fund with his bankers, accompanied by an order in writing to invest the money in consols, answerable for the omission of the bankers to make the investment, where he made no subsequent inquiry respecting it, until about five months afterwards, when the bankers became bkpt.—*CHALLEN v. SHIPPAM* (1845), 4 Hare, 555; 67 E. R. 768.

Annotations:—*Consd.* Johnson v. Newton (1853), 11 Hare, 160. *Reid.* Macnamara v. Carey (1867), 15 W. R. 374.

3954. —[—]—[—]—*No direction in will to invest.*—Where a will contains no direction for the exors. to invest the proceeds of testator's estate, & the proceeds are left in the hands of testator's bankers & a residuary legatee refuses to accept his share by small sums on account the

exors. will not be held liable for any loss which may ensue by failure of the bankers before the expiration of twelve months from testator's decease.—*JOHNSON v. NEWTON* (1853), 11 Hare, 160; 1 Eq. Rep. 511; 22 L. J. Ch. 1030; 17 Jur. 825; 68 E. R. 1230.

Annotations:—*Consd.* Astbury v. Beasley (1869), 17 W. R. 638. *Reid.* *Re* Marcon's Estate, Finch v. Marcon, [1871] W. N. 148.

3955. —[—]—[—]—*A decree in an administration suit directed a contract for the sale of a particular house to be completed, but contained no directions as to the investment or otherwise of the purchase money. The administratrix, with the knowledge of the solrs. of testator, & of other persons interested under his will, paid the purchase money for the house, & other moneys, into a private bank. The bank failed, & the moneys were lost:—Held: the administratrix was not liable for the moneys so lost.*—*WILKS v. GROOM* (1856), 3 Drew. 584; 25 L. J. Ch. 724; 27 L. T. O. S. 270; 2 Jur. N. S. 681; 4 W. R. 607; 61 E. R. 1026.

Annotations:—*Consd.* *Re* Marcon's Estate, Finch v. Marcon (1871), 40 L. J. Ch. 537. *Mentd.* *Re* Price, Price v. Newton, [1905] 2 Ch. 55.

3956. —[—]—[—]—*An extrix. allowed £190, part of the estate, to remain at a banker's, in her name, as extrix. A loss occurred, by their bkpy., a year after testator's death:—Held: she was not personally liable for the loss.*—*SWINFEN v. SWINFEN* (No. 5) (1860), 29 Beav. 211; 54 E. R. 608.

3957. —[—]—[—]—*Liability of legatees to contribute.*—Testatrix gave some legacies absolutely, others to tenants for life with remainder over, & directed the settled legacies to be invested in the funds or on mtge. The assets were sufficient to pay all the legacies & leave a trifling residue. The exors. paid all the legacies which were given absolutely & left the remaining cash in hand, amounting to £500, at a bank, until the money due on some mtges. which were about to be paid off came in, intending then to invest the whole on a mtge. which they were negotiating. Fourteen months after the death of testatrix, the bank, which up to that time had been in high repute, stopped payment, half of the £500 was thus lost, & the estate was rendered insufficient for payment of the legacies in full:—*Held*: (1) the exors. were not responsible for the loss; (2) as the assets had been originally sufficient to pay all the legacies in full, the legatees who had been paid were not liable to contribute to the loss, which must fall wholly on the unsatisfied legatees.—*FENWICK v. CLARKE* (1862), 4 De G. F. & J. 240; 31 L. J. Ch. 728; 6 L. T. 593; 10 W. R. 636; 45 E. R. 1176, L. J.J.

Annotations:—*As to* (1) *Fold.* *Re* Hurst, Addison v. Topp (1892), 67 L. T. 96. *As to* (2) *Fold.* *Re* Winslow, Frere v. Winslow (1890), 45 Ch. D. 249.

3958. —[—]—[—]—*An administrator who had deposited trust moneys in a private bank on a separate account current, using ordinary prudence, was held not to be liable for the loss of the moneys through the failure of the bank, although the moneys had been suffered to remain so deposited for three & a half years after the death of intestate, & for nearly a year & a half after*

PART IV. SECT. 1, SUB-SECT. 3.—**B. (c).**

1. Liability of representative—Discretion—Deposit in savings bank.—Where money is left by will to be invested at the discretion of the exor. or trustee, the discretion so given cannot be exercised otherwise than

according to law, & does not warrant an investment in personal securities or securities not sanctioned by the ct. An exor. & trustee who deposits funds so left in trust for infants, at three & a-half or four per cent., interest, in a savings bank does not conform to his duty; & his failure to do so exposes him to pay the legal rate of interest for

the money, although he acts innocently & honestly; & the acquiescence of the statutory guardian of the infants, not being for their benefit, does not relieve him.—*SPRATT v. WILSON* (1890), 19 O. L. 28.—**CAN.**

m. Balances retained for special purposes.—Exors. are not liable to

Sect. 1.—First duties: Sub-sect. 3, B. (c), (d) & (e); sub-sect. 4.]

the administrator had carried into chambers, in the suit, his accounts showing a large balance against himself.—*Re MARCON'S ESTATE, FINCH v. MARCON* (1871), 40 L. J. Ch. 537.

3959. ——— *Liability to pay interest.*—(1) An administrator, who allowed balances of intestate's property to remain uninvested for a considerable length of time, standing at the bankers' to the credit of intestate's estate, was ordered to pay interest at four per cent. on the shares of those balances, which belonged to some infants. *Qu.*: (1) Whether the next friend of an infant, who omits to call for the payment of the trust moneys into ct., may not be made answerable for any loss of interest, which the infant may sustain thereby. (2) Whether, a solr. acting for both sides, if he omits to call for the payment of the trust moneys into ct. may not be made answerable for any loss occasioned thereby.—*GRESLEY v. HEATHCOTE* (1825), 3 L. J. O. S. Ch. 107, L. C.

3960. ——— *An extrix., who was also tenant for life under a will directing the residuary estate to be sold & the proceeds invested in govt. or other good security:—Held: not personally liable for not converting into consols a sum of Navy 5 per cents. forming part of the residuary estate.*—*BAUD v. FARWELL* (1855), 7 De G. M. & G. 628; 25 L. J. Ch. 21; 20 L. T. O. S. 83; 1 Jur. N. S. 1214; 4 W. R. 40; 44 E. R. 245, L. J.

(d) *Retention of Existing Investments.*
See Sect. 1, sub-sect. 3, B. (a) iii., ante.

(e) *Other Cases.*

3961. *Transfer of stock where co-executor lunatic.*—Where one of three exors. of the surviving exor. of testator was of unsound mind an order was made under Trustee Act, 1850 (c. 60), s. 5, giving the right to transfer a sum of stock belonging to the estate of original testator, although the stock still remained standing in the name of original testator.—*Re WACHER* (1882), 22 Ch. D. 535; 48 L. T. 552, C. A.

See, generally, LUNATICS; TRUSTS & TRUSTEES.

3962. *Costs of investment—Out of what fund payable.*—Under a direction by will to accumulate & lay out a certain sum of money in the purchase of land, to be settled to uses thereby declared, the costs of the investment are to be paid out of the particular sum directed to be invested.—*GWYTHIER v. ALLEN* (1842), 1 Harc. 505; 66 E. R. 1131.

Annotation:—Reid. Parker v. Watkins (1859), John. 133.

SUB-SECT. 4.—NOTICES FOR CLAIMS.

See Law of Property Amendment Act, 1859 (c. 35), s. 20; Judicial Trustee Act, 1896 (c. 35), s. 3; Trustee Act, 1925 (c. 19), ss. 27, 61.

3963. *Time for issuing advertisements—Necessity for promptness.*—Judicial Trustee Act, 1896

(c. 35), s. 3, applies to the case of an exor. who has committed a *devastavit* but in construing that sect. the ct. is bound to remember the provisions of Law of Property Amendment Act, 1859 (c. 35), s. 20, & to see that there has been no undue delay in advertising for claims.

Testator who died in June, 1894, leaving assets amounting to £22,000 & debts as then ascertained of about £100 gave an immediate legacy of £300 to his widow; the exor. paid this legacy & allowed the widow to receive the income arising from the estate for the support of herself & family. In Aug. following a claim for rents received by testator as an agent & not accounted for was sent in; in Nov. the usual advertisements for creditors were issued; in Dec. an action claiming an account on the footing of wilful default by testator was commenced. The exor. without going to the ct. for directions defended the action & continued to allow the widow to receive the income till judgment in Apr. 1896, which resulted in some £26,000 being found due from testator's estate to plffs.:—*Held*: though there had been undue delay in issuing the advertisements for claims, the exor. had acted reasonably under all the circumstances in paying the £300 legacy & such further sums on account of income as were necessary to maintain the widow & family up to the issue of the writ but not after, & to this extent he might be relieved from personal liability.—*Re KAY, MOSLEY v. KAY*, [1897] 2 Ch. 518; 66 L. J. Ch. 759; 46 W. R. 74; 13 T. L. R. 582.

Annotations:—Reid. Re De Clifford's Estate, De Clifford v. Quilter, De Clifford v. Lansdowne, [1900] 2 Ch. 707; *Re Blow, St. Bartholomew's Hospital v. Camden*, [1914] 1 Ch. 233. *Mentd. Re Barker, Ravenshaw v. Barker* (1898), 46 W. R. 296; *Re Allsop, Whittaker v. Bamford*, [1914] 1 Ch. 1.

3964. *In what papers advertisements should be inserted.*—The exors. of testator, whose estate was liable to replace trust money in consequence of a breach of trust:—*Held*: not protected from liability under Law of Property Amendment Act, 1859 (c. 35), s. 20, they having only issued notices for claims against testator's estate, to be sent in within three weeks, by advertisement in local newspapers in the neighbourhood where testator resided, & not in the *London Gazette*.—*WOOD v. WRIGHTMAN* (1872), L. R. 13 Eq. 434; 26 L. T. 385; 20 W. R. 459.

Annotation:—Consd. Re Bracken, Doughty v. Townson (1889), 43 Ch. D. 1.

3965. ——— *There is no absolute rule that notices issued by exors., under Law of Property Amendment Act, 1859 (c. 35), s. 20, to creditors & others to come in & claim against the estate of testator, should be published in a London daily newspaper of large circulation, or that a month should be allowed for the bringing in of claims. In determining whether exors., have given such notices as are sufficient to entitle them to the protection of s. 20, the ct. will have regard to the circumstances of the particular case, such as the place of residence of testator & his position in life.*

Interest on balances, unless the purpose, for which the money is retained, appear to be answered.—*DAVSON v. MANSEY* (1809), 1 Ball & B. 219, 234.—IR.

PART IV. SECT. 1, SUB-SECT. 3.—B. (e).

n. Modes of investment specified.—The designation in a will of specific modes of investment does not operate to prevent the exors. investing trust funds in the securities referred to in s. 12 of 232, R. S. B. C.—*Re McCORMICK* (1915), 33 W. L. R. 190; 9 W. W. R. 499; 22 B. C. R. 327.—CAN.

PART IV. SECT. 1, SUB-SECT. 4.

a. Necessity for—in Gazette.—Publication in the Ontario Gazette of an advertisement for creditors, pursuant to R. S. O. 1887, c. 110, s. 36, is not necessary to release exors. from liability for payments made by them.—*Re CAMERON, MARON v. CAMERON* (1898), 15 P. R. 272.—CAN.

p. Sufficiency of notice—Time allowed less than one month.—The exor. of testator, whose estate was liable to replace trust money in consequence of a breach of trust:—*Held*: not protected from liability under 22 & 23 Vict. c. 35, s. 29, he having published

notices in one local paper twice, & in the General Advertiser twice, the time allowed by the first notice published in the latter paper being less than one month from the date of publication.—*STUART v. BARRINGTON* (1891), 27 L. R. Ir. 551.—IR.

q. Effect of advertising—New claim raised after distribution—Right of representative to recover portion of money paid.—An administratrix, having given the statutory notice for creditors after expiry of the time therein mentioned, paid money on a claim, & afterwards, new claims being raised against the estate, sought to recover a portion of

Testator was a small farmer in the country. He had lived at the same place for forty years previously to his death, & had never been engaged in any other occupation than that of farming his own land, consisting of about fifty-two acres. After his death his exors. issued a notice inviting creditors & others to come in & make their claims against testator's estate. The notice was published once in each of three local newspapers, & once in the *London Gazette*, but it was not published in any other London newspaper. The notice fixed the period of a month from its date for the bringing in of claims, but it was not published till a day or two after its date. After the expiration of the notice the exors. distributed the estate among claimants of whose claims they had notice:—*Held*: as against claims of which they had not then any notice, the notice was sufficient to entitle the exors. to the protection given by s. 29.—*Re BRACKEN, DOUGHTY v. TOWNSON* (1889), 43 Ch. D. 1; 50 L. J. Ch. 18; 61 L. T. 531; 38 W. R. 48; 6 T. L. R. 11, C. A.

3966. Sufficiency of notice—To person claiming as next of kin.—Law of Property Amendment Act, 1859 (c. 35), s. 29, is not confined to claims of creditors of testator or intestate, but applies also to persons having claims as next of kin. It also affords protection to the sureties in an administration bond, where the administrator before distributing the assets of intestate, has pursued the course pointed out by that sect. A notice addressed to creditors & other persons having claims or demands against or upon the estate of intestate, requiring them to send in particulars of their claims, or that, in default thereof he will, at the expiration of the time mentioned in the notice, proceed to administer the assets of deceased, having regard only to the claims & demands of which he should then have had notice:—*Held*: a sufficient notice under the statute to a person having a claim as next of kin.

A., the daughter of intestate, left her home at an early age, in 1857, changed her name, & without notice to any of her relatives went to America. In 1871, she returned to England, & endeavoured to find her mother; but, the mother having changed her residence & married again, she was unable to find her. She again came to England in 1874, when she found that her mother was dead. In the meantime a sister of her mother had obtained letters of administration,

& after advertising in the *London Gazette* & in the *Times*, & another London newspaper, in the terms of Law of Property Amendment Act, 1859 (c. 35), s. 29, for creditors & other persons having claims or demands against or upon the estate of deceased, distributed the assets amongst the brother & two sisters, herself being one, of deceased, being ignorant that the daughter A. was still living. In an action by A., who had procured the revocation of the letters of administration granted to her aunt, & a fresh grant to herself, & an assignment of the administration bond, against the sureties:—*Held*: the notice being good in form, & the publication all that could reasonably be required under the circumstances, Law of Property Amendment Act, 1859 (c. 35), s. 29, afforded a good defence.—*NEWTON v. SHERRY* (1876), 1 C. P. D. 216; 45 L. J. Q. B. 257; 34 L. T. 251; 40 J. P. 581; 24 W. R. 371.

3967. Effect of advertising—Before Law of Property Amendment Act, 1859 (c. 35).—Exors., whose testator died in 1827, advertised for persons having claims or demands on the estate of testator, & having provided for all that appeared, they, in 1829, distributed the estate amongst the legatees & took from them an indemnity. A demand previously unknown both to claimant & the exors. was made against the estate in 1836, & a bill filed to enforce it:—*Held*: if the claim were valid, the exors. were still personally liable to plaintiff.—*HILL v. GOMME* (1839), 1 Beav. 540; 8 L. J. Ch. 350; 3 Jur. 744; 48 E. R. 1050; *on appeal*, 5 My. & Cr. 250, L. C.

Annotation:—*Mentd.* Green v. Paterson (1886), 32 Ch. D. 95.

3968. —[An exor. who had distributed the assets of testator, after issuing advertisements, & taking the steps pointed out by Law of Property Amendment Act, 1859 (c. 35), will have the same protection as if he had administered the estate under a decree of the ct.; & if he should have retained any legacies as trustee, after appropriating them for the benefit of the *cestuis que trust*, he will no longer be under any liability *quid exor.*—*LEGG v. ROWLAND* (1866), L. R. 3 Eq. 368; 36 L. J. Ch. 137; 15 L. T. 385; 15 W. R. 251.

Annotations:—*Consd.* Hunter v. Young (1879), 4 Ex. D. 256. *Apld.* *Re Frewen, Frewen v. Frewen* (1880), 60 L. T. 953. *Rstd.* *Re Bowden, Andrew v. Cooper* (1890), 39 W. R. 219. *Mentd.* A-G. v. Smith (1892), 60 L. T. 857.

3969. —**Executor with notice of claim.**—An exor. with notice of a claim against testator's estate is not discharged from liability to satisfy

the money back as on an overpayment:—*Held*: she had no *locus standi* to maintain the action.—*LEITCH v. MOIRSONS BANK* (1896), 27 O. R. 621.—**CAN.**

F. —**Liability for testator's breach of trust—Trustee Limitation Act.**—A notice by exors. that parties having claims against the estate are required to file same by a named date, is not a sufficient notice within R. S. O., c. 129, s. 38, to protect the exors. from liability for claims not brought to their knowledge until after the estate has been distributed by them. Their liability in this respect extends to claims against their testator for money lost owing to a breach of duty by him as trustee. Persons having a reversionary interest in a trust fund may bring an action to compel the trustee to make good money lost owing to his negligence, & Trustee Limitation Act does not run against them from the time of the loss, but only from the time their reversionary interest becomes an interest in possession.—*STEWART v. SNYDER* (1900), 20 C. L. T. 351; 27 A. R. 423.—**CAN.**

Executor.]—Failure by a creditor of a

deceased person to lodge his claim with the exor. within the period specified by notice duly given does not bar such creditor from subsequently claiming payment of the debt from the exor., if the latter still has assets of the estate in his hands.—*HORN v. LEONOLFF* (1830), 1 Men. 403.—**S. AF.**

t. —[M. died intestate about July, 1867, & his widow was appointed executrix *dativo*. She appointed K. her agent in the administration of the estate. M. at his death owed A. the amount of two acknowledged debts. The widow was aware of the debt, but not of its exact amount. K. had virtually the sole administration of the estate & inserted a notice in the *Gazette* of July 30, 1867, calling in claims. On Oct. 4, 1867, K., an auctioneer, sold the property in M.'s estate at public auction. At that sale A. was present, & acquainted K. with his claim, but not its nature or amount, & promised to file it soon, signing at the same time, in common with other creditors, at the request of K., a consent to a *pro rata* dividend from the estate, to avoid its declaration as insolvent; but he never

sent in the promised particulars, either to K. or the widow. K. distributed the estate between Feb. & Apr. 1868, & in Nov. 1868, filed his account with the master. In Apr. 1868, when he had administered the estate, & had no funds, A. sent in his specified claim, & demanded payment, which, being refused on the ground of *plene administravit*, A. brought an action against the widow M., & against K., as her surety to the master for the due fulfilment of her office as *extrix*:—*Held*: it is the duty of the creditor, under the ordinance, to file his proper claim with the exor., & not for the exor. to search for claims due to the estate; wherefore judgment went for *defect*, accordingly.—*KOTZE v. MONTREV*, (1869), Buch. 199.—**S. AF.**

a. —[No claimant found—Fund in court.]—Testator by his will directed that his exor. should distribute his residuary estate amongst churches & charities, or otherwise as he might think fit. The exor. advertised for heirs & next of kin of testator without result, & then paid into ct. the money representing the residue. Upon a petition under R. S. O. 1887, c. 110,

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that claim by the fact that the person entitled to make the claim has failed to send in particulars of it in answer to an advertisement for creditors, under Law of Property Amendment Act, 1859 (c. 35), s. 29.—*Re LAND CREDIT CO. OF IRELAND, MARKWELL'S CASE* (1872), 21 W. R. 135.

3970. —. —.]—*NEWTON v. SHERRY*, No. 3966, ante.

3971. —. —.]—In an action against Y. & A., his wife, the claim alleged that W. owed pltf. £40, & that at his death he appointed by his will M. his residuary legatee; that M. died, having by her will appointed A., the female deft., her residuary legatee; that the residuary estate of W. had been assigned by his surviving exor. to defts. Pltf. claimed payment of £40 from defts., but the surviving exor. of W. was not made a party to the action:—*Held*: the claim disclosed a good cause of action; for even if the practice of the Ct. of Ch. would have required the surviving exor. of W. to be joined as deft., the proper course, since the passing of Jud. Acts, 1873 (c. 60), 1875 (c. 77), for defts. to take, if they wished to bring him before the Ct., was to make him a party to the action under R. S. C., Ord. 16, r. 17.

Another exception has been added by Lord St. Leonards' Act [Law of Property Amendment Act, 1859 (c. 35), s. 29,] which provides that when an exor. has given notices similar to those used in administration suits, he shall be at liberty to distribute testator's assets amongst the parties entitled thereto; the notices discharge the exor. from liability, & he is in the same position as if the estate had been administered under the direction of the Ct. of Ch. In order, however, to protect him it is essential that he should have no notice of any claim which, at the time of the distribution of the assets, is left unsatisfied. The claim in the present action does not allege that the notices required by Law of Property Amendment Act, 1859 (c. 35), s. 29, have been given, & that at the time of distributing the assets the surviving exor. of W. had no notice of pltf.'s claim (*BAGGALAY, L.J.*).—*HUNTER v. YOUNG* (1879), 4 Ex. D. 256; 48 L. J. Q. B. 680; 41 L. T. 142; 27 W. R. 637, C. A. *Annotation*:—*Mentd.* Sheehan v. G. E. Hy. (1880), 16 Ch. D. 59.

3972. —. —.]—This was an action by a legatee under the will of F., who died in 1870, asking for payment of her legacy, which was directed to be raised out of real estate, & the non-raising of which she alleged to be a breach of trust, & the execution of the trusts of F.'s will. There had originally been three exors. & trustees of F.'s will; one of these, J., still survived & was a party to the action. C., another of the exors., had died in 1878, the exors. of C. were made defts., but claimed to be

dismissed on the ground that in Oct. 1879, they had issued advertisements for claims under the provisions of Law of Property Amendment Act, 1859 (c. 35), s. 29, that no claim had been made for the legacy, & they had distributed the whole of C.'s estate. Pltf. insisted that they ought to be retained as defts. because J., the surviving trustee, had acted as solr. for the exors. of F. & had committed a breach of trust in not seeing that pltf.'s legacy was raised, & that the exors. of C. had constructive notice of this breach of trust when they distributed the estate, & because pltf. had a right to follow C.'s estate in the hands of the beneficiaries, & his exors. ought to be defts. in order that an account might be had against his estate:—*Held*: (1) under the circumstances no notice of pltf.'s claim could be brought home to the exors. of C.; (2) pltf. had no right to keep them before the ct. in order to obtain an account which she could use against the beneficiaries in whose hands she could follow C.'s assets, but must bring the beneficiaries themselves before the ct., if she desired to follow the assets in their hands.—*Re FREWEN, FREWEN v. FREWEN* (1889), 60 L. T. 953.

3973. —. —.]—Where an exor. has issued the proper notices for creditors fixing a time for claims to be made against testator's estate, & at the expiration of that time he distributes the estate, both real & personal, he is exempt from liability in respect of any creditors of whose claims he has received no notice, nor can the creditors follow the real estate in the hands of a purchaser.—*Re CARY & LOTT'S CONTRACT*, [1901] 2 Ch. 463; 70 L. J. Ch. 653; 84 L. T. 859; 49 W. R. 581; 17 T. L. R. 598; 45 Sol. Jo. 596.

Advertisements in administration proceedings.—*See* R. S. C., Ord. 55, rr. 44-46; Part VIII., Sect. 5, sub-sect. 3, II. (a), *post*.

2.—PAYMENT OF DEBTS PRESENTLY DUE.

SUB-SECT. 1.—IN GENERAL.

3974. Duty to pay debts—Before legacies.—*PINCHON'S CASE* (1611), 9 Co. Rep. 86 b; 77 E. R. 859; *sub nom.* *PUNCHEON v. LEGATE*, 2 Brownl. 137; *sub nom.* *LEGATE v. PINCHION*, Cro. Jac. 294; *sub nom.* *ANON.*, Jenk. 144, 290.

Annotations:—*Reid.* Papworth v. Johnson (1613), 2 Bulst. 91; Beresford v. Goodridge (1616), 3 Bulst. 236. *Mentd.* Case of Marshalsea (1613), 10 Co. Rep. 68b; Manby v. Scot (1663), 1 Keb. 361; London City v. Wood (1701), 12 Mod. Rep. 669; Farr v. Newman (1792), 4 Term Rep. 621; Raymond v. Fitch (1835), 2 Cr. M. & R. 588; Phillips v. Homfray (1883), 24 Ch. D. 439; Bathyany v. Walford (1887), 56 L. J. Ch. 881; Finlay v. Chirney (1888), 20 Q. B. D. 494.

3975. —. —.]—*PALMER v. LAWSON* (1667), 1 Sid. 332; 82 E. R. 1139. *Annotation*:—*Mentd.* Lewis v. Masters (1694), 5 Mod. Rep. 75.

The negligent creditor cannot recover from the exor. *de bonis propriis* nor from the other creditors in the estate, but a *condictio indebiti* will lie against any person, heir or legatee, who has been paid more than he should have been out of the assets of the deceased.—*COLONIAL TREASURER v. SWART* (1910), T. P. D. 552.—*S. AF.*

PART IV. SECT. 2, SUB-SECT. 1.

3974 i. Duty to pay debts—Before legacies.—An exor. is not entitled to make payment to beneficiaries without first providing for payment of all debts due by the executory estate.—*LAMOND'S TRUSTEES v. CROOM* (1871), 9 Macph. (Ct. of Sess.) 662; 43 Sc. Jur. 321.—*SCOT.*

d. Certification by affidavit—How

s. 37, for the advice of the ct. as to the construction of the will & as to further advertising for next of kin, the ct. refused to make any order in the absence of any of the heirs or next of kin.—*Re HARLEY'S ESTATE* (1897), 17 R. 483.—*CAN.*

b. — *Failure to trace one of next of kin.*—The administrators of the estate of an intestate, who died in 1906, inserted three times in a newspaper published at the place in Ontario where the intestate was residing at the time of his death an advertisement for claims against the estate. One of the next of kin, who would, if alive, have been entitled to a distributive share of the estate, had left Canada in 1876, & no communication had since been received from him or information about him, except that soon after his

departure a sister of his heard that he was in Oregon, & in 1895 an aunt heard that he was dead. Diligent inquiry was made for him in 1882, but he was not then found. No one had even heard of his marrying. No claim was made on his behalf upon the estate:—*Held*: the advertisement was sufficient; that it covered next of kin, & the absentee would be barred if he were hereafter to make any claim; & the administrators should divide the assets amongst those entitled as though the absentee were assuredly dead without every having had issue.—*Re ASHMAN* (1907), 10 O. W. R. 250; 15 O. L. R. 42.—*CAN.*

c. — *How far destroys debt.*—A creditor's neglect to lodge with the exor. his claim against the estate of a deceased debtor does not destroy the

3976. ———.]—WHITTON v. LLOYD, No. 4063, *post*.

— **When devastavit committed.**]—See Part VI., Sect. 3, sub-sect. 5, A. (b), *post*.

— **Priority of creditors.**]—See Sub-sect. 3, *post*.

3977. — **Debt paid by heir—Right of heir to be reimbursed.**]—Where the heir being forced to pay the debt of his ancestor, shall recover against the exor.—*ARMITAGE v. METCALFE* (1666), 1 Cas. in Ch. 74; 22 E. R. 701, L. C.

Annotations.—**Refd.** Anon. (1679), 2 Cas. in Ch. 4. **Mentd.** Twedell v. Twedell (1786), Rom. 159.

3978. — **Legacy conditional on payment of debts—Debts exceeding legacy.**]—Testator gives a specific bequest to A., & directs that, in consideration of the bequest, A. shall pay his debts, & makes A. his residuary legatee & exor.; the payment of the debts is a condition annexed to the specific bequest, & if A. accept the bequest, he is bound to pay the debts, though they should far exceed the amount of the property bequeathed to him.—*MESSENGER v. ANDREWS* (1828), 4 Russ. 478; 38 E. R. 885, L. C.

Annotations.—**Mentd.** Rees v. Engelback (1871), L. R. 12 Eq. 225; Woodhouse v. Walker (1880), 5 Q. B. D. 404; Re Williams, Andrew v. Williams (1885), 54 L. T. 105; Batthyany v. Walford (1886), 33 Ch. D. 621; Re Williams, Williams v. Williams, [1897] 2 Ch. 12.

3979. **Payment to executor—Validity as against co-executor.**]—Payment by a debtor of testator, & delivery by a bailee of chattels bailed by testator, to a *feme covert* who is appointed extrix., are valid as against her co-exor., though the husband of the extrix. never assented to his wife acting as extrix. & subsequently to the payment, refused to allow her to act, & although on that ground probate was refused to her, if the payment & delivery were made *bonâ fide* at the request of the extrix. as such, without knowledge, by the party paying & delivering, of the dissent of the husband, though with knowledge that she was a *feme covert*.—*PEMBERTON v. CHAPMAN* (1858), E. B. & E. 1056; 27 L. J. Q. B. 429; 31 L. T. O. S. 343; 5 Jur. N. S. 567; 6 W. R. 769; 120 E. R. 802, Ex. Ch.

Annotation.—**Refd.** Re Gale, Blake v. Gale (1883), 48 L. T. 101.

3980. **Whether interest allowed.**]—When there is a sufficiency of assets for payment of debts exors. may pay simple contract debts not bearing interest before specialty debts bearing interest, if not objected to by the specialty creditors; & the legatees are not at liberty to complain of the order of payment.—*TURNER v. TURNER* (1819), 1 Jac. & W. 39; 37 E. R. 290.

Annotations.—**Consd.** Re Stevens, Cooke v. Stevens, [1898] 1 Ch. 162. **Mentd.** Wharton v. Cradock (1836), 1 Keen, 267; Davenport v. Stafford (1851), 14 Beav. 319.

— **Right to set off debts due from creditors.**]—See Part VII., Sect. 1, sub-sect. 8, *post*.

— **Payment of death duties.**]—See ESTATE & OTHER DEATH DUTIES, Vol. XXI., pp. 27 *et seq.*, 47, 72 *et seq.*, 112 *et seq.*, 126 *et seq.*

SUB-SECT. 2.—OUT OF WHAT ASSETS.

A. In General.

See Land Transfer Act, 1897 (c. 65), s. 2 (3); repealed by Law of Property Act, 1922 (c. 16),

far necessary.]—By consolidated statutes, c. 52, s. 19, it is provided that no debt shall be paid by an exor. until the same be certified by affidavit.—**Held:** the obtaining of the affidavit was not a condition precedent to the right to sue for the debt, & if it was, to be available as a defence it would have

to be specially pleaded.—*MARSHALL v. ARMSTRONG* (1881), 21 N. B. R. 102.—**CAN.**

PART IV. SECT. 2, SUB-SECT. 2.—A.

— **General personal estate—Head rents due on derived lands.**]—P. devised &

s. 156 (11); Administration of Estates Act, 1925 (c. 23), ss. 2 (1), 32.

— **3981. Nature of distinction between legal & equitable assets.**]—*COOK v. GREGSON*, No. 4135, *post*.

3982. —.]—A. granted to B. an annuity, in consideration of purchase of trade stock, for their joint lives, & for the life of A. & B.'s wife, unless B. should transfer it in his lifetime. It was provided that B. should have a right to sell his wife's reversionary interest as if it were payable to him *in presenti*. B. was indebted at the time of the transaction, & it being determined, after B.'s death without having aliened the annuity, that the wife's reversionary interest was assets for B.'s creditors it was now determined that it was legal assets, following the doctrine of *Cook v. Gregson*, No. 4135, *post*.

The question whether assets are legal or equitable depends on this, whether, if the case were before a ct. of law, that ct. would treat the property as assets; if it would, then it is legal assets in this ct. & the principle on which a ct. of law proceeds is this, to inquire whether the property came to the hands of the exor. *virtute officii*. If it did, the ct. of law regards it as assets of testator applicable to the payment of his debts, & then this ct. treats it as legal assets (*KINDERLEY, V.-C.*).—*SHEE v. FRENCH, FRENCH v. FRENCH* (1857), 3 Drew. 716; 3 Jur. N. S. 428; 61 E. R. 1076; *sub nom.* HUE v. FRENCH, 26 L. J. Ch. 317; 28 L. T. O. S. 365; 5 W. R. 386.

Annotations.—**Refd.** Re Mount, Kingston Cotton Mills Co. v. Mount, [1891] 1 Ch. 831; O'Grady v. Wilnot, [1916] 2 A. C. 231. **Mentd.** Richards v. James (1867), L. R. 2 Q. B. 285; Re O'Sullivan, *Ex p.* Baller (1892), 61 L. J. Q. B. 228.

3983. —.]—The purchase money agreed to be paid for real estate under a binding contract, but where the vendor dies before the conveyance, having a good title is legal assets in the hands of the vendor's exor., & subject to probate duty; at least all moneys recovered by the exor. by virtue of the probate as part of the estate & effects of testator, & so liable to probate duty whether they are legal or equitable assets.

Whatever an administrator is entitled to recover *virtute officii* can never be equitable assets. The question whether assets are legal or equitable is not whether the money is recoverable through the agency of a ct. of law or of a ct. of equity, but whether the personal representative is entitled to recover them independently of any directions of testator (*Lord GRANWORTH*).—*A.-G. v. BRUNNING* (1860), 8 H. L. Cas. 243; 30 L. J. Ex. 379; 3 L. T. 36; 6 Jur. N. S. 1083; 8 W. R. 302; 11 E. R. 421, H. L.

Annotations.—**Consd.** Re Power, Re Stone, Acworth v. Stone, [1901] 2 Ch. 659; O'Grady v. Wilnot, [1916] 2 A. C. 231. **Refd.** A.-G. v. Partington (1864), 3 H. & C. 193; Lord v. Colvin (1867), L. R. 3 Eq. 737; Perry's Exors. v. R. (1868), L. R. 1 Exch. 27; Re Dixon, Pinfold v. Dixon, [1902] 1 Ch. 248; Re Scott, Scott v. Scott, [1916] 2 Ch. 268. **Mentd.** Re Capdevielle (1864), 11 L. T. 89; Re De Lancy (1870), L. R. 5 Exch. 102; Forbes v. Steven, Mackenzie v. Forbes (1870), L. R. 10 Eq. 178; A.-G. v. Lomas (1873), L. R. 9 Exch. 29; A.-G. v. Hubbuck (1884), 13 Q. B. D. 275; A.-G. v. Alesbury (1887), 12 App. Cas. 672; A.-G. v. New York Breweries Co., [1898] 1 Q. B. 205; Re Lyne's Settlement, Trusts, Re Gibbs, Lyne v. Gibbs, [1919] 1 Ch. 80.

3984. —.]—Testator devised to his exors., their heirs & assigns, his lands, upon trust to sell

bequeathed all his real & personal property to trustees, to pay certain annuities & legacies, & as to all his interest in all his estates, lands, houses, & landed property, to the use of his son H.; & he appointed E. his residuary legatee; & his trustees to be his exors. By a codicil executed the same

Sect. 2.—Payment of debts presently due: Sub-sect. 2, A. & B. (a).]

the same; & directed that the money arising from the sale should be deemed part of his personal estate, & that it should be subject to the disposition made concerning his personal estate. He then directed his personal estate to be sold, & when the money arising from the sale of his personal & real estate should be collected he disposed of it in the manner mentioned in the will, & among other dispositions he bequeathed a legacy to B.:—*Held*: the money arising from the sale of the real estate was equitable assets, & a legatee could not maintain a suit in the Ecclesiastical Ct. to recover his legacy.—*BARKER v. MAY* (1829), 9 B. & C. 489; 4 Man. & Ry. K. B. 386; 109 E. R. 182. *Annotation*:—*Refd.* A.-G. v. Brunning (1860), 8 H. L. Cas. 241.

B. Personal Estate and Effects.

(a) In General.

3985. General rule.]—Be it in account or trespass, a release is assets. It is not requisite that every assets be a thing in possession, or in the hands of testator; for a thing may be assets, which never was in testator's hands, if those things come in lieu of the thing which was in the hands of testator, as money for land or other goods sold: or if they came by reason of another thing which was in the hands of testator, as increase of goods by the exors. in their hands, by merchandising with the goods of testator or goods purchased by the villain of testator after his death, shall be assets. So money received by the exor. of the bailiff of testator after his death, shall be said assets (*ANDERSON, J.*).

If testator have sheep, swine, or cows, & they die, & they have young lambs, pigs, or calves, they are assets for the reason aforesaid (*WINDHAM, J.*).

Things in action or possession certain or uncertain, if they be released, they are assets: & the uncertainty must be such that the same cannot be proved to the ct., or unto a jury; that the thing released might not by possibility have been assets. For if trespass be done to testator by taking his goods & he dies, & the exors. release all actions, same is assets, because it might be proved to the jury that had they not released, but had brought their action of trespass, *de bonis asportatis in vita testatoris*, etc., that they might have recovered damages, which would have satisfied the debts or legacies of testator, & therefore it shall be assets: & yet the thing recovered was not in testator, or a thing in possession, or certain in the hands of the exors. (*PERIAM, J.*).—*KITTLEBY'S CASE* (1585), *Godb.* 29; 78 E. R. 19.

3986. —.]—*FOLY'S CASE* (1679), *Freem. Ch.* 49; 2 Eq. Cas. Abr. 459; 22 E. R. 1051, L. C.

3987. Bond made in trust for another.]—A man makes a bond to A. in trust for B. A. dies, his exor. receives the money; it shall not be assets

(*per CUR.*).—*NICOLS v. BRIDGE* (1700), 12 Mod. Rep 381; 88 E. R. 1394.

3988. Damages in trespass for goods.]—If exors. recover damages in trespass of goods taken away in the life of testator, such damages so recovered are assets. So if exors. redeem a pledge with their own proper goods, same is assets in their hands (*per CUR.*).

Where lands devised to be sold by the exors. for the payment of debts & legacies, in such case the money arising of such sale is assets (*per CUR.*).—*ALEXANDER & GRESHAM'S (LADY) CASE* (1591), 1 Leon. 224; 74 E. R. 205.

Annotation:—*Mentd.* *Chiverton v. Trudgeon* (1620), *Palm.* 97.

3989. Equitable interests reaching executor as money.]—In an action against a *feme covert* extrix. & her husband *plene administravit* was pleaded. It appeared that the husband, who was not exor., paid debts to more than the amount of the assets; but it appearing, that, before he so paid them, he had raised a sum of £1,400 by mtge. of lands, under a power given to him by a deed executed by testator in his lifetime, for the purpose of paying testator's debts, it was left to the jury to say whether he paid the debts out of the assets in the hands of his wife, or out of the sum so raised.

Equitable assets, when they come into the hands of the exor. in money, are legal assets.—*MARSTON v. DOWNES* (1834), 6 C. & P. 381, N. P.; *subsequent proceedings*, 1 Ad. & El. 31.

Annotations:—*Mentd.* *Phelps v. Prew* (1854), 23 L. J. Q. B. 140; *Boyle v. Wiseman* (1855), 10 Exch. 647.

3990. Goods subject of gift in fraud of creditors — In possession of deceased.]—*ANON.* (1476), *Cary*, 18; 21 E. R. 10.

3991. Insurance policy kept up by insolvent for benefit of widow.]—A member of a friendly society effected & duly kept up a policy with the society for £100, for the benefit of his widow. He died intestate, having been insolvent for some time before his death; after which the widow became his administratrix. A suit was instituted for the administration of the estate, when the creditors claimed the money to arise from the policy:—*Held*: the widow was entitled to the money.—*RE OWEN, CLAYTON v. OWEN* (1862), 31 Beav. 285; 31 L. J. Ch. 825; 6 L. T. 802; 8 Jur. N. S. 1117; 10 W. R. 770; 54 E. R. 1148.

3992. Jointure in money.]—*KNIVET v. BAXTER* (1630), *Toth.* 116; 21 E. R. 111.

3993. —.]—*PAWLET v. MALBURGH (LADY)* (1632), *Toth.* 116; 21 E. R. 141.

3994. Money payable to wife of deceased—Under marriage settlement.]—*LAWRENCE v. BEVERLEIGH* (1671), 2 Keb. 841; 84 E. R. 532.

Annotations:—*Apld.* *Baden v. Pembroke* (1688), 2 Vern. 52. *Consd.* *Symonds v. Butler* (1691), 2 Vern. 227. *Refd.* *Kettleby v. Atwood* (1687), 1 Vern. 471. *Mentd.* *Pulteney v. Darlington* (1782), 1 Bro. C. C. 223.

3995. — Annuity payable under husband's

day, he bequeathed all his household furniture, & his horses, stock, etc., to H.; & directed that all rents then due by the tenants on the respective lands, should belong to H. By a second codicil the testator declared it to be his intention that all his lands, houses, etc., should revert to H., & he left to W. the lands of T.: "these bequests subject to a bequest already made in my will"; & he desired that all rents due on his property in those respective lands, should belong to H.:—*Held*: head rents due by testator at his decease were properly payable out of the general personal estate & not out of the lands in respect of which they

had accrued due, or out of the arrears of rent due, at the death of testator, by the undertenants of the same lands, & which had been bequeathed to the devisee of the lands.—*HARRY v. HARDING* (1844), 1 Jo. & Lat. 475.—*IR.*

PART IV. SECT. 2, SUB-SECT. 2.—B. (a).

1. Proceeds of policy.]—Where testator, possessed of a policy of life assurance for a sum exceeding £1,000, gave his real & residuary personal estate to his trustees & exors. upon trust for sale & conversion, & to hold the net proceeds upon trust thereof

to pay his debts, funeral & testamentary expenses & to invest the residue of such net moneys:—*Held*: the proceeds of the policy were assets in the hands of the exors. for payment of debts.—*RE CHAPMAN* (1907), 3 Tas. L. R. 28.—*AUS.*

2. —.]—Testator, by his will, bequeathed all his real & personal estate to trustees upon trust to sell & convert the same into money, & to pay thereout his just debts, funeral & testamentary expenses. At his death testator held two policies of insurance on his own life. His estate proved insolvent:—*Held*: the money pay-

agreement with assignees.]—*SHEE v. FRENCH, FRENCH v. FRENCH*, No. 3982, ante.

3996. Money due on mortgage.]—Money due on a mtge. decreed to be assets in equity.—*BRIDGMAN v. TYRER* (1675), *Cas. temp. Finch*, 236; 23 E. R. 130.

3997. Money arising under will & paid by executors into court.]—Monies arising under a will, & paid by the exors. into ct. in a creditor's suit:—*Held*: legal assets.—*LOVEGROVE v. COOPER* (1854), 2 Sm. & G. 271; 65 E. R. 396.

Annotation:—*Consd. Bain v. Sadler* (1871), L. R. 12 Eq. 570.

3998. Money recovered on bond to secure performance of duties.]—A bond was given by a broker to the Corp'n. of London to secure the due performance of his duties. He made default:—*Held*: on his death the corporation held the amount recovered on the bond as equitable assets, & in trust for the general body of his creditors, & not exclusively for those who had suffered by his defaults.—*NASH v. BRYANT* (1858), 25 Beav. 533; 53 E. R. 741; *sub nom. NAISH v. BRYANT*, 27 L. J. Ch. 748; 32 L. T. O. S. 83; 4 Jur. N. S. 550; 6 W. R. 573.

3999. Personalty expressly charged by will.—What direction constitutes charge.]—*CLOUDSLEY v. PELHAM*, No. 4069, *post*.

4000. — Effect of making executors trustees for payment of debts.]—*LEWIN v. OKELEY*, No. 4082, *post*.

4001. Personalty which deceased may dispose by will.]—Where a man has a power to dispose of money by his will, this is assets, & liable to his debts.—*THOMPSON v. TOWNE* (1691), 2 Vern. 319; *Preced.* Ch. 52; 2 Eq. Cas. Abr. 466; 23 E. R. 800, H. L.

Annotations:—*Distd. Grise v. Goodwin* (1703), *Freem. Ch.* 265. *Apld. Lassells v. Cornwallis* (1704), 2 Vern. 465. *Consd. Re Lawley, Zaiser v. Lawley*, [1902] 2 Ch. 673. *Reid. Buckland v. Barton* (1793), 2 Hy. Bl. 136; *O'Grady v. Wilmot*, [1906] 2 A. C. 231; *Re Pryce, Lawford v. Pryce*, [1911] 2 Ch. 286.

4002. — Arrears of annuity.—Effect of direction to pay debts.]—A direction in the will of a married woman that her debts shall be paid makes all the property she has power to dispose of, including arrears of an annuity, which was subject to a restraint on anticipation, assets for payment of all liabilities of her separate estate, including damages for breach of covenant by her legal personal representatives.

By a separation deed the husband covenanted to pay £1,000 to a trustee upon trust to pay the income thereof to the wife for her separate use without power of anticipation & to pay him a further annual sum upon the same trusts. Afterwards the husband sued for a divorce. The proceedings were compromised by a deed whereby the wife & the trustee purported to release the husband from his covenant to pay the further annual sum & she & a surety covenanted with the husband that neither she nor any person on her behalf should take proceedings to compel the husband to allow her any support, maintenance, alimony or additional income other than the income of the £1,000. The wife lived ten years

after this deed, & on every quarter day she received from the trustee a cheque for £10 representing the income of the £1,000 & made no claim for more. The £1,000 was not in fact invested & the £10 a quarter was found by the husband.

The wife made a will whereby she directed all her debts to be paid & gave her property to an adopted daughter for life. Her legal personal representative brought this action against the husband for arrears of the annuity. The husband counterclaimed for damages for breach of the wife's covenant:—*Held*: the release of the husband's covenant being admittedly void, the conduct of the wife, in accepting the trustee's cheques for less sums than were due, did not amount either to accord & satisfaction, or to such acquiescence as would prevent the wife claiming the arrears. Her representative was therefore entitled to succeed in the action.—*SPRANGE v. LEE, LEE v. SPRANGE*, [1908] 1 Ch. 424; 77 L. J. Ch. 274; 98 L. T. 400.

4003. Personalty bequeathed on special trusts.—Corpus not disposed of by special trusts.]—The circumstance, that a fund, in which a party takes a life interest under a will, is transferred by the exor. to the trustees of that fund appointed by the will, is not necessarily & conclusively a severance of the fund from the bulk of the estate, unless the exor. has, by such transfer, done all that it is incumbent upon him to do in the administration of the fund.

Upon a transfer to trustees of a fund bequeathed to them upon trust to pay the interest to a tenant for life, without any bequest of the corpus, or with a bequest thereof of doubtful validity, & which upon construction might fail, so that the corpus would ultimately become part of the residuary estate, the trustees of such fund are not, *ipso facto*, trustees for the residuary legatees or the next of kin, but the corpus of the fund must be regarded as assets of testator's estate unadministered, *ultra* the life-estate.

The circumstance, that the residue of the estate, omitting the fund so vested in trustees for the tenant for life, has been administered in equity, does not affect the principle; nor is it less applicable, because, from the time which has elapsed since the death of testator, the exor. is not a necessary party in the administration of the particular fund, & has not been made a party to the suit.—*PENNINGTON v. BUCKLEY* (1818), 6 Hare, 451; 67 E. R. 1212.

Annotation:—*Mentd. Re Hodgson, Ex p. Cunliffe* (1851), 18 Jur. 780.

4004. Release.]—*KITTLE'S CASE*, No. 3985, *ante*.

4005. Rent.]—This assignment [of such arrears of rent as should be due at A.'s death] is utterly void, for it cannot create any specific lien, because the thing itself, viz. the arrears, was not then in being, nor is it to take effect till A.'s death, & then it is too late, for the arrears then become part of his assets liable to his debts generally; & this differs from the case of off-reckoning or of pay, due or to become due, etc., which cases were objected, because in those cases the thing assigned

able under the policies was liable to pay testator's debts.—*Re SMITH* (1901), 20 N. Z. L. R. 640.—N.Z.

b. — Protected under Life Insurance Act, 1908.—No special direction.]—Testator devised the whole of his real & personal estate with the exception of his business to trustees upon trust to sell & convert into money all such parts of his real & personal estate as should not consist of

money & to call up & get in all such parts of his estate as consisted of money, & subject to payment of all his just debts funeral & testamentary expenses to hold the proceeds in trust for his daughter & sister in equal shares. Part of his estate consisted of two life insurance policies protected under Life Insurance Act, 1908. His trustees received payment of those policy moneys amounting to £1,586 12s., out of which they paid a legacy

of £86 12s., & invested the remainder in their names. Subsequently an order was made for administration of the estate under Administration Act, 1908, Part IV. There was a deficit of over £2,700, & the ct. was asked to determine whether the policy-moneys in the hands of the trustees were liable for the debts or testamentary expenses of deceased & the expenses of administration by the appointee:—*Held*: (1) the policy-moneys were not liable to be

2.—*Payment of debts presently due: Sub-sect. 2, B. (a) & (b).]*

is certain, & the assignee has a certain interest, but notwithstanding the assignment or agreement, he, A., had it still in his power to receive all the arrears, & so defeat his own assignment (VARNEY, M.R.).—GRAY (LADY) v. HAMILTON (DUCHESS) (1730), 2 Eq. Cas. Abr. 88; 22 E. R. 76.

4006. — *Improved rent less moiety of expense of building party-wall—Fire Prevention (Metropolis) Act, 1774 (c. 78).]*—An administrator, who as such receives the improved rents of a house in the metropolis, from the tenant in possession, is liable, under sect. 41 of above Act, to be sued for the moiety, or other proportional part, of the expense of building of a party-wall, erected by the owner of the adjoining house in pursuance of the Act. *Semble*: these expenses are in the nature of a lien upon the improved rent; & therefore to the extent of such moiety, or other proportional part, the rent is not assets in the hands of the administrator.—THACKER v. WILSON (1835), 3 Ad. & El. 142; 4 Nev. & M. K. B. 658; 1 Har. & W. 131; 4 L. J. K. B. 149; 111 E. R. 367.

Annotation:—*Mentd.* Mason v. Fulham Corpn. (1910), 102 L. T. 188.

4007. Reversionary interest.]—A father, by articles previous to the marriage of his son, covenants at the end of three years after the solemnisation thereof, to pay to trustees, their exors., etc., £12,000, to be settled to husband for life, to the wife for life; then to the use of the first & other sons in tail male, remainder to the daughter & daughters in tail general, remainder to the right heirs of the husband. Provided, if there should be but one daughter, & no other child, & the heirs, etc., of the husband should, within three calendar months after his death, pay to the trustees £4,000. Then all the uses limited to such daughter, & the heirs of her body in the £12,000, should cease & be void, & from thenceforth should be to the use of the heirs & assigns of the husband. The husband dies, leaving no child but a daughter, & by will devises the £12,000, & all his property in the same, & to the lands to be purchased therewith, subject to the trusts, to the deft., his heirs, etc., & appoints him exor. He lets the three months elapse, without paying the £4,000, & denies he ever had assets sufficient to have paid it. Pltf., a judgment creditor of the husband, brings his bill to be paid principal, interest, & costs, out of the personal assets, & if not sufficient, insisted that the husband's reversionary interest in the £12,000 ought to be deemed real assets, & applied in payment of his demand. The reversionary interest in the £12,000, together with the benefits of discharging the same from the estate tail limited to the daughter, is to be considered as real assets, & pltf., notwithstanding the three months lapsed without payment of the £4,000, ought not to be prejudiced thereby, but let into the benefit of the redemption.—FREDERICK v. AYNSCOMBE (1730), 1 Atk. 392; 26 E. R. 250, L. C.

Annotation:—*Mentd.* Re De Lancey (1869), L. R. 4 Exch. 345.

applied in payment of the debts of deceased, there being no special direction to that effect in the will; (2) the policy-moneys should not be liable for the funeral & testamentary expenses in exoneration of the residue of the estate available for creditors.—WRIGHT v. ROACH (1911), 30 N. Z. L. R. 456.—N.Z.

k. — *Friendly Societies Act, 1909* — *Express direction.*—Testator by his will gave & bequeathed all his real &

personal estate & effects whatsoever & wheresoever situate including money payable to his estate by virtue of any policies of insurance on his life upon trust after payment of his debts & funeral & testamentary expenses for his wife absolutely. Deceased was a member of a lodge registered under Friendly Societies Act, 1909, under the rules of which a sum of £20 was payable out of the funeral fund to the nominee or legal representative of deceased, &

a further sum of £100 was payable out of the special fund to the nominee or next-of-kin of deceased. Deceased had made no nomination:—*Held*: the money was not available for the payment of testator's debts, for, although there was an express direction in the will within Friendly Societies Act, 1909, s. 99, there was no specific direction within that section.—*Re JOHNSON'S WILL* (1912), 32 N. Z. L. R. 166.—N.Z.

4008. — *Testator died in 1842 entitled in reversion to a moiety of a settled fund of personality. His other property, consisting of real estate charged by his will with debts, was administered by the ct. In 1858 the reversion fell into possession, the trustees of the settlement paid the money into ct. under Trustee Relief Acts, & testator's moiety was paid to his exors.:*—*Held*: (1) this fund was distributable as legal assets; (2) this fund must bear a share of the costs of suit, which had been paid out of the equitable assets.—MUTLOW v. MUTLOW (1859), 4 De G. & J. 539; 45 E. R. 209, L. J.

4009. Stock—Representing proceeds of sale of personality.]—How far money in same respects may be said to have an earmark. When an exor. sells part of the personal estate of testator & converts the money into stock, how far the creditors of testator may be allowed to follow the stock into which the money was converted. If stock belonging to testator is given by his will subject to a contingency, the ct. does not presume that the stock will always remain in the same plight; & if it is converted into other stock, the stock into which it is so converted shall be subject to the same contingency.

It has been objected on the part of pltf. that money has no earmark, & therefore upon that account the money which has been purchased cannot be considered as part of the estate of Sir N. This objection has been enforced by saying, that if an exor. sells part of testator's estate & converts the money into stock, a creditor of testator shall not be allowed to follow that money into the stock wherein it was so converted, & consider the stock as assets in the hands of the exor., but shall only be allowed to charge the exor. with a *devastavit*; & undoubtedly that is the general rule, not only at law but in this ct. also. But there are many cases wherein that rule does not hold in this ct. & the creditor shall be allowed to follow the stock specifically (LORD HARDWICKE, C.).—BATTEN v. WHOREWOOD (1740), Barn. Ch. 420; 27 E. R. 703.

4010. — *Specifically bequeathed.]*—Where the proprietor of stock in the public funds makes a specific bequest of it:—*Held*: the Bank of England must nevertheless allow the exor. to make a transfer of it, unless it be shown that he has assented to the legacy.—FRANKLIN v. BANK OF ENGLAND (1829), 9 B. & C. 156; 4 Man. & Ry. K. B. 11; 7 L. J. O. S. K. B. 183; 109 E. R. 58.

(b) *Personalty over which Deceased exercised General Power of Appointment.*

4011. Power exercised by will.]—Husband assigns a personal estate belonging to his wife as extrix., in trust for such uses as he by deed or will should appoint; & in default of such appointment in trust for himself, his exors., etc. He afterwards devises this estate to his wife & children. This is assets, & the devise to the wife & children is only a legacy, & it must be liable to the debts of the husband in the first place.—ASHFIELD v. ASHFIELD (1693), 2 Vern. 287; 23 E. R. 785.

4012. —.]—*GRISE v. GOODWIN* (1703), *Freem.* Ch. 264; 22 E. R. 1200.

4013. — **Necessity for actual exercise of power.** —If a man who has power to raise money dies in debt, having made no appointment for raising it, the creditors cannot make this assets, & raise the money pursuant to the power.—*CORNWALLIS'S (LORD) CASE* (1704), *Freem.* Ch. 279; 2 E. Cas. Abr. 250, 466; 22 E. R. 1210; *sub nom.* *LASSELLS v. CORNWALLIS (LORD)*, 2 Vern. 465; *Prec.* (Ch. 232; 1 E. Cas. Abr. 242).

Annotations:—*Refd.* *Hinton v. Toye* (1739), 1 Atk. 465; *Townshend v. Windham* (1750), 2 Ves. Sen. 1; *Re Lawley*, *Zaiser v. Lawley*, [1902] 2 Ch. 673; *O'Grady v. Wilmot*, [1916] 2 A. C. 231. *Mentd.* *Willis v. Brady* (1740), *Barn.* Ch. 64; *Buckland v. Barton* (1793), 2 Hy. Bl. 136; *Holmes v. Coghill* (1802), 7 Ves. 499; *Ewart v. Ewart* (1853), 11 Hare, 276.

4014. —.]—Before the marriage of E. with M., it was agreed that £300, till it could be laid out in the purchase of lands, should be settled in trust for E. for life, for M. for life, & in default of issue, to the use of such person, & for such estate as she should by any deed direct or appoint, & for want of such appointment, to her right heirs for ever. M. by deed poll appoints the £300 to be paid to her husband, to be employed by him to such charitable uses, or other intents & purposes as he should think fit. E. by will devises to defts. W., S. & A., £100 a-piece, being the money charged on the estate of his wife's father, & declared in his will that such disposition was in pursuance of the directions. The creditors of E. bring their bill to have the £300 applied to the payment of his debts, as a part of his assets. This is not a naked power only to convey to charitable uses, but ought to be considered as a part of the assets of E., & applied in payment of his debts.—*HINTON v. TOYE* (1739), 1 Atk. 465; 26 E. R. 290.

4015. — **Over fund transferred in breach of trust.**—A. was tenant for life of a trust fund, with a general power to appoint by will, & in default, it was settled on pltf. A. ordered the trustees to pay over the fund to her on an indemnity, & she afterwards appointed the fund to pltf. & others, who filed a bill to make the trustees liable for a breach of trust:—*Held*: by the appointment, the fund became assets for answering A.'s liabilities, of which the indemnity was one, & therefore, the trustees were not liable.—*WILLIAMS v. LOMAS* (1852), 16 Beav. 1; 51 E. R. 675.

Annotation:—*Mentd.* *O'Grady v. Wilmot*, [1916] 2 A. C. 231.

4016. — **By married woman.**—A married woman with separate estate in personality for life, & a general power of appointment by will, does not, by exercising the power, make the fund assets for payment of her creditors.—*BLATCHFORD v. WOOLLEY* (1863), 2 Drew. & Sm. 201; 62 E. R. 599; *sub nom.* *BLATCHFORD v. WOOLLEY*, 1 New Rep. 507; 32 L. J. Ch. 531; 8 L. T. 232; 9 Jur. N. S. 568; 11 W. R. 478.

Annotations:—*Refd.* *Re Roper*, *Roper v. Doncaster* (1888), 39 Ch. D. 482. *Mentd.* *Lechmere v. Brothelidge* (1863), 32 Beav. 353.

4017. —.]—Personal property settled on the marriage of C. in trust as she should during coverture by deed or will appoint, & subject thereto, for her separate use for life, & if she survived her husband, which happened, for her absolutely:—*Held*: to be bound by her general engagements.

C. having in a settlement on the marriage of her daughter L. covenanted with the trustees thereof for the payment to them on her decease of £1,000 to be in trust for L. for life, then for the husband of L. for life, then upon the usual trusts for her children:—*Held*: the trustees of

settlement were entitled, on the death of C., to stand in the position of creditors in respect of the property comprised in the first settlement.—*MAYD v. FIELD* (1876), 3 Ch. D. 587; 45 L. J. Ch. 699; 34 L. T. 614; 41 J. P. 20; 24 W. R. 660.

Annotations:—*Consd.* *Re Roper*, *Roper v. Doncaster* (1888), 39 Ch. D. 482. *Refd.* *Re Harvey's Estate*, *Godfrey v. Harben* (1879), 13 Ch. D. 216; *Sklinner v. Todd* (1881), 51 L. J. Ch. 198. *Mentd.* *Re Tussaud's Estate*, *Tussaud v. Tussaud* (1878), 9 Ch. D. 363; *Re Wilson's Menteth v. Campbell* (1878), 26 W. R. 848.

4018. — **Whether fund liable as separate estate—Married Women's Property Act, 1882 (c. 75).**—In cases not within above Act, the exercise by the will of a married woman of a general power of appointment, whether the power be exercisable by deed or will, or by will only, does not make the property appointed liable to engagements entered into with her on the credit of her separate estate.

In 1881 a married woman joined in a mtge. as surety, for an advance made to her husband; & she assigned a policy on her life by way of security, with a declaration that, as between herself & the mtgees., she & the policy moneys should be deemed a principal debtor & security respectively for the sums thereby secured. At this date her only property, as to which she was not restrained from anticipation, was some furniture & the policy; but she had a general power of appointment by will over certain funds. She died in 1887, leaving her husband surviving & having, by her will, dated in 1873, exercised the power of appointment in favour of her daughter. The policy moneys were received by the mtgees., & applied in part satisfaction of their claims. An application was then made to the ct., by originating summons, by the daughter, the mtgees. appearing & consenting to be bound, to determine whether the funds so appointed had become liable to satisfy testatrix's obligations under her covenants with the mtgees.:—*Held*: the case not coming within above Act, the funds appointed in favour of testatrix's daughter were not affected by the mtge.

Semble: as to cases falling within above Act in order to render property appointed by the will of a married woman liable to her engagements under that Act, it would be necessary to hold that the appointment by her will made the property appointed her separate property, so as to bring it within sect. 1 (4) of above Act. *Re Roper*, *Roper v. DONCASTER* (1888), 39 Ch. D. 482; 58 L. J. Ch. 215; 59 L. T. 203; 36 W. R. 750.

Annotations:—*Consd.* *Re Parkin*, *Hill v. Schwarz*, [1892] 3 Ch. 510; *Re Lawley*, *Zaiser v. Lawley*, [1902] 2 Ch. 673. *Refd.* *Re Ann*, *Wilson v. Ann*, [1894] 1 Ch. 549; *Re Hughes*, *Brandon v. Hughes*, [1898] 1 Ch. C.

further, HUSBAND

WIFE.

4019. —.]—Where a power of appointment is exercised by a general bequest in a will the property appointed is included in & passes by the bequest according to the terms of the will, & not as if a separate execution of the power were read into the will. The property is therefore not necessarily postponed, as a fund liable for payment of his debts, to other assets of testator.—*WILLIAMS v. WILLIAMS*, *Re HARTLEY*, *WILLIAMS v. JONES*, [1900] 1 Ch. 152; 69 L. J. Ch. 79; 81 L. T. 804; 48 W. R. 245.

4020. —.]—The donee of a general testamentary power of appointment over a fund borrowed money & as security covenanted with the lender that he would make a will appointing that the loan should be a first charge on the fund—that he would not revoke the will. He made a will accordingly & died:—*Held*: the lender was

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not entitled to priority as regards the fund over the appointor's general creditors; for personalty appointed by will under a general power is subject to the payment of the appointor's debts.—*BEYFUS v. LAWLEY*, [1903] A. C. 411; 72 L. J. Ch. 781; 89 L. T. 309, H. L.; *affg. S. C. sub nom. Re LAWLEY, ZAISER v. LAWLEY*, [1902] 2 Ch. 799, C. A.

*Annotations:—**Reid. Stamp Duties Comr. v. Stephen*, [1904] A. C. 137; *Re Hadley, Johnson v. Hadley*, [1909] 1 Ch. 20; *Re Whitehead, Whitehead v. Street*, [1913], 108 L. T. 364; *O'Grady v. Wilmot*, [1916] 2 A. C. 231; *Re Wernher, Wernher v. Belt*, [1918] 2 Ch. 82. *Mentd. Re Purdie's Settlement, Rose v. Hill* (1904), 48 Sol. Jo. 524.

4021. — By bankrupt—Appointor subsequently becoming bankrupt.]—Under a settlement H. had a general testamentary power of appointment over a fund. In 1892 he made his will, executed the power in favour of E., & appointed him exor. In 1900 a receiving order was made against H., & on Oct. 1, 1900, he was adjudicated a bkpt. E. proved in this bkpcy. for £1,131. H. never obtained his discharge, & in 1904 he died. At the time of his death he was indebted to various persons for debts incurred since the date of the receiving order. The question in dispute was whether the appointed fund ought to be paid to E. as exor. of H. for the benefit of the subsequent creditors, or to the bkpcy. trustee to be administered as assets for payment of the debts provable in the bkpcy.:—*Held*: (1) the property divisible amongst the creditors in the bkpcy. did not include the appointed fund; (2) the trustee in the bkpcy. was not entitled to receive the fund; (3) the duty of dividing it devolved upon the exor.; (4) the creditors who had become so after the bkpcy. were the only creditors who had a right to share in the fund.—*Re GUELDALLA, LEE v. GUELDALLA'S TRUSTEE*, [1905] 2 Ch. 331; 75 L. J. Ch. 52; 94 L. T. 94; 54 W. R. 77; 12 Mans. 392. *Annotation:—Reid. Re Benzon, Bower v. Chetwynd*, [1914] 2 Ch. 68.

4022. — Appointor bankrupt at time of exercise of power.]—Debtor, under a will, took a life interest in £15,000 subject to a trust over for accumulation in case of his bkpcy., & was given a general power of appointment over the accumulated fund by will. Debtor was adjudicated bkpt. in 1890 & 1892. A dividend of 5s. 2d. was paid in the first bkpcy. & nothing in the second. Debtor never obtained his discharge in either bkpcy. Debtor exercised his power of appointment by his will & died July 20, 1911. In an action in the Ch. Div. an order was made for the administration of debtor's estate, which consisted practically only of the appointed fund. Creditors in the two bkpcies. claimed to prove in administration for the balance of their claims in the bkpcies.:—*Held*: the fund did not pass to the trustees in bkpcy., & the claims were barred by Stat. Limitations.—*Re BENZON, BOWER v. CHETWYND*, [1914] 2 Ch. 68; 83 L. J. Ch. 658; 110 L. T. 926; 30 T. L. R. 435; 58 Sol. Jo. 430; 21 Mans. 8, C. A.

Annotation:—Mentd. Re Lee, Ex p. Grunwaldt, [1920] 2 K. B. 200.

See, generally, BANKRUPTCY, Vol. V., pp. 740 et seq.

4023. — Whether fund assets for payments of estate duty—Finance Act, 1894 (c. 30), s. 9 (1).—Personal property appointed by will in exercise of a general power of appointment is "property which does not pass to the exor. as such" within above sub-sect., & consequently the estate duty payable in respect thereof is a first charge on the property.—*O'GRADY v. WILMOT*, [1916] 2 A. C. 231; 85 L. J. Ch. 386; 32 T. L. R. 456; 60 Sol. Jo. 456; *sub*

nom. Re O'GRADY, O'GRADY v. WILMOT, 114 L. T. 1097, H. L.; *reusq. S. C. sub nom. Re O'GRADY'S SETTLEMENT, O'GRADY v. WILMOT*, [1915] 1 Ch. 613, C. A.

Annotations:—Expld. Re Scull, Scott v. Morris (1917), 87 L. J. Ch. 59. *Reid. Re Scott, Scott v. Scott* (1916), 60 Sol. Jo. 478; *Re Hicklin, Public Trustee v. Hoare*, [1917] 2 Ch. 278; *Re Wernher, Wernher v. Belt*, [1918] 2 Ch. 82. *Mentd. Re Goswell's Trust*, [1915] 2 Ch. 106; *Re Ffennell's Settlement, Re Ffennell's Estate, Wright v. Holton*, [1918] 1 Ch. 91; *Re Sturt, De Bunsen v. Hardinge*, [1922] 1 Ch. 416.

See, generally, ESTATE & OTHER DEATH DUTIES, Vol. XXI., pp. 29 et seq.

4024. Power exercised by deed—Voluntary deed.]

—A. had a power to charge a sum of money on land, by deed or will, & executes it by a voluntary deed; the ct. in favour of the creditors of A. will consider it as personal assets, & lay hold of it for their benefit.—*PACK v. BATHURST* (1745), 3 Atk. 269; 20 E. R. 957, L. C.

4025. — Power conferred by will.]—Testator bequeathed certain stock to trustees upon such trusts & subject to such powers, etc., as A. should by deed or will direct or appoint; & in default of appointment, upon trust to pay the dividends to A. during her life, & after her decease to pay the principal amongst her children. After testator's death A. executed a deed according to the mode described by the will; by which, after reciting that she was desirous of executing the power, she directed the trustees to transfer the fund to herself & a new trustee, upon such trusts & subject to such powers, etc., as A. should by deed, with or without power of revocation & new appointment, or by her last will, direct & appoint, with certain limitations over in default of appointment, similar to those contained in the will; in pursuance of which deed the fund was transferred into the names of A. & the new trustee. A. afterwards, by will by virtue & execution of that power, appointed the fund to be transferred to certain persons, in trust that the same might be consolidated with & become part of her residuary estate, & follow the dispositions thereof thereafter mentioned:—*Held* the deed executed by A. being an exercise of the power under the original will, the property thereby became liable to her debts, & became her personal estate, in which she had a beneficial interest, & consequently was liable to the payment of probat. duty.—*A.-G. v. STAFF* (1833), 2 Cr. & M. 124; 4 Tyr. 14; 3 L. J. Ex. 6; 149 E. R. 700.

Annotations:—Reid. Vandiest v. Fynmore (1834), 6 Sim. 570; *Platt v. Routh* (1840), 6 M. & W. 756; *Ewart v. Ewart* (1853), 1 Eq. Rep. 536.

(c) *Chattel Real Interests.*

4026. General rule—Interest not sold.]—JURY v. WOODHOUSE (1735), Barnes, 333; 94 E. R. 941

4027. ——A leasehold estate, bequeathed among other personalty for the support of a charity under a devise void by Charitable Uses Act, 1733 (c. 30), is applicable in the first place, as asset undisposed of, to the payment of debts, etc., & the residue is to be appropriated according to testator's intentions.—*A.-G. v. TOMKINS* (1754) Amb. 216; *Keny. Ch. 129*; 96 E. R. 1334, L. C.

Annotations:—Reid. Hilliard v. Taylor (1773), 2 Dick. 476; *Field v. Mostin* (1778), 3 Dick. 543. *Mentd. Dawson v. Clark* (1809), 15 Ves. 409.

4028. ——*SPACKMAN v. TIMBRELL*, No. 410: *post.*

4029. Rent in hands of executor of executor possessed of term.]—(1) The exor. should have the rent (*per CUR.*)

(2) When recovered [the rent] it should be asset in his hands (*HALE, C.J.*).—*NORTON v. HARVE* (1674), 1 Vent. 259; 86 E. R. 173.

4030. Effect of redemption by settlement trustee

to deceased.]—A. on his marriage demised lands to B., who redeemed them to A. for a lesser term, paying a peppercorn rent during the life of A. & after his death an annual sum for the life of his wife for her jointure & a peppercorn for the remainder of the term. A. died indebted:—*Held*: the redeemed term should not be assets to pay any debts but what affected the inheritance, the term redeemed being raised for a particular purpose.—*BADEN v. PEMBROKE (COUNTESS)* (1690), 2 Vern. 213; 23 E. R. 739; *sub nom.* *BLADEN v. PEMBROKE (EARL)*, Nels. 164; *sub nom.* *PEMBROKE (EARL) v. BOWDEN*, 3 Rep. Ch. 217.

Annotations:—*Refd.* *Trelawney v. Booth* (1738), *West temp. Hard.* 441. *Mentd.* *Scott v. Fenhoullat* (1779), 1 Bro. C. C. 69.

4031. Term not expressly declared attendant on inheritance.]—A purchaser takes a term in a trustee's name, & the inheritance in his own; this term, unless declared to attend the inheritance will be assets in equity. If he takes the inheritance in a trustee's name, & a term in his own, it will be assets at law.—*CHAPMAN v. BOND* (1683), 1 Vern. 188; 23 E. R. 405.

4032. ——Where a lease for years is to wait on the inheritance, it shall be assets as to debts as well where the interest of the lease is in the hands of a stranger, & not in the owner of the inheritance, as when it is in the *cestui qui trust*, of the inheritance, & the interest of the inheritance in a strange trustee.—*RATCLIFF v. GRAVES* (1683), 2 Cas. in Ch. 152; 1 Vern. 196; 22 E. R. 890.

Annotations:—*Consd.* *Thurxton v. A.-G.* (1685), 1 Vern. 340. *Mentd.* *Bilson v. Saunders* (1727), Bunn. 240.

4033. Term vested in party & inheritance in trustees.]—A term vested in trustees is not assets to pay debts; otherwise if the term be in the party himself & the inheritance in trustees.—*THURXTON v. A.-G.* (1685), 1 Vern. 340; 23 E. R. 507, L. C. *Annotations*:—*Mentd.* *Burgess v. Wheate, A.-G. v. Wheate* (1759), 1 Eden, 177; *Downe v. Morris* (1844), 3 Hare, 394; *Barrow v. Wadkin* (1857), 24 Beav. 1.

4034. Trusts of term.]—*CREED v. COLVILLE*, No. 4111, *post*.

4035. Effect of limitation to executors & administrators.]—A. seized of a leasehold estate to him & his heirs for three lives settled it on his daughter & her husband for their lives, remainder to the use of his own exors. & administrators. The daughter & her husband die. A. died indebted by simple contract, & devised his estate to his wife. Decreed that the use of this estate being limited to the exors. & administrators of A. this makes it personal estate in A. & being personal estate A. cannot devise it exempt from his debts, though due but by simple contract.—*DEVONSHIRE (DUKE) v. KINTON* (1716), 2 Vern. 719; 23 E. R. 1072, L. C. *Annotations*:—*Consd.* *Ripley v. Waterworth* (1802), 7 Ves. 425. *Refd.* *Westfaling v. Westfaling* (1746), 3 Atk. 460. *Mentd.* *Fitzroy v. Howard* (1828), 3 Russ. 225.

4036. Lease subject to lien.]—A lease which belonged to intestate, upon which *plff.* has a lien, on account of which he retains it in his hands, is nevertheless to be considered as assets in the hands of the administrator, who has the power to redeem it.—*VINCENT v. SHARP* (1819), 2 Stark. 507, N. P.

(d) Accretions after Death.

4037. Increase in animals.]—*KITTLEY'S CASE*, No. 3985, *ante*.

4038. Surplus rents & profits—In hands of mortgagee.]—*GOFFE v. SKIPTON* (1628), Litt. 211; 124 E. R. 212.

4039. ——Testator mortgaged freeholds, & died in May, 1867, having devised all his real & personal estate to A. & B. upon certain trusts, & having appointed them his exors. The exors. without making provision for the mtge. debt,

applied the whole of the personal estate in payments to simple contract creditors & beneficiaries. In 1869 A. died, & C. was appointed trustee in his place in 1871. The rents of the real estate were received by A. & B., & by B. & C., & after payment of the interest on the mtge. the balance was applied in accordance with the trusts of the will. The mtgd. property became an insufficient security, & interest having fallen into arrear, the mtgees. in 1886 commenced proceedings against B. & C., under which accounts of testator's personal estate received by A. & B. or by B. alone, were directed, & also the usual accounts of testator's real estate, including an account of rents & profits against B. & C. Accounts were accordingly carried in in which B. & C. claimed credit for all payments & disbursements made to simple contract creditors & beneficiaries, & further that as to such of the payments as were made by A. & B. upwards of six years prior to the action any claim on a *devastavit* was statute barred, & that as to the rents & profits they were not liable to account for them at all:—*Held*: as to the rents & profits which had been received by B. or B. & C. jointly, they were under 3 & 4 Will. 4, c. 101, assets by accretion liable under the circumstances for payment of creditors by specialty just as much as the real estate was assets under that statute.—*Re HYATT, BOWLES v. HYATT* (1888), 38 Ch. D. 609; 57 L. J. Ch. 777; 59 L. T. 297.

Annotations:—*Consd.* *Re Moon, Holmes v. Holmes*, [1907] 2 Ch. 304. *Mentd.* *How v. Winterton* (1896), 65 L. J. Ch. 832; *Lacour v. Warmoll*, [1907] 2 K. B. 350; *Re Croyden, Hinks v. Roberts* (1911), 55 Sol. Jo. 632; *Re Blow, St. Bartholomew's Hospital v. Camblen*, [1914] 1 Ch. 233.

4040. Money received for goodwill.]—Money received by an extrix. for the goodwill of a public house is assets in her hands.—*WORRAL v. HAND* (1791), Peake, 105, N. P.

(e) Debts Released and Securities Accepted by Representative.

4041. General rule.]—If an exor. release, the debt released is judged assets in his hand. *COCKE v. JENNOR* (1614), Hob. 66; 80 E. R. 214. *Annotations*:—*Consd.* *Pennington v. Healey* (1833), 1 Cr. & M. 402. *Mentd.* *Lacy v. Kingston* (1701), 1 Ld. Raym. 688; *Duck v. Mayeux*, [1892] 2 Q. B. 511; *Howe v. Oliver* (1908), 24 T. L. R. 781; *Greenlands v. Wilmshurst & London Assocn. for Protection of Trade*, [1913] 3 K. B. 507.

4042. ——An administrator sued a debtor to his intestate, & recovered a verdict against him, & the debtor, being in gaol, subsequently petitioned to be discharged under the Insolvent Act. The debtor offered terms, whereby he was to be liberated on payment of £150, a sum less than the costs incurred in the action. The administrator agreed to the terms, & liberated the debtor. In an action brought against him by a creditor of the intestate:—*Held*: he was not chargeable with any part of the debt as assets.—*PENNINGTON v. HEALEY* (1833), 1 Cr. & M. 402; 3 Tyr. 319; 2 L. J. Ex. 98; 149 E. R. 455.

4043. Debt due from executor.]—A debt due from an exor. to a testator is assets in equity to pay legacies.—*NICHOLS v. CHAMBERLAIN* (1646), 3 Rep. Ch. 89; Nels. 44; 21 E. R. 737, H. L.

4044. Debtor's bond taken by executor.]—Exor. taking a bond from a debtor makes it assets.—*ANON.* (1699), 12 Mod. Rep. 346; 88 E. R. 1370.

C. Real Estate.

(a) Charged with or Devised Subject to Payment of Debts.

i. Really not devised to Executor.

See Administration of Estates Acts, 1833 (c. 104); 1925 (c. 23), s. 32.

Sect. 2.—Payment of debts presently due: Sub-sect. 2, C. (a) 1.

4045. General rule.]—When a man settles his lands for payment of his debts generally, then all his creditors are equally concerned & entitled & none is to be preferred before another, & in this case debts without specialty are to be in the same condition, & equally regarded as debts by specialty; for though there be a difference in case of exors. who are to pay specialties before promises, that is an artificial preference by law; but naturally a debt by contract without specialty is as just as the other; & the conveyance to the trustees being themselves creditors, & sureties for a guard, does not give them any preference before others, but they must be in the same degree in point of payment & satisfaction as other creditors were.

But as to the personal estate, the administrator may according to law, so far as that goes, prefer himself so far as the personal estate extends, but no further.—*ANON.* (1681), 2 Cas. in Ch. 54; 22 E. R. 843, L. C.

4046. —.]—A charge for payment of debts makes equitable assets.—*BAILEY v. EKINS* (1802), 7 Ves. 319; 32 E. R. 130, L. C.

*Annotations:—***Folld.** *Shiphard v. Lutwidge* (1802), 8 Ves. 26. **Consd.** *Clay v. Willis* (1823), 1 B. & C. 364; *Barker v. May* (1829), 9 B. & C. 489. **Refd.** *Spackman v. Timbrell* (1837), 8 Sim. 253; *Ball v. Harris* (1839), 4 My. & Cr. 204. **Mentd.** *Gosling v. Carter* (1845), 1 Coll. 644.

4047. —.]—A charge makes equitable assets.—*SHIPARD v. LUTWIDGE* (1802), 8 Ves. 26; 32 E. R. 259, L. C.

*Annotations:—***Consd.** *Clay v. Willis* (1823), 1 B. & C. 364; *Barker v. May* (1829), 9 B. & C. 489. **Refd.** *Bailey v. Ekins* (1802), 7 Ves. 319; *Spackman v. Timbrell* (1837), 8 Sim. 253.

4048. Equity of redemption charged.]—Where an equity of redemption or trust estate is devised for payment of debts all debts shall be paid equally. Otherwise, if the devise is to the exor., for then the lands will be legal assets.—*GIRLING v. JEE* (1682), 1 Vern. 63; 1 Eq. Cas. Abr. 141; 23 E. R. 312; *sub nom.* *GIRLING v. LOWTHER*, 2 Rep. Ch. 202.

*Annotations:—***Refd.** *Silk v. Prime* (1766), 1 Dick. 384. **Mentd.** *Harton v. Vanheythuyssen*, *Stone v. Vanheythuyssen* (1853), 11 Haro. 126; *Beavan v. Oxford* (1856), 6 De G. M. & G. 507.

4049. —.]—Tenant in tail suffers a recovery to let in a mtge. of five hundred years, & then limits to the old uses, & by will devises all his lands for payment of debts; the equity of redemption of this mtge. held assets to satisfy creditors, or for a subsequent grantee of an annuity.—*FOSSET v. AUSTIN* (1691), Prec. Ch. 39; 2 Eq. Cas. Abr. 250, 485; 24 E. R. 20.

4050. Right of creditors to enforce testator's contract for sale.]—Where lands are devised for payment of debts, the creditors may bring a bill for the execution of a contract made by testator, for a sale of part of the lands.—*NICHOLAS v. SOUTHWELL* (1729), Mos. 177; 25 E. R. 335.

4051. Land descending to heir.]—*HARGRAVE v. TINDAL* (1753), 1 Bro. C. C. 136, n.; 28 E. R. 1037, L. C.

*Annotation:—***Refd.** *Bailey v. Ekins* (1802), 7 Ves. 319.

4052. Devise beneficially in fee subject to charge of debts.]—Testator wills his debts to be paid, & charges his estates with the payment of them, & subject thereto, devises his estate in fee simple to

his widow; held to be equitable assets.—*WRIDE v. CLARKE* (1766), 1 Dick. 382; 2 Bro. C. C. 261, n.; 21 E. R. 317.

*Annotations:—***Consd.** *Donne v. Lewis* (1787), 2 Bro. C. C. 257. **Refd.** *Manning v. Spooner* (1796), 3 Ves. 114. **Mentd.** *French v. Davies* (1795), 2 Ves. 572.

4053. Lands specifically devised charged in case of deficiency.]—Testator charged all his real estates, except a particular estate, with the payment of his debts, which he willed should be paid, & directed his exors. *nominalim*, & the survivor and his heirs, to sell for that purpose, without devising the estate to them: these estates held to be equitable assets & if deficient, a real estate specifically devised, & part of the personal estate, specifically bequeathed, to contribute in proportion to raise the deficiency, & the master to settle such proportions.—*SILK v. PRIME* (1766), 1 Dick. 384; 1 Bro. C. C. 138, n.; 2 Coll. 509; 21 E. R. 318, L. C.; *subsequent proceedings* (1768), 2 Coll. 511, L. C.

*Annotations:—***Consd.** *Clay v. Willis* (1823), 1 B. & C. 364; *Barker v. May* (1829), 9 B. & C. 489. **Apld.** *Gervis v. Gervis* (1847), 14 Sim. 654. **Refd.** *Newton v. Bennet* (1782), 1 Bro. C. C. 135; *Tombs v. Roch* (1846), 2 Coll. 490; *Re Bate*, *Bate v. Bate* (1890), 43 Ch. D. 600.

4054. Direction to treat proceeds of sale as personal estate.]—Devise to sell the residue after payment of debts & the money to be part of the personal estate; upon a total insolvency held to be equitable assets.—*BATSON v. LINDEGREEN* (1786), 2 Bro. C. C. 94; 29 E. R. 55, L. C.

*Annotations:—***Consd.** *Clay v. Willis* (1823), 1 B. & C. 364; *Barker v. May* (1829), 9 B. & C. 489. **Refd.** *Bailey v. Ekins* (1802), 7 Ves. 319.

4055. Specific lands charged with specific debts only.]—By the marriage settlement of W. an annuity of £800 Jamaica currency was settled on his wife for life, & was subsequently charged on an estate of W., in that island. W. afterwards made his will whereby he charged his estate in a certain manner with the payment of his debts; & then, after reciting the settlement & that he was desirous of making a larger provision for his wife he gave her a rent charge of £2,000 *per annum* for life, which he charged on the R. estate & which was to be in lieu of all dower & thirds. Upon the death of W. the widow released her title, if any to dower, & elected to take the £2,000 annuity, & payments were made to her on account of it by the exors. W., however, being at his death largely indebted to the firm of W. & Co. of which he was a partner, that debt was paid by his exors. by means of a mtge. of the R. estate & by the terms of the mtge. deed the mtgee. was to hold the estate, subject to the several annuities given by the will of W., but freed & discharged of & from the debts & legacies charged upon the premises by the will & of & from all other charges & incumbrances whatsoever. The assets of W. turned out to be insufficient for payment of all his debts:—*Held*: (1) a portion of the payments made by the exors. to the widow must be ascribed to the annuity of £800 Jamaica currency, & were to that extent good, but the residue of such payments were not good against the creditors of W.; (2) there being certain arrears of the annuity of £2,000 & a fund in ct. arising from the produce of the R. estate, as to that part of the fund which was not applicable to the portion of the annuity representing the annuity of £800 currency, the creditors of W. had priority over the mtgee. as well as over the exors.

PART IV. SECT. 2, SUB-SECT. 2.— C. (a) 1.

4045 I. General rule.]—Personal estate, bequeathed in trust for testator's

daughter, the primary fund to pay debts charged on his real estate, there being no words or apparent intention in the will, to exempt it.—*ALDRIDGE v. WALLACOURT* (LORD) (1810), 1 Ball

& B. 312.—*IR.*

1. Land made chargeable by
—Rights of creditors.]—A statute of 1814 enacted that lands in New South Wales should be liable to & chargeable

of the widow.—*LYON v. COLVILLE* (1844), 1 Coll. 449; 63 E. R. 494.

Annotation:—*Reid*. *Turner v. Cox* (1853), 8 Moo. P. C. C. 229.

Charge on copyhold.—*See* COPYHOLDS, Vol. XIII., pp. 121, 122.

4056. Charge on rents & profits.—Where debts are directed by will to be paid out of rents & profits, the ct. if 'tis necessary, will decree a sale.—*BERRY v. ASKHAM* (1687), 2 Vern. 26; 1 Eq. Cas. Abr. 199; 23 E. R. 627.

Annotation:—*Reid*. *Okeken v. Okeken* (1738), 1 Atk. 550.

4057. —.]—Testator commenced his will with the words, "In the first place, I direct my just debts, funeral expenses, & the charges of proving this my will, to be duly paid." He then made several devises, & he gave to G. a small quantity of plate, together with the rents & profits of his freehold & leasehold premises due & accruing up to the quarter day next after his decease; which rents & profits he charged with the payment of his said debts, funeral expenses, & the charges of proving his will:—*Held*: testator had not charged his real estates generally with the payment of his debts.

The general charge by implication is controlled by the specific charge made in the subsequent part of the will (*LORD LANGDALE, M.R.*).—*PALMER v. GRAVES* (1837), 1 Keen, 545; *Donnelly*, 203; 1 Jur. 164; 48 E. R. 417.

Annotations:—*Consd.* *Price v. North* (1841), 1 Ph. 85; *Wrigley v. Sykes* (1856), 21 Beav. 337; *Corser v. Cartwright* (1873), 8 Ch. App. 971. *Folld. Re Major, Taylor v. Major*, [1914] 1 Ch. 278. *Reid*. *Jones v. Williams* (1844), 1 Coll. 156.

4058. —.]—Testator directed his debts to be paid out of his real & personal estate; & he afterwards provided that if his personal estate should fall short in paying his debts, then he empowered his exors. to enter into the receipt of the rents of his freeholds, until the same should be wholly paid off. The personal estate was sufficient for payment of the debts:—*Held*: nevertheless, that a trust had been created for payment of the debts out of the realty, so as to prevent the operation of the Stat. limitations, & the real estate remained liable to pay a simple contract debt which had been left unpaid after distribution of the residuary personal estate.—(*CRALLAN v. OULTON* (1840), 3 Beav. 1; 9 L. J. Ch. 319; 49 E. R. 1.

4059. What directions constitute charge.—*BARKER v. BOUCHER* (1784), 1 Bro. C. C. 140, n.; 28 E. R. 1040.

Annotations:—*Consd.* *Clay v. Willis* (1823), 1 B. & C. 364; *Barker v. May* (1829), 4 Man. & Ry. K. B. 386.

4060. —.]—After a general direction, that debts, funeral & testamentary charges shall be paid, & a bequest of the personal estate, subject to the payment of those charges, testator, in case his personal estate should not be sufficient to discharge "the same" charged his freehold estates with payment "thereof," & "subject thereto" gave all his freehold & copyhold estates, which he had surrendered, or intended to surrender, to the use of his will. The copyhold estates charged. Construction for creditors favoured; not doing violence to, or straining the words.—*NOEL v. WESTON* (1813), 2 Ves. & B. 269; 35 E. R. 321; *subsequent proceedings* (1815), *Coop. G.* 138, L. C.

4061. —.]—The words "I will & direct that my just debts, funeral & testamentary expenses, be paid & satisfied," in the introductory part of a

will, amount to a charge of the debts upon the real estate.—*CLIFFORD v. LEWIS* (1821), 6 Madd. 33; 56 E. R. 1002.

Annotations:—*Consd.* *Graves v. Graves* (1836), 8 Sim. 43; *Harris v. Watkins* (1854), Kay, 438. *Reid*. *Douce v. Torrington* (1833), 2 My. & K. 600; *Mirchouse v. Scalfs* (1837), 2 My. & Cr. 695.

ii. Realty devised to Executor.

4062. General rule.—If land is devised to be sold by exors. for payment of debts, the produce of such sale is assets in the exors.' hands if an action of debt is brought against them.—*BURWELL & SALTER v. CORRANT* (1665), *Hard.* 405; 145 E. R. 520.

4063. —.]—Debts before legacies, where lands are devised.—*WHITTON v. LLOYD* (1670), 1 Cas. in Ch. 275; 22 E. R. 798, L. C.

4064. —.]—*FOLY'S CASE* (1679), *Freem. Ch.* 49; 2 Eq. Cas. Abr. 459; 22 E. R. 1051, L. C.

4065. —.]—Where lands are devised to exors., to be sold for payment of debts, the money becomes legal assets, & debts shall be paid in a course of administration.—*CUTTERBACK v. SMITH* (1700), *Prec. Ch.* 127; 24 E. R. 61.

4066. —.]—(1) An advowson in fee in gross, is assets by descent to satisfy bond creditors.

(2) An estate *pur autre vie*, though it is devised, will be liable to debts by specialty, to contribute in a course of administration, according to the gross value. As before Stat. Frauds, etc., granting an estate *pur autre vie* to A. his exors., etc., would have made it assets, devising it to them makes it equally so.

(3) Where a man takes an estate as an exor., it is assets, for as an exor. of testator he can take nothing without being so.—*WESTFALING v. WESTFALING* (1740), 3 Atk. 400; 26 E. R. 1064, L. C.

Annotations:—As to (3) *Reid*. *Ripley v. Waterworth* (1802), 7 Ves. 425. *Generally, Mend.* *Gully v. Exeter* (1827), 4 Bing. 290.

4067. —.] **Effect of void devise to heir.**—Testator devised all his estates to J. his brother, who was his heir-at-law, in fee, subject, & liable to the payment of his debts & funeral expenses, & appointed him exor.:—*Held*: the devise to him as heir was void, & the estate consequently descending to him was legal assets.—*YOUNG v. DENNET* (1771), 2 Dick. 452; 21 E. R. 345, L. C.

4068. —.]—(1) Testator devised a freehold house to his son A., whom he appointed one of his exors., charged with a sum of money, payable within twelve months after his death, to be applied in payment of debts & legacies:—*Held*: equitable assets in the hands of the exors., though not available for distribution till the expiration of the twelve months.

(2) A. made a promissory note, payable, on demand, to his son B., & by his will devised to B. a freehold house, charged with £240, to be raised within a year after his death, & paid to his exors. for the liquidation of debts & legacies; & he made B., & C., another son, his exors. The two exors. proved the will, & B. took possession of the house, & afterwards indorsed the note to D., who sued the exors. thereon. To this action B. pleaded *plene administravit*; & C. pleaded, amongst other pleas, not including *plene administravit*, that the note was made payable to B. on demand, & that it was indorsed by B. to D. after the death of testator, & that B. at the time of such indorsement had assets of testator in his hands, whereby the note was satisfied. The only assets that ever came to the hands of B. consisted of the £240 charged upon the

with the debts of deceased persons there, as lands in England were for specialty debts:—*Held*: this statute

did not pass real estate to the exor. & enable creditors of deceased to seize lands of the deceased in the exor.'s

hands, as if they were personal estate.—*BULLEN v. A'BECKETT* (1863), 9 L. T. 99.—*AUS.*

Sect. 2.—Payment of debts presently due: Sub-sect. 2, C. (a) i

house devised to him:—*Held*: the plea was not proved; for, the allegation that B. had assets of testator in his hands at the time of the indorsement of the note, was a material allegation, & meant legal assets presently available; & the £240 was not legal, but equitable assets, & not available as assets until the expiration of the year.—*LOWE v. PESKETT* (1855), 16 C. B. 500; 3 C. L. R. 1264; 24 L. J. C. P. 196; 25 L. T. O. S. 140; 1 Jur. N. S. 1049; 3 W. R. 481; 139 E. R. 854.

4069. What directions constitute charge.—One devises all his lands to A. & the heirs of his body, remainder over, & in another part of the will devises to A. all his personal estate, & makes him exor., willing him to pay his debts. This is a charge upon the lands as well as on the personal estate to pay the debts.—*CLOUDSLEY v. PELHAM* (1686), 1 Vern. 411; 1 Eq. Cas. Abr. 198; 23 E. R. 552, L. C.; *affd.*, 2 Vern. 229, H. L.

Annotations:—*Apld.* *Elliot v. Hancock* (1690), 2 Vern. 143; *Alcock v. Sparhawk* (1691), 2 Vern. 228. *Distd.* *Schellinger v. Blackerby* (1749), *Belt's Sup.* 164. *Apld.* *Lypet v. Carter* (1750), 1 Ves. Sen. 499. *Refd.* *Vernon v. Vernon* (1737), 1 Amb. 4; *Frogmorton v. Holyday* (1765), 1 Wm. Bl. 535.

4070. —.]—*SCHELLINGER v. BLACKERBY* (1749), 1 Ves. Sen. 347; *Belt's Sup.* 164; 27 E. R. 1074, L. C.

Executor also trustee.—*See* Nos. 4076–4084, *post*.

iii. *Really devised in Trust for Payment of Debts.*

See Administration of Estates Act, 1833 (c. 104); Land Transfer Act, 1897 (c. 65), s. 2 (3), repealed by Law of Property Act, 1922 (c. 16), s. 156 (11); Administration of Estates Act, 1925 (c. 23), s. 32.

4071. Devise in trust to pay debts & legacies.—If lands are devised, in trust, to pay debts & legacies, the debts shall be first paid.—*BRADGATE v. RIDLINGTON* (1728), Mos. 56; 25 E. R. 268.

4072. Devise in trust to sell & pay debts.—(1) If a devise be to exors. of an equity of redemption only, this is but equitable assets, & to be applied to pay all sorts of creditors equally.

(2) A. devised all his real & personal estate to his exors. & their heirs, in trust to sell & pay all his debts, his real estate being only equitable assets, & testator leaving debts by bond & simple contract: if the bond creditors are paid part out of the personal estate, they shall bring it back again into hotchpot, if they would be paid anything out of the real estate.

(3) Testator's heir-at-law who opposed the will as to part of the lands devised thereby to pay debts, yet being a creditor was let into the residue of the fund raised by the will for the payment of debts.—*DEG v. DEG* (1727), 2 P. Wms. 412; 21 E. R. 791.

Annotations:—*As to* (1) *Refd.* *Hall v. Kendall* (1730), Mos. 328. *As to* (2) *Apld.* *Baily v. Ploughman* (1729), Mos. 95.

4073. —.]—Where a creditor is part satisfied out of the personal estate, he shall receive nothing out of the real estate, devised in trust to exors., till the other creditors have been first paid out of the real estate, the same proportion he received out of the personal.—*BAILY v. PLOUGHMAN* (1729), Mos. 95; 25 E. R. 291.

4074. —.]—Testator devised his real estate to trustees in trust for sale & out of the proceeds & out of the rents till sale to pay his debts & the trustees' costs, charges, & expenses, & then upon trust to pay three legacies of £500 each; & as to all his personal estate & effects, testator gave the same to R., his exors. administrators & assigns:—*Held*: (1) the will did not give to R. nor dispose

of the surplus of the beneficial interest in the produce of testator's real estate after paying the charges which ought to be considered as imposed thereon; & such surplus belongs to the heir-at-law; (2) as between the heir & R. the personal estate is the fund first applicable to the payment of testator's debts. *Semble*: 3 & 4 Will. 4, c. 104 ought to have some influence in favour of the exoneration of the personal estate.—*COLLIS v. ROBINS* (1847), 1 De G. & Sm. 131; 16 L. J. Ch. 251; 9 L. T. O. S. 121; 11 Jur. 362; 63 E. R. 1002.

Annotations:—*As to* (2) *Refd.* *Paterson v. Scott* (1852), 1 De G. M. & G. 531; *Kilford v. Blaney* (1885), 55 L. J. Ch. 185. *Generally*, *Mentd.* *Spencer v. Wilson* (1873), 42 L. J. Ch. 754.

4075. — Partial exemption of personal estate for particular purpose—Effect of failure of purpose.

—Testator in his lifetime mortgaged certain estates to secure a sum borrowed for the purpose of paying portions charged upon the same estates by the marriage settlement of his father, under whose will testator claimed:—*Held*: this was not the personal debt of testator, & therefore where testator had devised other estates to be sold, & the produce applied *inter alia*, to discharge the mtge. debt in exoneration of the mortgaged property, & gave the residue to resps., & bequeathed his personal estate to his wife, who died in his lifetime, the mtge. debt was, notwithstanding the failure of the bequest to the wife, to be paid out of the produce of the real estate directed to be sold.

One of the sums directed to be paid out of the produce of the estate directed to be sold was a sum of £5,000 in satisfaction of a similar sum settled upon the wife in the event of her surviving her husband:—*Held*: this sum, sunk for the benefit of the persons entitled to the residue of money arising from the sale, was not a resulting trust for the heir.—*NOEL v. NOEL* (1823), 12 Price, 213; 147 E. R. 851; *sub nom.* *NOEL v. HENLEY* (LORD), Dan. 322, H. L.

Annotations:—*Consd.* *Jenkinson v. Harcourt* (1854), Kay, 688. *Mentd.* *Louch v. Peters* (1834), 1 My. & K. 489; *Attwood v. Small* (1840), 6 Cl. & Fin. 232; *A.-G. v. Giles* (1860), 5 H. & N. 255; *Dacre v. Patrickson* (1860), 1 Drew. & Sm. 182; *Re Hooper, Banco de Portugal v. Waddell* (1880), 5 App. Cas. 161; *Re Turnbull, Skipper v. Wade*, [1905] 1 Ch. 726.

—**Trustee also executor.**—*See* Nos. 4076–4084, *post*.

4076. Trustee for payment of debts also executor.—Testator made his nephew exor., & devised to him & his heirs all his lands in trust to sell & to pay all his debts & his children's portions, & gave to his children £100 apiece.

The money arising by this sale is not legal assets, & the debts & children's portions are to be paid in equal proportions.—*ANON.* (1690), 2 Vern. 133; 23 E. R. 694.

4077. —.]—A devise to trustees for payment of debts & legacies, & the trustees were made exors. The estate fell short. The debts must be paid first, because the trustees being made exors. the money was legal assets.—*GRAVES v. POWELL* (1691), 2 Vern. 248; 23 E. R. 760.

4078. —.]—A reversion in fee expectant on an estate for life, is devised to A. & B. for payment of debts & legacies, & A. & B. are made exors. The devisees being exors. the money raised by sale is legal assets, & the debts must be first paid; otherwise if the trustees had not been made exors.—*ANON.* (1700), 2 Vern. 405; 23 E. R. 863.

4079. —.]—A man devised lands to be sold for payment of his debts, & made the devisees exors.; & the question was, whether the debts should be paid in proportion, or according to the course of administration:—*Held*: they must be paid in a course of administration, because where

the same person is exor. & trustee, the land when sold is legal assets; otherwise, when the trustee is executor, there they shall be paid in proportion.—**BICKHAM v. FREEMAN** (1700), Prec. Ch. 136; 24 E. R. 66.

4080. —[Refusal to act as executors.]—Creditors shall be paid *pro rata*, & not in a course of administration, where an estate is devised to trustees to sell for payment of debts, though they are made exors. too, especially if they refuse to act.—**CHAMBERS v. HARVEST** (1729), Mos. 123; 25 E. R. 307.

4081. —[.]—In *Deg v. Deg*, No. 4072, *ante*, where an estate was devised to exors. & their heirs, in trust, to sell for payment of debts, I decreed that the money raised by the sale was not legal assets. If an authority is given to exors. to sell for payment of debts, or if the estate is devised to them & their heirs, to sell to pay debts, the money arising by the sale is assets at law; but where the estate is devised to them in trust, calling them exors., it is only considered as describing the persons who are to sell, & I always strongly incline to an equality among creditors (**VARMY, M.R.**).—**HALL v. KENDALL** (1730), Mos. 328; 25 E. R. 421.

4082. —[.]—Where an exor. is also the trustee for payment of debts, the assets shall still be equitable & not legal, & the creditors must be paid *pari passu*.—**LEWIN v. OKELEY** (1740), 2 Atk. 50; 26 E. R. 428.

Annotations:—**Folld.** *Clay v. Willis* (1823), 1 B. & C. 364. **Reid.** *Silk v. Prime* (1766), 1 Dick. 384; *Newton v. Bennet* (1782), 1 Bro. C. C. 135; *Barker v. May* (1829), 9 B. & C. 489.

4083. —[.]—A. mortgaged lands in fee to B. & Co., with a power of sale upon trust to repay themselves the moneys advanced, etc., & to pay over the surplus to A., his exors. or administrators. Before any sale was made, A. died, having devised all his real & personal property to C. & D., whom he also made his exors., upon trust to sell & pay debts, etc. During the lifetime of C. & D., B. & Co. sold the estate, & paid the surplus into the hands of E., who was agent for C. & D. Whilst the money remained in E.'s hands, C. & D. died. E. also died soon after, leaving deft. his exor. Pltfs. having taken out administration *de bonis non*, with the will of A. annexed brought an action for money had & received against deft.:—**Held**: it could not be maintained, for the money in deft.'s hands was equitable, & not legal assets, & therefore would not have been recoverable by C. & D. in their representative character.—**CLAY v. WILLIS** (1823), 1 B. & C. 364; 2 Dow. & Ry. K. B. 539; 1 L. J. O. S. K. B. 144; 107 E. R. 135.

Annotation:—**Apld.** *Barker v. May* (1829), 9 B. & C. 489.

4084. —[.]—Debtor devised his real estate to his creditor, in trust for sale & payment of debts, & appointed the creditor his exor. The exor. retained part of his debt out of the legal assets come to his hands; & then claimed a further payment in respect of it, out of the equitable assets, conjointly with the other creditors:—**Held**: (1) they must be placed on an equality with him, out of those assets before he could be allowed anything further thereout; (2) proceeds of real estate ordered to be sold for payment of debts, & paid into ct., are equitable & not legal assets; (3) the union of the two characters of trustee for sale & exor. in the creditor did not give him rights analogous to those he would have as exor., but which he had not as trustee.—**BAIN v. SADLER** (1871), L. R. 12 Eq. 570; 40 L. J. Ch. 791; 25 L. T. 202; 19 W. R. 1077.

Annotation:—*As to* (3) **Reid.** *Re Illidge*, *Davidson v. Illidge* (1884), 51 L. T. 523.

4085. *Direction for sale*—**Proceeds devised in trust for payment of debts.**—Testator ordered his estate to be sold, & after giving a legacy to his wife, directs the remainder to be vested in the exors. for payment of debts, the money arising from the sale is equitable assets.—**NEWTON v. BENNET** (1782), 1 Bro. C. C. 135; 28 E. R. 1035, L. C.

Annotations:—**Apld.** *Clay v. Willis* (1823), 1 B. & C. 364. **Reid.** *Barker v. May* (1829), 9 B. & C. 489.

4086. *Trust for payment of debts of another.*—A., who had a life interest in certain estates, gave a bond to a creditor & a warrant of attorney to confess judgment for its amount. No judgment was entered up. A. died within three years of the date of the bond, leaving no assets, real or personal. B., his son, the first tenant in tail of the estates, entered into possession, & expressed in letters to the creditor a wish to pay his father's debts, but would not give any security for them. B. made a will, in which, reciting his own wish, & a promise in conformity with it, made by him to his father & mother he said, " & in case I should not be able to fulfil my intentions during my lifetime, & that I should not have a sufficient fund for that purpose arising from my personal estate, I hereby charge all my just debts, & also all the debts of my late father, A., which shall remain unpaid at the time of my decease, upon all my real estates wheresoever," etc. He then directed his trustees to stand seized of all his estates " subject in manner aforesaid to the payment of all my just debts & to the debts of my father." B. survived his father many years. The obligee of the bond filed a charge thereof against the trustee under the son's will:—**Held**: the debts of the father, which were not barred by Stat. of Limitations at the death of the father, were charges on the real estates of the son.—**O'CONNOR v. HASLAM** (1855), 5 H. L. Cas. 170; 25 L. T. O. S. 237; 10 E. R. 863, H. L. *Annotation*:—**Mentd.** *Askew v. Thompson* (1858), 4 K. & J. 620.

(b) *Not Charged with or Devised subject to Payment of Debts.*

i. *In General.*

See Land Transfer Act, 1897 (c. 65), s. 2 (3), repealed by Law of Property Act, 1922 (c. 10), s. 150 (11); Administration of Estates Act, 1925 (c. 23), s. 32.

Copyholds.—*See* COPYHOLDS, Vol. XIII., p. 151, Nos. 1965, 1966.

4087. *Estate pur autre vie—Whether chargeable with legacies.*—Estate *pur autre vie* is only assets in respect of creditors, & not chargeable with legacies, unless thereout expressly given; & the exor. or administrator, if no debts, will be occupant, & not distributable.—**OLDHAM v. PICKERING** (1696), 12 Mod. Rep. 103; Carth. 376; Comb. 388, 475; Holt, K. B. 503; 2 Salk. 401; 88 E. R. 1195; *sub nom.* **OLDEROON v. PICKERING**, 1 Ld. Raym. 96; *sub nom.* **OLDISON v. PICKERING**, 3 Salk. 137.

Annotations:—**Consd.** *Ripley v. Waterworth* (1802), 7 Ves. 425. **Reid.** *Head v. Godlee*, *Reynolds v. Godlee* (1859), 20 L. J. Ch. 633.

4088. —[.]—**WESTFALING v. WESTFALING**, No. 4066, *ante*.

4089. *Estates in West Indies.*—Notwithstanding West India estates are made legal assets by 5 Geo. 2, c. 7, s. 4, they may be devised so as to make them equitable assets.—**CHARLTON v. WRIGHT** (1811), 12 Sim. 274; 59 E. R. 1136.

Annotations:—**Overd.** *Turner v. Cox* (1853), 8 Moo. P. C. C. 289. In *Lyon v. Colville*, decided since *Charlton v. Wright*, the contrary was ruled (**Knight Bruce, L.J.**). **Reid.** *Lyon v. Colville* (1844), 1 Coll. 449.

Secl. 2.—Payment of debts presently due: Sub-sect. 2, C. (b) i., ii. & iii.]

4090. —[S. was seized of real estate in the Island of Barbadoes. S. was indebted to T. in a sum secured by S.'s bond, & at the death of T., in the lifetime of S., such bond debt was due. T., by his will, appointed S. his exor., who proved & acted in the trusts thereof. S., after T.'s death, regularly entered up his books, debiting himself, not only with the principal but the interest of this debt annually as it accrued. In this state of affairs, S. died, being at the time indebted to B. H. & Co., of Liverpool, & having by his will devised his real estates in Barbadoes to trustees for sale, subject to his debts, & directed them to consign the crops of such real estates to B. H. & Co., until the several debts due by him to them should be paid in manner therein described:—*Held*: 5 Geo. 2, c. 7, s. 4, made real estates in the West Indies legal assets, in such a way as to give the same priority to specialty creditors against real estate, as they previously had against personal estate, & it was not competent to testator by devise, to change the legal distribution of his assets, by directing a distribution equally among his creditors: *Charlton v. Wright*, No. 4089, *ante*, over.—*TURNER v. COX* (1853), 8 Moo. P. C. C. 288; 1 Eq. Rep. 1; 21 L. T. O. S. 173; 14 E. R. 111, P. C.

Annotation:—*Refd.* *Bullen v. A'Beckett* (1863), 1 Moo. P. C. C. N. S. 223.

4091. Jointure in lands.—*KNIVET v. BAXTER* (1630), Toth. 116; 21 E. R. 141.

4092. —[*JAWLET v. MALBURN (LADY)* (1632), Toth. 116; 21 E. R. 141.

4093. Lands held in occupancy—Statute of Frauds—Estate vesting in mortgagee for forfeiture for non-payment.—*TUPHORNE v. GILBIE* (1629), 1 Rep. Ch. 39; 21 E. R. 501.

4094. —[*THROGMORTON v. WAGSTAFF* (1632), 1 Rep. Ch. 59; 21 E. R. 507.

4095. Reversion expectant—On estate for life.—*Held*: a reversion expectant upon an estate for life, & upon estates tail limited to unborn children, were assets for the payment of specialty debts, & should be decreed to be sold for that purpose. *Semble*: a reversion expectant upon an estate tail may be sold for payment of specialty debts.—*TYNDALE v. WAIRE* (1821), Jac. 212; 37 E. R. 829.

4096. —[*On estate tail.*]—*TYNDALE v. WAIRE*, No. 4095, *ante*.

4097. Trust of fee.—By Stat. Frauds, the trust of a fee was assets at law; but the trust of a term was not.—*KING v. BALLETT* (1691), 2 Vern. 248; 23 E. R. 760.

4098. Trust of term.—*KING v. BALLETT*, No. 4097, *ante*.

4099. Freehold—Debt secured on another part of testator's estate.—A simple contract creditor has no claim on the freehold, whose debt is secured on another part of testator's estate.—*ALEXANDER v. HOLLAND* (1753), 3 Keny. 4; 90 E. R. 1287.

4100. Widow's freebench.—By 3 & 4 Will. 4, c. 104, freeholds & copyholds of a deceased are now assets for the payment of his debts, & by 3 & 4 Will. 4, c. 105, all debts to which the land of a deceased are subject, are valid & effectual as against the right of his widow, to dower:—*Held*: the widow's right to dower or freebench has still priority over mere creditors of a deceased.—*SPYER v. HYATT* (1855), 20 Beav. 621; 25 L. T. O. S. 20; 1 Jur. N. S. 315; 3 W. R. 294; 52 E. R. 743.

Annotation:—*Refd.* *Jones v. Jones* (1858), 4 K. & J. 361.

4101. Effect of insufficiency of personality to pay

debts—Effect of creditors holding real securities.]—*GRISE v. GOODWIN* (1703), Freem. Ch. 264; 22 E. R. 1200.

4102. Necessity for obtaining judgment—Administration of Estates Act, 1833 (c. 104).—Above Act, which makes the real estate of a deceased person assets for the payment of his debts, whether due on simple contract or on specialty, gives no lien or charge on such real estate until a judgment has been obtained.

Testator, who died in 1870, devised & bequeathed his residuary real & personal estate to three persons in equal shares. At the time of his death he was entitled to certain real estate which he had mortgaged in 1839 to secure the repayment of a certain sum & interest. In 1902 the devisees commenced an action for sale in lieu of partition, & in that action certain sums, representing the rents & profits of the mortgaged property, had been paid into ct. In 1903 judgment in the action was given directing the usual accounts & inquiries, & ordering the property to be sold which had not, however, yet been done. In 1907 plffs., in whom the benefit of the mtge. of 1839 was now vested, issued their writ in the present action, suing on behalf of themselves & all other creditors of testator, against the devisees, claiming administration of testator's real & personal estate, & that the devisees might be restrained from applying for the transfer & payment to them of the fund in ct. to the credit of the partition action, & that such fund might be ordered to be transferred to the credit of the present action. No judgment had as yet been obtained in this action. On an application by the plffs. for an *interim* order:—*Held*: under above Act, neither the corpus nor the rents & profits of the real estate became liable to creditors until a judgment had been obtained, & as no judgment had been obtained in the present case, the application must be refused.—*Re MOON, HOLMES v. HOLMES*, [1907] 2 Ch. 304; 76 L. J. Ch. 535; 97 L. T. 748; 51 Sol. Jo. 552.

Annotation:—*Refd.* *Re Welch, Mitchell v. Willders*, [1916] 1 Ch. 375.

—[*Sec. also*, No. 4109, *post*.

ii. Really devised by Testator.

4103. General rule.—A. had a son & three daughters, & was seized of some lands in fee & of others in tail, & by his will devised his fee-simple lands to his daughters, & died leaving all his children infants. His widow took the profits of both estates as guardian to her children; & in a bill brought by the son & daughters against the mother for an account of the personal estate & of the rents & profits of the real estate the mother swore, that she had paid bond debts due from testator out of the entailed estates, & afterwards died insolvent:—*Held*: as the answer could not be read against the daughters, & there was no other evidence, & since the guardian ought to have paid the bonds only out of the fee simple estate, payment should be intended to have been made only out of the fund, which ought to have borne it.—*CHAPLIN v. CHAPLIN* (1735), 3 P. Wms. 365; 24 E. R. 1103, L. C.

Annotation:—*Mentd.* *Price v. Carver* (1837), 3 My. & Cr. 157.

4104. —[A., who was a trader at his death & indebted by specialty & simple contract, devised freehold estates to his son in fee. The son, on his marriage, settled the estates on his wife & children, & afterwards died:—*Held*: 3 & 4 Will. & Mar. c. 14, & 47 Geo. 3, c. 74, s. 2, do not charge the real assets descended or devised, with the

ancestor's debts; but make the heir or devisee personally liable to the value of the assets; & therefore, the son's widow & children were entitled to hold the estates discharged from the debts of the father.

Testator bequeathed leaseholds to his son, & appointed him & another person his exors. Three years after testator's death, the son settled the leaseholds on his marriage:—*Held*: as against the son's wife & children, the property was not liable to testator's creditors.—*SPACKMAN v. TIMBRELL* (1837), 8 Sim. 253; *Donnelly*, 171, 209; 6 L. J. Ch. 147; 59 E. R. 101.

Annotations:—*Reid*. *Pimm v. Insall* (1849), 1 H. & Tw. 487; *Morley v. Morley*, *Harland v. Morley* (1855), 5 De G. M. & G. 610; *Kinderley v. Jervis* (1856), 22 Beav. 1; *Dilkes v. Broadmead* (1860), 2 De G. F. & J. 566; *Hodkinson v. Quinn* (1860), 1 John. & H. 303.

4105. —[Where a person dies seized of land which he has not by will charged with his debts, 3 & 4 Will. 4, c. 104, makes the lands themselves, & not merely the estate or interest of such person in the lands, assets for the payment of his debts.—*DOWNE (VISCOUNT) v. MORRIS* (1844), 3 Hare, 394; 13 L. J. Ch. 337; 3 L. T. O. S. 72; 8 Jur. 486; 67 E. R. 435.

Annotations:—*Reid*. *Re Hyatt, Bowles v. Hyatt* (1888), 38 Ch. D. 609. *Mentd*. *Beale v. Symonds* (1853), 16 Beav. 406; *Barrow v. Wadkin* (1857), 21 Beav. 1.

4106. — **Exercise of general power of appointment.**—[*FLEMING v. BUCHANAN, DOWNS v. BUCHANAN*, No. 5910, *post*.

4107. —[The liability, under Debts Recovery Act, 1830 (c. 47), of a devisee of land, who alienates the land, to the unpaid debts of testator, is such that, on the alienation, the debts become his own debts to the extent of the value of the land alienated.

When a woman to whom land had been devised settled it on her marriage, after the passing of Married Women's Property Act, 1870 (c. 93), the first trust being for herself absolutely until the marriage, & after its solemnisation, on trust for herself for her life, without power of anticipation, with remainder on trusts for the issue of the marriage:—*Held*: testator's personal estate being insufficient to pay his debts, the life interest of the settlor was, notwithstanding the restraint on anticipation, liable to make good the deficiency, to the extent of the value of the devised land; her liability to satisfy the debts of testator, which arose on her alienation of the land by the settlement, being a debt "contracted by her before marriage" within Married Women's Property Act, 1870 (c. 93), s. 12.—*Re HEDGELY, SMALL v. HEDGELY* (1886), 34 Ch. D. 379; 56 L. J. Ch. 360; 56 L. T. 19; 35 W. R. 472.

Annotations:—*Apld*. *Re Atkinson, Proctor v. Atkinson*, [1908] 2 Ch. 307. *Mentd*. *Axford v. Reid* (1889), 58 L. J. Q. B. 230.

4108. What is included in term "devisee"—**Equitable devisee.**—[*COOPE v. CRESSWELL*, No. 5693, *post*.

4109. — **Equitable mortgagee of devisee—Necessity for obtaining judgment.**—[*Semble*: an equitable mtge. by deposit of title-deeds made by an heir-at-law or a devisee of a legal estate would be good as against creditors of the ancestor or testator who had not obtained any judgment or decree binding the land before the mtge. was made.—*BRITISH MUTUAL INVESTMENT CO. v. SMART* (1875), 10 Ch. App. 567; 44 L. J. Ch. 695; 32 L. T. 849; 23 W. R. 800, L. J.

Annotations:—*Apld*. *Re Atkinson, Proctor v. Atkinson*, [1908] 2 Ch. 307. *Reid*. *Price v. Price* (1887), 35 Ch. D. 297; *Re Moon, Holmes v. Holmes*, [1907] 2 Ch. 304.

Compare No. 4102, *ante*.

4110. — **Equitable tenant for life.**—[An

equitable tenant for life is a "devisee" within Debts Recovery Act, 1830 (c. 47), ss. 6, 8, & consequently a *bond fide* alienation by such a devisee before action brought will be protected, there being no difference for this purpose between the alienation of an equitable & the alienation of a legal interest.—*Re ATKINSON, PROCTOR v. ATKINSON, HARTLEY v. ATKINSON*, [1908] 2 Ch. 307; 77 L. J. Ch. 766; 99 L. T. 174, C. A.

iii. Really descended.

4111. General rule.—[Whether the trust of an estate in fee descended upon the heir is liable in equity to the satisfaction of a debt by bond, wherein the heir is bound.

There is a difference between the case of an heir, & the case of an exor.; & therefore the trust of a term & the trust of an inheritance are not the same thing as to this point: for whatever money comes to the hands of the exor., either by sale of the term, or if money be decreed to him in this et., will be assets; but if an heir, before an action brought, sells & alienates the assets, the money is not at law liable in his hands (*per* CUR.).—*CREED v. COLVILLE* (1683), 1 Vern. 172; 23 E. R. 395.

4112. —[*REDSHAW v. HESTER* (1695), 5 Mod. Rep. 119; 87 E. R. 557.

Annotation:—*Reid*. *Middleton v. Graveley* (1823), 12 Price, 513.

4113. —[The heir-at-law is as much chargeable with the ancestor's judgment as the executor with the testator's debts (*per* CUR.).—*PRATT v. COLT* (1669), *Freem. Ch.* 139; 1 Cas. in Ch. 128; 22 E. R. 1114.

Annotation:—*Reid*. *Burgess v. Wheate* (1759), 1 Eden. 177.

4114. —[Where an obligor is seized of a reversion in fee expectant on several estates tail; this reversion, coming into possession in the hands of his heir, is then assets by descent to charge him with the debt.—*SMITH v. PARKER* (1778), 2 Wm. Bl. 1230; 96 E. R. 724.

Annotations:—*Reid*. *Tweedale v. Coventry* (1783), 1 Bro. C. C. 240; *Doe d. Andrew v. Hutton* (1804), 3 Bos. & P. 643; *Tyndale v. Warre* (1821), Jac. 212.

4115. Reversion must vest in possession.—[*TERLING v. TRAFFORD* (1570), cited 6 Co. Rep. 42 a; 77 E. R. 316.

Annotations:—*Reid*. *Brediman's Case* (1606), 6 Co. Rep. 56 b; *Mildmay's Case* (1606), 6 Co. Rep. 10 a; *Tyndale v. Warre* (1821), Jac. 212.

—[A reversion in fee expectant on an estate tail, is, when it vests in possession, assets for payment of a bond debt of the ancestor last actually seized in fee in possession. In declaring against the heir on such a bond, he may be named immediate heir to the obligor, without mentioning the intermediate descents of the reversion.—*ROUND v. KELLO* (1690), *Freem. K. B.* 498; 89 E. R. 373; *sub nom. KELLOW v. ROWDEN*, 3 Mod. Rep. 253; *Carth.* 126; *Holt, K. B.* 71; 1 Show. 244; 3 Lev. 285; *sub nom. KILLOW v. ROWDEN*, 3 Salk. 178.

Annotations:—*Consd*. *Giffard v. Barber* (1740), 2 Eq. Cas. Bar. 706. *Reid*. *Doe d. Andrew v. Hutton* (1804), 3 Bos. & P. 643; *Tyndale v. Warre* (1821), Jac. 212. *Mentd*. *Nottingham v. Jennings* (1700), 1 P. Wm. 23; *Gunningham v. Moody* (1748), 1 Ves. Sen. 174; *Smith v. Camelford* (1795), 2 Ves. 698.

4117. —[Reversion on an estate for life, is assets by descent, *quando acciderint*.—*ROOK v. CLEALAND* (1695), 1 Ld. Raym. 53; 1 Lut. 503; 91 E. R. 931.

4118. —[Reversion in fee after an estate tail spent, held to be assets to pay debts.—*WARWICK (COUNTESS) v. EDWARDS* (1728), 1 Dick. 51; 1 Eq. Cas. Abr. 140; 21 E. R. 186, L. C.

Annotation:—*Mentd*. *Trelawney v. Booth* (1738), *West temp. Hard.* 411.

Sect. 2.—Payment of debts presently due: Sub-sect. 2, C. (b) ii

4119. Effect of entry by guardians of infant heir.]—*WATERS v. EBRALL* (1707), 2 Vern. 606; 1 Eq. Cas. Abr. 602; 23 E. R. 906.

4120. Copyholds.]—A surrender of copyholds to one & his heirs, in trust for another & his heirs breaks the custom; if a copyholder in Borough English surrenders in trust for himself & his heirs, the trust goes to the heir-at-law; therefore the trust in the hands of the heir is assets.—*HELLEY v. HELLEY* (1708), 2 Eq. Cas. Abr. 509; 22 E. R. 431, L. C.

4121. Advowson.]—An advowson descending to an heir is real assets, & may be sold for the payment of debts.—*TONG v. ROBINSON* (1730), 1 Bro. Parl. Cas. 114; 1 E. R. 453; *sub nom.* *ROBINSON v. TONGE*, 2 Stra. 879, II. L.

*Annotations:—***Consd.** *Westfaling v. Westfaling* (1746), 3 Atk. 460; *Aldrich v. Cooper* (1803), 8 Ves. 382. **Refd.** *Kinaston v. Clark* (1741), 2 Atk. 204; *Barret v. Glubb* (1776), 2 Wm. Bl. 1052; *Ripley v. Waterworth* (1802), 7 Ves. 425. **Mentd.** *Banks v. Sutton* (1732), 2 P. Wms. 700; *Waghorne v. Langmoad* (1796), 1 Bos. & P. 571; *Hoath v. Brindley* (1834), 2 Ad. & El. 365; *Re Tristram, Ex p. Hartley* (1835), 2 Mont. & A. 496; *Sproule v. Prior* (1836), 8 Sim. 189.

4122. —.]—*WESTFALING v. WESTFALING*, No. 4066, *ante*.

4123. Lands entailed.]—*CHAPLIN v. CHAPLIN*, No. 4103, *ante*.

4124. Effect of judgment against heir for personal debts—Administration of Estates Act, 1833 (c. 104)—Judgments Act, 1838 (c. 110), s. 13.]—The rights of simple contract creditors of an ancestor as against the descended estates are not defeated by judgments entered up against the heir, for his personal debts, before suit.

Administration of Estates Act, 1833 (c. 104), makes real estate "assets to be administered in cls. of equity" for payment of simple contract debts of deceased, & Judgments Act, 1838 (c. 110), s. 13, makes a judgment a charge on any lands of which the judgment creditor is seized, etc., or over which he shall have any disposing power, for his own benefit, & it makes such judgment an equitable mtge. thereon:—**Held:** judgments, entered up against the heir for his own debt, before any action or suit by the simple contract creditors of the ancestor, have no priority over the simple contract creditors of intestate, in respect of the descended estate.

It was not the object, nor is it the operation, of Administration of Estates Act, 1833 (c. 104), to make the simple contract debts of a deceased person in the nature of mtges. or specific charges on his real estate, but as the statute makes the land assets for the payment of his debts, these debts constitute a general charge upon them, but not so that a *bond fide* purchaser of the lands, from the heir or devisee, is bound to see to the application of the purchase money, as he would be in the case of a particular mtge. on any portion of the lands themselves.

The real estate of a deceased person constitutes assets, to be administered in a ct. of equity, according to the priorities specified by the statute, & all the incidents of assets attach to it, & consequently, such assets are liable, in the first place, to pay the debts of deceased debtor, & subject thereto, they belong to his devisee or heir-at-law, but the devisee or heir at law takes no beneficial interest therein, except subject to & after payment of the debts of deceased testator or ancestor.

By Judgments Act, 1838 (c. 110), s. 13, the Legislature meant that a judgment was to operate on all lands & interest in lands over which the

debtor might have a disposing power, for his own benefit, without committing a breach of duty, that is, over which he had a right, at law or in equity, to consider himself the beneficial owner. The introduction of such words as "honestly" or "without committing a breach of duty" appears to be superfluous, for they are necessarily to be understood as forming a part of the clause.—*KINDERLEY v. JERVIS* (1856), 22 Beav. 1; 25 L. J. Ch. 538; 27 L. T. O. S. 245; 2 Jur. N. S. 602; 4 W. R. 579; 52 E. R. 1007.

*Annotations:—***Refd.** *Price v. Price* (1887), 35 Ch. D. 297. **Mentd.** *Nicholls v. Rosewarne* (1859), 6 C. B. N. S. 480; *Baker v. Tynte* (1860), 6 Jur. N. S. 1192; *Eyre v. McDowell* (1861), 9 H. L. Cas. 619; *Pickering v. Ilfracombe Ry.* (1868), L. R. 3 C. P. 235; *Robinson v. Nesbitt* (1868), L. R. 3 C. P. 264; *Gill v. Continental Gas Union* (1872), 41 L. J. Ex. 176; *Re Leavesley*, [1891] 2 Ch. 1.

See Administration of Estates Act, 1925 (c. 23), s. 32; Law of Property Act, 1925, c. 20, s. 195.

4125. Realty passing by escheat.]—Testator died without heirs, seized of freeholds which he had not charged with his debts:—**Held:** as against the lord claiming by escheat, they were assets for the payment of the testator's debts.

Qu.: whether such freeholds are liable to the debts in priority to or *pari passu* with lands specifically devised.—*EVANS v. BROWN* (1842), 5 Beav. 114; 11 L. J. Ch. 349; 6 Jur. 380; 49 E. R. 520.

*Annotations:—***Consd.** *Downe v. Morris* (1814), 3 Hare. 394; *Spyer v. Hyatt* (1855), 25 L. T. O. S. 20; *Re Hyatt*, *Bowles v. Hyatt* (1888), 38 Ch. D. 609.

iv. Equity of Redemption.

4126. General rule.]—Equity of redemption is not assets.—*ANON.* (1673), *Freem. K. B.* 303; 89 E. R. 220.

4127. —.]—*ANON.* (1690), *Freem. Ch.* 115; 22 E. R. 1095.

4128. —.]—An equity of redemption of a mtge. in fee was not assets at law, but was so in equity.—*SOLLEY v. GOWER* (1688), 2 Vern. 61; 23 E. R. 649, L. C.

4129. —.]—Husband after marriage purchases a term to himself & wife, & the survivor & the exors., administrators & assigns of such survivor; husband assigns the term in mtge., proviso to be void on payment of the money by him or wife, or the exors. of him or wife. Proviso that the husband, his exors. or administrators shall till default of payment quietly enjoy. Husband, seven years after, contracts debts & dies:—**Held:** this settlement of the term being after marriage, in the power of the husband, & the equity of redemption being reserved to him as well as to his wife, & being also in the case of creditors, was assets to pay debts.—*WATTS v. THOMAS* (1726), 2 P. Wms. 364; 24 E. R. 767.

4130. —.]—*DEG v. DEG*, No. 4072, *ante*.

4131. —.]—A. gives several legacies, & makes B. his exor. & residuary legatee. B. receives all the assets, & buys lands with the money, & dies, & also bought the equity of redemption of another estate on which A. had a mtge. Bill brought by legatees, to be paid their legacies out of A.'s real & personal estate. The ct. directed an inquiry, whether part of the assets were laid out in the purchase of an estate, & if they were, declared they ought to be restored to testator's personal estate. The equity of redemption held to be assets.—*RYALL v. RYALL* (1739), 1 Atk. 59; 20 E. R. 30, L. C.

*Annotations:—***Mentd.** *Lane v. Dighton* (1762), Amb. 409; *Lench v. Lench* (1805), 10 Ves. 511; *Re West of England & South Wales District Bank, Ex p. Dale*, *Young* (1879), 48 L. J. Ch. 600.

4132. —.]—*P.*, a *cestui que trust* of a real estate, made a mtge. upon it in fee, & devised the

equity of redemption to his son & his heirs, subject to the payment of his debts, & died indebted by bond & simple contract:—*Held*: as this was a mtge. of the whole inheritance, & nothing remaining in the mtgor., the bond-creditor could have no preference, but must be paid *pari passu* with other creditors.—*PLUNKET v. PENSON* (1742), 2 Atk 290; 26 E. R. 577, L. C.

Annotation:—*Mentd.* *Scott v. Scholey* (1807), 8 East, 467.

4133. — Administration of Estates Act, 1833 (c. 104).—The equity of redemption of a mtge. in fee is made legal assets by above Act.—*FOSTER v. HANDLEY* (1851), 1 Sim. N. S. 200; 15 Jur. 73 61 E. R. 77.

Annotation:—*Apld.* *Re Burrell, Burrell v. Smith* (1870), L. R. 9 Eq. 443.

4134. ——*J.*—T., the exor. of S., purchased the equity of redemption of an estate for £815, subject to a mtge. in fee, which contained a power of sale, to secure the repayment of £800; this security was transferred to A. & D. T. was illegitimate. He died unmarried & intestate, in Dec. 1831. B purchased the estate, which, on Aug. 12, 1834 was conveyed to him in fee by A. & D. the mtgees., & by G. the administratrix *de bonis non* of S. The deed recited that T. had purchased the estate in part with the money of S. B. the purchaser, died, & his estate was sold under the direction of the ct. Objections were taken to the title, because the mtgees. had not executed their power of sale under the mtge., & because no person claiming through T. had conveyed the estate or was a party to the suit; because there was no evidence showing that T. was illegitimate, or that he died without heirs, or that he was a trustee for S., & if those statements were true, the estate had escheated to the Crown; & because, as the equity of redemption had not been foreclosed, it was assets for the payments of his debts, & this personal representative was not before the ct. The master reported that a good title could not be made. Upon exceptions to his report:—*Held*: the evidence of T. being a mere trustee was not such that a purchaser could be compelled to take the title; assuming T. had a beneficial title, the equity of redemption had not escheated to the Crown; as the equity of redemption might possibly be assets for the payment of the debts of T. generally & on covenant, no title could be made in the absence of the legal personal representative of T. If it could, then mtgees. having the legal estate might hold the whole property against creditors discharged from the equity of redemption.—*BEALE v. SYMONDS* (1853), 16 Beav. 406; 22 L. J. Ch. 708; 22 L. T. O. S. 61; 1 W. R. 137; 51 E. R. 835.

Annotation:—*Reid.* *Kinderley v. Jervis* (1856), 22 Beav. 1. *Mentd.* *Catley v. Sampson* (1864), 33 Beav. 551.

4135. ——*J.*—(1) The equity of redemption on a mtge. of a sum of money charged on land is legal assets in the hands of the exor.

(2) Distinction between legal & equitable assets. Much difficulty has sometimes arisen in determining the precise distinction between legal & equitable assets. The general proposition is clear enough that, when assets may be made available in a ct. of law, they are legal assets; & when they can only be made available through a ct. of equity, they are equitable assets (*KINDERSLEY, V.-C.*).—*COOK v. GREGSON* (1856), 3 Drew. 547; 25 L. J. Ch. 706; 27 L. T. O. S. 332; 2 Jur. N. S. 510; 4 W. R. 581; 61 E. R. 1012.

Annotations:—*As to* (1) *Reid.* *A.-G. v. Brunning* (1860), 8 H. L. Cas. 243; *Re Stewart, Crowder v. Stewart* (1860), 50 L. J. Ch. 136; *Re Power, Re Stone, Acworth v. Stone*, [1901] 2 Ch. 659. *As to* (2) *Apld.* *Shoe v. French, French v. French* (1857), 3 Drew. 716. *Consd.* *O'Grady v. Wilmot*,

[1916] 2 A. C. 231. *Reid.* *Re Hadley, Johnson v. Hadley*, [1909] 1 Ch. 20. *Generally, Mentd.* *Duignan v. Croomo* (1879), 41 L. T. 672.

4136. Mortgage of land descending to heir.—*TREVOR v. PERRYOR* (1669), 1 Cas. in Ch. 148; 22 E. R. 736.

4137. Mortgage of leaseholds.—*BARTHOLOP v. WEST* (1671), 2 Rep. Ch. 62; 21 E. R. 616.

4138. ——*J.*—Equity of redemption of a leasehold estate is equitable assets.—*HARTWELL v. CHITTERS* (1756), Amb. 308; 27 E. R. 208, L. C.

Annotations:—*Apld.* *Clay v. Willis* (1823), 1 R. & C. 364. *Consd.* *Barker v. May* (1829), 4 Man. & Ry. C. B. 386.

4139. Mortgage of term of years.—One possessed of a term for years, mortgaged it, & died, leaving debts, some by bond, & some by simple contract; the equity of redemption is equitable assets, & shall be liable to all the debts equally.—*COX'S CREDITORS CASE* (1734), 3 P. Wms. 341; 2 Eq. Cas. Abr. 462, pl. 19; 24 E. R. 1092.

Annotations:—*Apld.* *Hartwell v. Chitters* (1756), Amb. 308; *Newton v. Bennet* (1782), 1 Bro. C. C. 133. *Consd.* *Sharpe v. Scarborough* (1799), 4 Ves. 538. *Apld.* *Clay v. Willis* (1823), 2 Dow. & Ry. C. B. 539. *Obtd.* *Cook v. Gregson* (1856), 27 L. T. O. S. 332. *Reid.* *Plunket v. Penson* (1742), 2 Atk. 290; *Silk v. Prime* (1766), 1 Dick. 384; *Barker v. May* (1829), 4 Man. & Ry. C. B. 386; *Whitaker v. Wright* (1843), 2 Haro. 310.

4140. Proceeds of sale of equity of redemption in hands of debtor's assignee.—*Re YAPP* (1758), Barnes, 402; 94 E. R. 975.

4141. Mortgage of copyholds.—The equity of redemption of a mtge. in fee of copyholds is made legal assets by 3 & 4 Will. 4, c. 101. *Re BURRELL, BURRELL v. SMITH* (1870), L. R. 9 Eq. 443; 30 L. J. Ch. 544; 22 L. T. 263.

Annotation:—*Mentd.* *Re Richardson, Richardson v. Richardson* (1880), 14 Ch. D. 611.

4142. Whether assets against judgment creditor with right to redeem.—An equity of redemption of a mtge. in fee is not equitable assets, at least as against judgment creditors; who have a right to redeem. Assets are not marshalled against judgment creditors.—*SHARPE v. SCARBOROUGH (EARL)* (1799), 4 Ves. 538; 31 E. R. 276, L. C.

Annotation:—*Mentd.* *Dollond v. Johnson* (1854), 18 Jur. 767.

D. Statutory Rights of Creditors against Heir or Devisee.

See Debts Recovery Act, 1830 (c. 47); Administration of Estates Act, 1833 (c. 104); Administration of Estates Act, 1925 (c. 23), ss. 32, 38.

4143. Whether purchaser of tailed land protected against creditors.—*HEARLE v. BOTTELENS* (1604), Cary, 25; 21 E. R. 14, L. C.

Annotation:—*Mentd.* *Mackreth v. Symmonds* (1808), 15 Ves. 329.

4144. Duty of purchaser from heir or devisee to see to application of purchase money.—*KINDERLEY v. JERVIS*, No. 4124, *ante*.

4145. — Effect of notice of debt.—Where an estate is, under 3 & 4 Will. 4, c. 104, assets for the payment of a simple contract debt, a purchaser of that estate, having notice of such debt, is not bound to see that his purchase money is applied in payment thereof. Where deceased owner was a tenant, the fact that the simple contract creditor was the committee of his estate, & that the debt was due in respect of such committee, does not alter the case.—*JONES v. NOYES & ALLEN* (1858), 8 L. J. Ch. 47; 32 L. T. O. S. 102; 4 Jur. N. S. 633; 7 W. R. 21.

Who is a "devisee."—*See* Nos. 4109, 4110, *ante*, No. 5663, *post*.

Sect. 2.—Payment of debts presently due: Sub-sect. 2, E.; sub-sect. 3, A., B. & C. (a).]

E. Effect of Registration of Judgment or of Administration Action as lis pendens.

See, generally, JUDGMENTS.

4146. Registration of judgment — Descended estate.]—*KINDERLEY v. JERVIS*, No. 4124, ante.

4147. Registration of administration action—Whether creditor given priority over purchaser or mortgagee.]—Where debts are charged upon testator's real estate by his will or as judgment debts under the old law an action by a creditor for the administration of the real & personal estate is a *lis pendens* which, when registered gives pltf. priority over a purchaser or mtgee. from any debt. entitled to real estate under the will except where debt. is in such a position that the purchaser or mtgee. has a right to suppose he is selling or mortgaging for the purpose of paying testator's debts. A creditor's action for general administration may be a sufficient *lis pendens* before final decree so as to entitle pltf. to priority over a purchaser or mtgee. taking subsequently to the registration of the *lis* from a specific devisee who is a debt., if pltf. previously to the purchase or mtge., has sufficiently indicated the real estate sought to be charged in the action; a mere general claim for administration of the real & personal estate not being of itself a sufficient indication of intention to make liable the specifically devised real estate.—*PRICE v. PRICE* (1887), 35 Ch. D. 207; 56 L. J. Ch. 530; 56 L. T. 842; 35 W. R. 386; 3 T. L. R. 453.

*Annotations:—***Refd.** *Edgar v. Plomley*, [1900] A. C. 431. **Mentd.** *Wigram v. Buckley*, [1894] 3 Ch. 483.

SUB-SECT. 3.—PRIORITY OF CREDITORS.

A. In General.

4148. Duty to discharge first debts of highest degree.]—Exors. must discharge debts of the highest nature first.—*LITTLETON v. HIBBINS* (1600), Cro. Eliz. 793; 78 E. R. 1022.

*Annotations:—***Consd.** *Fuller v. Redman* (No. 1) (1859), 26 Beav. 600. **Refd.** *Hickey v. Hayter* (1795), 6 Term Rep. 384.

4149. — Payment without notice of existence of debt of higher degree.]—To debt on bond an exor. may plead a judgment recovered on a simple contract; for unless he had notice of the bond it is no *devastavit* to pay such debt on simple contract.—*HARMAN v. HARMAN* (1686), 3 Mod. Rep. 115; 2 Show. 492; Comb. 35; 87 E. R. 74.

*Annotations:—***Apld.** *Re Pludyer*, *Wingfield v. Erskine*, [1898] 2 Ch. 562. **Refd.** *Davis v. Blackwell* (1832), 9 Bing. 5.

4150. How priorities determined—Personal assets abroad.]—(1) The priorities of creditors are regulated by the domicile of testator, though the personal assets may be situate & administered in another country.

(2) The decree in a foreclosure suit in Ireland is not a judgment for payment of the amount due, or of the balance after realising the security.

(3) A foreign judgment constitutes but a

simple contract debt.—*WILSON v. DUNSANY (LADY)* (1854), 18 Beav. 293; 2 Eq. Rep. 706; 23 L. J. Ch. 492; 23 L. T. O. S. 73; 18 Jur. 762; 2 W. R. 288; 52 E. R. 115.

*Annotation:—***Obtd.** *Re Kloebe*, *Kannreuther v. Gelsebrocht* (1884), 28 Ch. D. 175.

4151. Note for part of purchase-money of land charged with payment of debts.]—A. purchases lands of B. & mortgages back those lands for part of the purchase-money, & gives a note to B. for £200, the other part thereof. A. devises those lands to be sold for payment of his debts. This £200 note, though for part of the purchase-money, shall not be preferred to other debts, nor be a charge on the land in equity.—*BOND v. KENT* (1692), 2 Vern. 281; 23 E. R. 782.

*Annotation:—***Mentd.** *Mackreth v. Symmons* (1808), 15 Vcs. 329.

4152. Damages for dilapidations—Recovered against executor of deceased incumbent—Postponed to specialty & simple contract debts.]—The exor. of a deceased incumbent is bound to satisfy simple contract debts before paying for dilapidations by testator. Therefore, in a suit on the custom of England for dilapidations, by the successor of a deceased incumbent against the exor., it is a good plea that, since the commencement of the suit, debt. has paid simple contract debts, leaving no assets to be administered.—*BYRAN v. CLAY* (1852), 1 E. & B. 38; 22 L. J. Q. B. 23; 20 L. T. O. S. 64; 17 J. P. 38; 17 Jur. 276; 1 W. R. 20; 118 E. R. 351.

*Annotation:—***Consd.** *Re Monk*, *Wayman v. Monk* (1887), 35 Ch. D. 583.

4153. — Order made under Ecclesiastical Dilapidations Act, 1871 (c. 43), s. 34.]—Where the bishop has, under above sect. made an order stating the cost of the repairs for which the exors. of a late incumbent are liable, the sum so stated is under sect. 36 a debt payable to the new incumbent out of the assets of the late incumbent *pari passu* with the debts of his other creditors.—*Re MONK*, *WAYMAN v. MONK* (1887), 35 Ch. D. 583; 56 L. J. Ch. 809; 56 L. T. 856; 52 J. P. 198; 35 W. R. 691; 3 T. L. R. 552.

4154. Whether solicitor with lien preferential creditor.]—A solr. who is in disburse for his client has a right to be paid out of a duty decreed to an administrator, & a lien upon it, before the bond creditors of deceased; nor can the administrator controvert this rule, by insisting on applying the assets in a course of administration.—*TUWIN v. GIBSON* (1749), 3 Atk. 720; 26 E. R. 1212.

*Annotations:—***Mentd.** *Griffin v. Eyles* (1789), 1 Hy. Bl. 122; *Gould v. Davis* (1831), 1 Cr. & J. 415; *Wild v. Simpson*, [1919] 2 K. B. 544.

4155. Whether guardians preferential creditors—For maintenance of deceased pauper.]—Poor Law Amendment Act, 1849 (c. 103), s. 16, which gives the guardians power in the event of the death of a pauper having property belonging to him, to reimburse themselves the expenses of the maintenance of such pauper during the twelve months prior to the decease, constitutes the guardians ordinary, & not preferential creditors for the amount so expended by them, & the exor. of such pauper is therefore entitled to retain

PART IV. SECT. 2, SUB-SECT. 3.—A.

m. Widow's right to dower—Preferred to simple contract debts.]—Where a woman bars her dower in a mtge. to secure a debt of her husband, & after his death the property is sold for more than the claim of the mtgee., the widow will be entitled to have her dower secured out of the surplus in preference to the simple contract creditors of her husband.—*SHEPPARD v. SHEPPARD* (1867), 14 Gr. 174.—**CAN.**

n. — — —.]—Notwithstanding Administration of Estates Act, 1833 (c. 104), & Dower Act, 1833 (c. 105), s. 5, the widow's right to dower has still priority over mere creditors of a deceased husband.—*Re M'MACKIN*, *NORTHERN BANKING CO. v. M'MACKIN*, [1909] 1 I. R. 374.—**IR.**

o. — Party to mortgage — Insolvency of mortgagor.]—Where a wife joins in a mtge., & on the death of the husband there are not sufficient assets

for the payment of all his debts, the widow is not entitled to have the mtge. debt paid in full out of the assets to the prejudice of creditors.—*WHITE v. BASTEDO* (1869), 15 Gr. 546.—**CAN.**

p. Debts of testator — Preferred to debts incurred by legatee carrying on testator's business.]—A legatee to whom testator had bequeathed his business continued to carry it on with the acquiescence of the exors. After decree for administration the business

Annotation:—Mentd. *Re Benson, Knaresborough Grdns. v. Benson* (1918), 87 L. J. Ch. 622.

Annotations:—*Reid. In the Goods of Ewing* (1881), 6 P. D. 19; *O'Grady v. Wilmot*, [1916] 2 A. C. 231. **Mentel.** *Hicks v. Powell* (1869), 4 Ch. App. 741; *Re Chapman-Cocks v. Chapman*, [1896] 1 Ch. 323; *West v. Gwynne* (1911), 80 L. J. Ch. 578; *R. v. Southampton Income Tax Commrs.*, *Ex p. Singer*, [1916] 2 K. B. 219.

—**New South Wales Life, Fire & Marine Insurance Act, 1902, s. 4**, purports to protect the proceeds of a life insurance policy from payment of the debts of deceased:—*Held*: whatever the true construction & effect of the sect., the Act itself did not bind the Crown, which was entitled to be paid in priority to all other creditors of deceased.—**A.-G. FOR NEW SOUTH WALES v. INTESTATE ESTATES (CURATOR OF)**, [1907] A. C. 519; 77 L. J. P. C. 14; 97 L. T. 614; 23 T. L. R. 752, P. C. *Annotation*:—**Mentd.** The Lordano, [1922] P. 209.

4158. — [] — Bkpy. Act, 1914 (c. 59), s. 33, which, after giving statutory priority to certain Crown & other debts in the distribution of a bkpt.'s or deceased insolvent's property, provides that subject thereto all debts shall be paid *pari passu*, does not apply to the private administration of a deceased insolvent's estate out of ct. It does not therefore affect the common law priority of any Crown debt in such a case.—*Re LAYCOCK, LAYCOCK v. INCOME TAX SPECIAL COMRS.*, [1919] 1 Ch. 241; 88 L. J. Ch. 128; 120 L. T. 473; 63 Sol. Jo. 302; [1918-19] B. & C. R. 165.

was conducted by a receiver appointed by the ct., & was subsequently sold by the ct. as a going concern. The assets were insufficient to pay all liabilities in full.—*Held*: the legatee had no duty to perform towards the estate, & was not entitled to any indemnity, & the creditors of testator were entitled to be paid in priority to the creditors whose debts were incurred during the legatee's trading.—*Re O'KELLY*.

BURKE v. WHELAN, [1920] 1 I. R. 200.—IR.

q. Ordinary debts paid before preferential debt—By one of several trustees—*Liability of other trustees.*—Trustees & exors. resident in Scotland sent a power of attorney to a co-trustee resident in a foreign country, where the greater part of the trust property was situated, empowering him to

A. was indebted by judgment to B., & by bonds to C. & D., & by simple contract to E., & died. E., being a debtor to the King, caused the debt due to him to be seized into the King's hands: & upon this a *sci. fa.* issued against the exor. of A. & before the return of it C. & D., the bond-creditors obtained judgment: & then the exor. pleaded to the *sci. fa.* the judgment prior & the subsequent judgments:—*Held*: the debt should be preferred before the subsequent judgments (viz.) before any bond. —*It. v. DICKENSON* (1692). Park. 202: 145 B. R. 774.

Annotations :— **Mentd.** Uppom v. Sumner (1779), 2 Wm. Bl. 1294; Rorke v. Dayrell (1791), 4 Term Rep. 402; R. v. Giles (1820), 8 Price, 293; Giles v. Grover (1832), 9 Bing. 128.

4162. Simple contract debt due to Crown - Priority over specialty & simple contract debts due to subject.—Testator died insolvent after 1870 owing specialty & simple contract debts, including a simple contract debt to the Crown. The assets were more than sufficient for payment of the Crown debt after satisfying the specialty debts: -- *Held*: having regard to Administration of Estates Act, 1869 (c. 46), the assets ought first to be apportioned ratably between the specialty & simple contract debts, & the Crown debt ought then to be taken out of the amount apportioned to the simple contract debts. -- *Re BENTINCK, BENTINCK v. BENTINCK*, [1897] 1 Ch. 673; 66 L. J. Ch. 359; 76 L. T. 284; 45 W. R. 397; 13 T. L. R. 201; 41 Sol. Jo. 319.

Annotation :—**Refd.** *Re Hankey, Cunliffe Smith v. Hankey*
[1899] 1 Ch. 541.

4163. Failure of executor to pay Crown debts—
Or render accounts—Attachment.]—*Re HIGGS,*
Re WEBB, Re NICHOLSON, Re HITCHCOCK (1888),
5 T. L. R. 125.

Crown debts generally, *see* CONSTITUTIONAL LAW, Vol. XI., pp. 581, 582, Nos. 830-839; CONTEMPT OF COURT, Vol. XVI., p. 41, Nos. 422-426.

See Administration of Estates Act, 1925 (c. 23), s. 34.

4164. Priority over statute or recognisance.]—

ingather the estate & pay the debts of deceased. He, in consequence of an over-estimate of the value of the estate, paid ordinary debts, without retaining sufficient to pay a preferential creditor in full.—*Held*: the whole body of trustees were liable to make good the amount of the creditor's claim.—**JAMOND'S TRUSTEES v. CROOM** (1871), 9 Macph. (Ch. of Sess.) 662; 43 Sc. Jur. 321.—**SCOT.**

Sect. 2.—Payment of debts presently due: Sub-sect. 3, C. (a) & (b) 1.

A judgment in the King's Ct. upon judicial & ordinary proceeding is of a higher degree than a statute or recognisance; & in payment of debts by exors. is entitled to precedence.—**SADLERS' CASE** (WARDEN & COMMONALTY OF) (1588), 4 Co. Rep. 54 b; 76 E. R. 1012.

*Annotations:—***Relf**, Harrison's Case (1598), 5 Co. Rep. 28 b. **Mentd.** Menvill's Case (1585), 13 Co. Rep. 19; Reynold's Case (1612), 9 Co. Rep. 95 a; Holland v. Fisher (1602), O. Bridg. 181; Bankers Case (1695), Skin. 601; *Ex p.* Roberts (1743), 3 Atk. 5; A.-G. v. Duplessis (1752), Park. 144; Burgess v. Wheate, A.-G. v. Wheate (1759), 1 Eden, 177; Doe d. Hayne v. Redfern (1810), 12 East, 96; Tobin v. R. (1864), 16 C. B. N. S. 310.

4165. —.]—(1) A debt by bond shall be satisfied before a statute to perform covenants, which covenants are not broken.

(2) Judgments recovered in the King's Cts. shall be paid before bonds in the nature of a statute-staple or merchant, & before recognisances.—**HARRISON'S CASE** (1598), 5 Co. Rep. 28 b; Jenk. 274; 77 E. R. 94.

*Annotations:—*As to (1) **Relf**, Cago v. Acton (1699), 12 Mod. Rep. 288; Bank of England v. Morrice (1732), 2 Barn. K. B. 183.

4166. —.]—An exor. or administrator ought to pay a debt due by judgment, before a debt upon a statute or recognisance of an older date.—**BEARLOCK v. READ** (1600), Cro. Eliz. 822; 78 E. R. 1049; *sub nom.* **REDE v. BEARELOCKE**, Yelv. 29; *subsequent proceedings* (1611), Brownl. 81.

*Annotations:—***Consd.** Prinn v. Edwards (1695), 1 Ld. Raym. 47. **Mentd.** Anon. (1692), 12 Mod. Rep. 48; Lancashire v. Killingworth (1701), 12 Mod. Rep. 529.

4167. Priority over specialty & simple contract debts.—Administrators must pay their intestates' judgment debts before specialties.—**EXETER (DEAN & CHAPTER) v. TREWINNARD** (1553), 1 Dyer. 80 a; 73 E. R. 171.

*Annotation:—***Relf**, Phillips v. Echard (1603), Cro. Jac. 8.

4168. — Judgment debt charge on lands.]—A debtor upon bonds & simple contract makes a conveyance of lands upon trust to sell for payment of his debts. It was declared to be the constant practice, & so ruled & decreed here, that all the debts should be paid in proportion; & that if the lands were not sufficient to pay all, all should lose in proportion; & so it is where lands are given to pay debts & legacies, they shall be paid in equal proportion, because the land is made liable to the one as well as the other by the debtor himself. But otherwise it is in case of debts & judgments, that in their own nature charge the lands.—**WOLESTONCROFT v. LONG** (1663), 1 Cas. in Ch. 32; 22 E. R. 679; *sub nom.* **WOLLSTENCROFT v. LONG**, 3 Rep. Ch. 12, L. C.

4169. —.]—Judgment in *assumpsit* had after debt's death & before the day in bank. If it shall so relate as to the good against all other judgments, etc., & to be paid by the exor. before obligations, by the new statutes.—**BURNETT v. HOLDEN** (1600), 1 Lev. 277; 1 Mod. Rep. 6; T. Raym. 210; 83 E. R. 405.

*Annotations:—***Relf**, Smith v. Harmon (1704), 6 Mod. Rep. 142; Colebeck v. Peck (1706), 2 Ld. Raym. 1280; Saunders v. M'Gowan (1843), 12 M. & W. 221.

4170. —.]—Pltf. obtained a decree in Chancery for £80 against debt's intestate, & thereupon brought a *sci. fa.* to revive the decree against debt. Debt. pleaded that he had paid away all intestate's estate, to satisfy debts due upon bond from intestate, before the *sci. fa.* brought, & before

he had notice of this decree; & thereupon the question was, whether this should be a *devastavit* in debt., in paying bond debts before this decree. It was decreed for pltf., that a decree in this ct. for a sum certain was equal to a judgment at law; & as an exor. shall be bound to take notice of a judgment at law, although in an inferior ct. of record, so much more of a decree in this ct., being a ct. of a higher authority & jurisdiction.

But if the decree had been only to account, & had not ascertained the sum, it would have been no more than a judgment *quoad computet* at law, which is no complete judgment till the account stated.—**SEARLE v. LANE** (1688), Freem. Ch. 103; 2 Vern. 88; 22 E. R. 1086, L. C.

*Annotation:—***Relf**, Morrice v. Bank of England (1736), Cas. temp. Talb. 217.

4171. —.]—The husband in consideration of his wife's joining with him in a fine, & parting with her jointure of £40 *per annum* gives her trustee a bond to settle other lands of £40 *per annum* on the wife for life, remainder to the heirs of his body by her. The husband being indebted in other bonds, dies intestate, & the wife takes administration, & confesses judgment to her trustee: on a bill by another bond-creditor decreed the wife's bond as to herself only, to be performed before pltf. is paid; but the children to have no benefit of this bond, preferable to the other bond-creditors, the husband being to be made tenant in tail of the lands by the condition of the bond.—**COTTE v. FRIPP** (1691), 2 Vern. 220; 23 E. R. 743.

4172. — Extent in aid taken out by simple contract creditor against himself.]—By an extent in aid, taken out by a simple contract creditor against himself & the debt found, he preferred himself to bond-creditors, who had recovered judgment against the exor., the exor. not being relievable in equity.—**DICKINSON v. MOLINEUX** (1692), Prec. Ch. 47; 24 E. R. 24.

4173. — Mortgage debts paid out of personal assets.]—One dies indebted by mtge. & simple contract; one of the contract creditors gets judgment of assets *cum acciderent*. The exor. applies the assets to pay off the mtge. The simple contract creditors shall stand in the place of the mtgee. as to what he has exhausted out of the personal assets; & this being only by the aid of equity, all the simple contract creditors shall come in equally with the creditor that got judgment.—**WILSON v. FIELDING**, **HILLERSDEN v. FIELDING** (1718), 2 Vern. 763; 10 Mod. Rep. 426; 1 Eq. Cas. Abr. 143; 23 E. R. 1098.

4174. —.]—**PATTERSON v. HUDDLESTON** (1729), 1 Barn. K. B. 186; 94 E. R. 128.

4175. —.]—One possessed of a term for 1,000 years articles to purchase the inheritance, & by will gives £3,000 to his daughter, & makes his son exor., & dies; the son assigns the term in trust to attend the inheritance, of which he takes a conveyance in his own name. Afterwards the son acknowledges a judgment to A., & mortgages the same lands to B. & dies insolvent; A. shall first be paid his judgment, then B. shall be paid his mtge., & then the daughter, being administratrix to her brother, is entitled to her legacy of £3,000 in preference to the simple contract creditors.—**CHARLTON v. LOW** (1734), 3 P. Wms. 328; 2 Eq. Cas. Abr. 463; 24 E. R. 1087, L. C.

4176. —.]—Where a bill prays for the payment of debts in a due course of administration,

PART IV. SECT. 2, SUB-SECT. 3.—
C. (a).

r. Paid part passu—Insolvent es-

take.]—In the administration of the assets of a person whose estate has proved insufficient to pay his debts, judgment creditors will be paid *part*

passu, & not in priority of time.—**M'CAUSLAND v. O'CALLAGHAN**, [1904] 1 I. R. 376.—**IR.**

a bond creditor cannot claim payment *pari passu* with a judgment creditor, on the ground that the bill is filed on behalf of all the specialty creditors, even though the assets may have been partially distributed *pari passu*, in the belief that there would be no deficiency.—*BERRINGTON v. EVANS* (1839), 3 Y. & C. Ex. 384; 160 E. R. 751.

4177. — Irish judgment creditor.—Where a testator died domiciled in Ireland, with legal assets in that country & in England, owing debts in both countries, & the exors. proved his will in both; but one of the exors. who collected the assets in Ireland remitted them to this country:—*Held*: an Irish judgment-creditor, who claimed to be paid out of the Irish legal assets in this country in priority, was entitled to be paid out of the legal assets here in the same priority as he would have been had they been administered in Ireland.—*COOK v. GREGSON* (1854), 2 Drew. 286; 2 Eq. Rep. 1132; 23 L. J. Ch. 731; 2 W. R. 401; 61 E. R. 729; *sub nom.* *COOKE v. GREGSON*, *COOKE v. KENT*, 23 L. T. O. S. 86.

Annotations.—*Consd.* *Re Kloebe*, *Kannreuther v. Geiselsbrecht* (1884), 28 Ch. D. 175. *Refd.* *Carron Iron Co. v. Maclaren* (1855), 5 H. L. Cas. 416; *Blackwood v. R.* (1882), 8 App. Cas. 82.

4178. Degrees of priority—Between judgment creditors—Power of executor to prefer.—*BLUNDIVELL v. LOVERDELL* (1661), 1 Sid. 21; 82 E. R. 946.

4179. — — — — ——Creditors under successive decrees, are entitled to payment according to their priorities.—*ABBIS v. WINTER* (1733), 3 Swan. 578, n.; 30 E. R. 983.

Annotations.—*Refd.* *Morrice v. Bank of England* (1736), 3 Swan. 573; *Dolland v. Johnson* (1854), 2 Sm. & G. 301.

4180. — — — — ——Where by Stat. Frauds it is said, that judgments shall not bind lands, but from the signing, this relates only to purchases, & therefore, as between creditors, a judgment entered in the vacation relates to the first day of the preceding term.

A. owes money by several judgments & bonds, & dies intestate. His administrator pays the judgments & some of the bonds, & pays more than the personal estate comes to; what the administrator paid on the judgments must be allowed him; but as to what he paid on the bonds, he must come in *pro rata* with other bond creditors out of the real assets.—*ROBINSON v. TONGE* (1735), 3 P. Wms. 398; 2 Eq. Cas. Abr. 259; 24 E. R. 1117, L. C.

Annotations.—*Refd.* *Ripley v. Waterworth* (1802), 7 Ves. 425; *Heath v. Brindley* (1834), 2 Ad. & El. 365. *Mentd.* *Waghorne v. Langmead* (1796), 1 Ros. & P. 571; *Re Tristram, Ex p. Hartley* (1835), 2 Mont. & A. 496; *Sproule v. Prior* (1836), 8 Sim. 189.

4181. — — — — ——An extrix. of A. who was greatly indebted to divers persons, in debts of different natures, is sued in this ct. by some of them; appears & answers immediately, & confesses their bill, some of plffs. here being her own daughters; other creditors sue the extrix. at law, where she cannot plead the decree, & obtain judgments. The decree here being for just debts is not *per fraudem*, & the creditors, plffs. at law, shall be enjoined, & the extrix. protected in her obedience to the decree; plffs. at law to come in afterwards in due course of administration, the whole being legal assets. The judgments of all cts. at law, having proper jurisdiction, whether by grant or prescription, are equally binding. The decrees in this ct. are of equal force with judgments at law; & the real priority in point of time, &

not by relation to the first day of a term, must give the preference in point of payment.—*MORRICE v. BANK OF ENGLAND* (1736), Cas. temp. Talb. 217; 3 Swan. 573; 25 E. R. 745, L. C.; *affd. sub nom.* *BANK OF ENGLAND v. MORICE* (1737), 2 Bro. Parl. Cas. 465.

Annotations.—*Consd.* *Perry v. Phillips* (1804), 10 Ves. 34; *Jackson v. Leaf* (1820), 1 Jac. & W. 229; *Dolland v. Johnson* (1854), 2 Sm. & G. 301. *Refd.* *Smith v. Haskins* (1742), 2 Atk. 385; *Martin v. Martin* (1749), 1 Ves. Sen. 211; *Anon.* (1758), 2 Keny. 294; *Paxton v. Douglas* (1803), 8 Ves. 520; *Clarke v. Ormonde* (1821), Jac. 108; *Lee v. Park* (1836), 1 Keen. 714; *Maerac v. Smith, Panton v. Smith* (1856), 2 K. & J. 411.

4182. — — — — ——In a suit to administer the estate of testator judgments obtained against his exors. are payable according to their respective dates out of legal assets.—*DOLLAND v. JOHNSON* (1854), 2 Sm. & G. 301; 2 Eq. Rep. 621; 23 L. J. Ch. 637; 23 L. T. O. S. 285; 18 Jur. 707; 2 W. R. 505; 65 E. R. 410.

Annotation.—*Refd.* *Re Bentluek*, *Bentluek v. Bentluek*, [1897] 1 Ch. 673.

4183. Necessity for recovery of judgment before decree for administration.—A creditor obtained a judgment against the exor., & on the same day, a decree was made for the administration of the estate:—*Held*: the judgment creditor had obtained no priority.—*PARKER v. RINGHAM* (1861), 33 Beav. 535; 55 E. R. 476.

Necessity for registration.—*See* Sub-sect. 3, C. (c).

(b) What constitute Judgments conferring Priority.

i. In General.

4184. Judgment confessed pending bill.—A judgment confessed by an exor. pending a bill here shall not be allowed upon an account of assets.—*SURBEY v. SMALLLEY* (1687), 1 Vern. 457; 1 Eq. Cas. Abr. 240; 23 E. R. 581, L. C.

4185. Voluntary judgment given by freeman of London.—A voluntary judgment given by a freeman of London, payable three months after his death, will be postponed to debts by simple contract, & to the widow's customary part, but will bind the freeman's legatory part.—*FAIRBEARD v. BOWERS & FOXCHAFT* (1690), Prec. Ch. 17; 2 Vern. 202; 1 Eq. Cas. Abr. 143; 24 E. R. 9.

Annotations.—*Consd.* *Jeffries v. Alexander* (1860), 8 H. L. Cas. 594. *Refd.* *Cray v. Ilooke* (1735), Cas. temp. Talb. 153; *Ramsden v. Jackson* (1737), 1 Atk. 292; *Fortescue v. Hennah* (1812), 19 Ves. 67.

4186. Judgment suspended by writ of error.—An exor. may justify payment of a statute when a judgment is suspended by writ of error.—*ANON.* (1693), 12 Mod. Rep. 43; 88 E. R. 1153.

4187. Judgment in respect of which writ of error pending.—A writ of error depending is a good plea in abatement to an action of debt upon a judgment. If such plea concludes with a prayer of *quod eat inde sine die quousque*, it is bad. If an exor. brings debt on a judgment against his testator, he may pending the writ pay a statute.—*PIRN v. EDWARDS* (1695), 1 Id. Raym. 47; 3 Salk. 145; 91 E. R. 927.

4188. Judgment after death of debtor.—R. having devised his real & personal estate to his exors., for payment of debts & legacies, & the creditors having preferred their bill to have satisfaction of their several debts out of the said estate; upon hearing of the cause it was decreed that the several creditors should come in before

PART IV. SECT. 2, SUB-SECT. 3.—C. (b) i.

a. Order for costs—Awarded by Probate Division.—Though the Pro-

bate Div. has jurisdiction to award the payment of the costs of litigation in that division out of the personal estate of deceased, the Ch. Div. has jurisdiction in the administration of assets

to regulate the order & priority in which such costs are to be paid. When a contest for priority arose between pecuniary legatees & parties who had been awarded, by a judgment of the

Sect. 2.—Payment of debts presently due: Sub-sect. 3, C. (b) i. & ii., & (c).]

the master, & prove their debts, & receive satisfaction for the same out of testator's personal estate, according to the course of law in payment of debts by exors. or administrators; & there being £800 in the master's hands, to be distributed amongst the creditors, as the ct. should direct; & the creditors having preferred their petition to have the direction of the ct. therein, it was insisted for some of the creditors that they had obtained judgments for their debts, that they ought to be preferred to creditors by simple contract. On the other side it was insisted that testator at the time of his decease owed no debt upon judgment, & that they, who had obtained judgments by contrivance against the said J., did by their bill charge themselves to be creditors by bond only, & that the bill was brought on behalf of themselves, & all other the creditors of the said testator; & did hope that the said testator's estate should be applied for satisfaction of his debts, according to his will, & should go accordingly without preference, share & share alike; & that they who had got judgments should not make use of the same to defraud the rest of the creditors. Ordered that the said testator's real & personal estate should be applied amongst the creditors share & share alike, without preference.—*KILDARE (EARL) v. KENT* (1702), *Freem. Ch.* 253; 22 E. R. 1190.

4189. Judgment in Mayor's Court.]—A judgment in the Lord Mayor's Ct., obtained against the garnishee does not entitle pltf. to rank as a judgment creditor in the administration of the garnishee's assets.—*HOLT v. MURRAY* (1827), 1 Sim. 485; 57 E. R. 659.

4190. Foreign judgment—Irish judgment.]—*COOK v. GREGSON*, No. 4177, *ante*.

—*WILSON v. DUNNANY (LADY)*,

No. 4150, *ante*.

4192. Order to sign judgment.]—An order nisi to sign judgment had been obtained in a creditors' action against an extrix. in the Exch. Div. for a balance admitted to be due from a testator's estate, but before judgment was signed a decree for the administration of the same estate in the Ch. Div. had been obtained by another creditor. On the motion of the parties to the administration action for the transfer of the first action to the Ch. Div.:—*Held*: the creditors who were plffs. in the Exchequer action had no priority over the other creditors, & the action must be transferred, & the proceedings therein stayed, plffs. in that action to be at liberty to prove for their claim & costs in the administration.—*Re STUBBS' ESTATE, HANSON v. STUBBS* (1878), 8 Ch. D. 154; 47 L. J. Ch. 671; 26 W. R. 736.

Annotations:—Reid. Crowder v. Stewart (1880), 16 Ch. D. 368; *Re Jones, Calver v. Laxton* (1885), 31 Ch. D. 440.

4193. — Under R. S. C., Ord. 14.—Failure to sign judgment under Ord. 41.]—An order under R. S. C., Ord. 14, r. 1, giving liberty to sign final judgment for the amount claimed by the writ of summons, is not equivalent to signing or entry of judgment, so as to give a judgment creditor's right of priority to a pltf. who has failed to follow up the order by signing judgment under Ord. 41.—*Re GURNEY, CLIFFORD v. GURNEY*, [1896] 2 Ch. 863; 66 L. J. Ch. 32; 75 L. T. 332; 45 W. R. 92; 41 Sol. Jo. 67.

4194. Balance order obtained by liquidator against personal representative of deceased con-

tributory.]—(1) Where under Companies Act, 1862 (c. 89), ss. 76 & 103, & General Ord., Nov. 1862, r. 35, a balance order has been obtained by the official liquidator of a co. against the legal personal representative of a deceased contributory for payment of a call made after the death, directing the legal personal representative to pay the call "out of the assets of deceased in his hands as such legal personal representative to be administered in due course of administration," such an order is not in the nature of a judgment so as to constitute the liquidator a judgment creditor; it is to be treated simply as analogous to a common administration judgment which may be obtained by the liquidator under sect. 105 of above Act, & which is his proper remedy in case the legal personal representative has failed to comply with the order; & therefore, the order, whether followed by an administration judgment or not, leaves untouched all priorities & rights usually existing in the due course of the administration of the estate of a deceased person, including an exor.'s right of retainer. Thus, the order, if obtained against the exors., does not give the liquidator priority over a debt due to one of them from testator, & therefore retained by that exor. out of the assets, even though the order be prior in date to notice of the retainer.

(2) One of several exors. is entitled to a right of retainer in respect of a mtge. debt due from testator to a body of trustees of whom that exor. is one.—*Re HUBBACK, INTERNATIONAL MARINE HYDROPATHIC CO. v. HAWES* (1885), 29 Ch. D. 934; 54 L. J. Ch. 923; 52 L. T. 908; 33 W. R. 666, C. A.

Annotations:—As to (1) Consd. Re Marvin, Crawford v. Marvin, [1905] 2 Ch. 490. *Reid. Re Ithodes, Ex p. Ithodes*, [1899] 1 Q. B. 905.

ii. Decrees of Courts of Equity.

4195. General rule.]—Debt by a decree shall be paid after judgments, & before debts by bond.—*HARDING v. EDGE* (1682), 1 Vern. 143; 2 Cas. in Ch. 94; 1 Eq. Cas. Abr. 144; 23 E. R. 375.

Annotation:—Reid. Morrice v. Bank of England (1736), 3 Swan. 573.

4196. —.]—*SEARLE v. LANE*, No. 4170, *ante*.

4197. —.]—A decree equal to a judgment at law.—*BISHOP v. GODFREY* (1701), *Prec. Ch.* 179; 24 E. R. 87.

Annotation:—Reid. Morrice v. Bank of England (1736), 3 Swan. 573.

4198. —.]—A final decree, upon a sum ascertained, is equal to a judgment: but a mere decree for an account of pltf.'s demand, & of the personal estate come to the hands of deft., with a mere direction for payment out of the result of that account, does not prevent the exor. paying a judgment.—*PERRY v. PHELIPS* (1804), 10 Ves. 34; 32 E. R. 756, L. C.

Annotations:—Reid. Lee v. Park (1836), 6 L. J. Ch. 93; *Whitaker v. Wright* (1843), 2 Hare, 310.

4199. —.]—Creditors by judgment at law, & creditors by decree in equity shall be paid equally by an exor., without any preference.—*PEPLOE v. SWINBURN* (1719), *Bunb.* 48; 145 E. R. 591.

4200. —.]—*MORRICE v. BANK OF ENGLAND*, No. 4181, *ante*.

4201. —.]—A decree against an exor. is in nature of a judgment at law. After that he may on motion, without filing a bill for an injunction, restrain a creditor suing at law. The exor. must pay the costs till notice of the decree, but not after

Probate Div., costs of contentious proceedings to be paid out of the assets, upon the personal estate proving insufficient for the discharge of both

costs & legacies:—*Held*: the costs awarded by the Probate Div. should be paid in priority to the legacies. the claims of creditors would

not be postponed to costs of contentious litigation between legatees or next-of-kin.—*GILLOOLY v. PLUNKETT* (1882), 9 L. R. Ir. 324.—*IR.*

notice; & he must make an affidavit as to the funds in his hands.—*PAXTON v. DOUGLAS* (1803), 8 Ves. 520; 32 E. R. 456, L. C.

Annotations.—*Reid*. *Lee v. Park* (1836), 1 Keen, 714. *Mentl*. *Vernon v. Thellusson* (1844), 1 Ph. 466.

4202. Decree for account.—*SEARLE v. LANE*, No. 4170, *ante*.

4203. ———.]—A decree *quod computet* makes no variation as to an exor., for before a final decree he may confess a judgment, & it does not at all alter the nature of the demand.—*SMITH v. EYLES* (1742), 2 Atk. 385; 26 E. R. 633, L. C.

Annotations.—*Reid*. *Perry v. Phillips* (1804), 10 Ves. 31; *Beaufort v. Phillips* (1847), 11 Jur. 600; *Phillips v. Homfray* (1883), 24 Ch. D. 439.

4204. ——— & for payment out of result of account.]—*PERRY v. PHILLIPS*, No. 4198, *ante*.

4205. Decree for specific performance.—A decree for specific performance of an agreement for purchase, by which it was referred to the master to compute interest on the purchase-money, & debt, was ordered to pay to plffs. what should be found due on the account directed, & also plff.'s costs when taxed, was held to have the effect of a judgment debt against the assets of deft., who had died before any proceeding under the decree had been taken.—*BEAUFORT (DUKE) v. PHILLIPS* (1847), 1 De G. & Sm. 321; 9 L. T. O. S. 352; 11 Jur. 600; 63 E. R. 1087.

Annotations.—*Distd*. *Chadwick v. Holt* (1856), 8 De G. M. & G. 584. *Reid*. *Garner v. Briggs* (1858), 27 L. J. Ch. 483; *Taylor v. Roe*, [1891] 1 Ch. 413.

(c) Necessity for Registration of Judgment.

See Land Charges Act, 1900 (c. 26), s. 2 (1); Law of Property Act, 1925 (c. 20), s. 195; Administration of Estates Act, 1925 (c. 23), s. 34.

4206. Against deceased—4 Will. & Mar., c. 20.—A debt on a judgment against a testator or intestate, not docketed according to above Act, is put by that Act on a level with simple contract debts. On a plea of *plene administravit*, to debt on a judgment against intestate not docketed, deft. may give in evidence payment of bond & other specialty debts, which exhausted all the assets.—*HICKEY v. HAYTER* (1795), 6 Term Rep. 384; 1 Esp. 313; 101 E. R. 608.

Annotations.—*Consd*. *Hall v. Tapper* (1832), 3 B. & Ad. 655. *Reid*. *Braithwaite v. Watts* (1832), 2 Tyr. 293; *Lloyd v. Nicholas* (1838), 6 Scott, 355; *Re Turner, Turner v. Waller* (1864), 12 W. R. 337.

4207. ———.]—*To sci. fa.* on a judgment, deft., an extrix., pleaded that she fully administered before she had notice of the recovery, & that she had had no assets since. Replication, that deft. had notice of the recovery on, etc., & had assets afterwards.—*Held*: the mention of notice in the plea was surplusage, & the replication bad, as leading to an immaterial issue; for a judgment, to be entitled to preference in administration, must be docketed pursuant to 4 Will. & Mar., c. 20, & notice of it in any other way is of no consequence.—*HALL v. TAPPER* (1832), 3 B. & Ad. 655; 110 E. R. 239.

Annotations.—*Consd*. *Horne v. Shepherd, Horne v. Dendy* (1857), 3 Jur. N. S. 806; *Walter v. Turner* (1864), 9 L. T. 756.

4208. ——— **Effect of Judgments Act, 1839 (c. 11).**—By 4 & 5 Will. & Mar., c. 20, judgments not docketed were not to have any preference against exors., etc., in the administration of estates. Judgments Act, 1839 (c. 11), closed the docket:—*Held*: the old law was thereby revived, & the administrator had committed a *devastavit* by paying a simple contract debt before a judgment debt, even though he had no actual notice of the latter.—*FULLER v. REDMAN* (No. 1) (1859), 20

Beav. 600; 29 L. J. Ch. 324; 33 L. T. O. S. 313; 5 Jur. N. S. 1046; 7 W. R. 430; 53 E. R. 1030.

Annotations.—*Consd*. *Jennings v. Rigby* (1863), 33 Beav. 198; *Re Turner, Turner v. Waller* (1864), 12 W. R. 337.

4209. ——— **Effect of Law of Property Amendment Act, 1860 (c. 38)—Executor with notice of judgment debts.**—Above Act, s. 3, restores the protection which was given to representatives against undocketed judgments by 4 & 5 Will. & Mar., c. 20; & therefore, where judgments are not registered, so as to form a charge upon land, they have no priority over simple contract debts; & an exor., even with notice of the judgment debts, is justified in parting with the assets to simple contract creditors.—*Re TURNER, WALTER v. TURNER* (1864), 3 New Rep. 413; 33 L. J. Ch. 232; 9 L. T. 756; *sub nom.* *WALLER v. TURNER*, 10 Jur. N. S. 147; *sub nom.* *Re TURNER, TURNER v. WALLER*, 12 W. R. 337.

Annotations.—*Reid*. *Van Ghelulve v. Nerlnck* (1882), 21 Ch. D. 189; *Re Illidge, Davidson v. Illidge* (1884), 51 L. T. 523.

4210. ———.]—*EVANS v. WILLIAMS* (1865), 2 Drew. & Sm. 324; 5 New Rep. 397; 34 L. J. Ch. 661; 11 L. T. 762; 11 Jur. N. S. 250; 13 W. R. 423; 62 E. R. 644.

4211. ———.]—The meaning of Law of Property Amendment Act, 1860 (c. 38), s. 3, like that of 4 Will. & Mar. (c. 20), s. 3, is not merely that protection is given to an exor. or administrator against an action for a *devastavit* by a judgment creditor of testator or intestate whose judgment has not been registered, but that such a judgment debt is not entitled in the administration of the estate to any priority over the simple contract debts of testator or intestate.—*VAN GHELULVE v. NERLNCK* (1882), 21 Ch. D. 189; 51 L. J. Ch. 620; 47 L. T. 46; 30 W. R. 780.

Annotation.—*Apld.* *Re Illidge, Davidson v. Illidge* (1884), 53 L. J. Ch. 991.

4212. ———.]—By 4 Will. & Mar., c. 20, no judgment not duly docketed shall "affect any lands as to purchasers or mtgees., or have any preference against heirs, exors., or administrators, in their administration of their ancestors', testators', or intestates' estates." Law of Property Amendment Act, 1860 (c. 38), s. 3, after reciting the above sect., & that by several later Acts judgments not registered shall not affect lands, tenements, or hereditaments, as to purchasers, mtgees., or creditors, & that the later Acts "do not expressly enact that judgments not docketed as thereby required shall not have preference against heirs, exors., or administrators in their administration of their ancestors', testators', or intestates' estates," in consequence whereof such heirs, etc., had lost the protection which they enjoyed under the first recited Act, it was enacted that no judgment not docketed under the Acts in force so as to bind "lands, etc., as against purchasers, mtgees., or creditors, shall have any preference against heirs, exors., or administrators in their administration of their ancestors', testators', or intestates' estates":—*Held*: the effect of the sect. was not only to protect heirs, exors., or administrators from an action by a judgment creditor for a *devastavit*, in case they should pay simple contracts in priority to the judgment debt, but also to regulate the order of administration, & therefore an unregistered judgment debt had no priority over a simple contract debt.—*Re ILLIDGE, DAVIDSON v. ILLIDGE* (1884), 27 Ch. D. 478; 53 L. J. Ch. 991; 51 L. T. 523; 33 W. R. 18, C. A.

Annotation.—*Mentl.* *Re Moon, Holmes v. Holmes*, [1907] 2 Ch. 304.

4213. Against representative.—Law of Property

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Amendment Act, 1860 (c. 38), s. 3, providing that unregistered judgments shall have no preference in the administration of assets, does not apply to judgments obtained against a personal representative; & consequently such judgments, if obtained before decree, must, though not registered until after decree, be paid in preference to simple contract debts, & in order of priority according to the dates of their being entered up.—*Re RIGBY, JENNINGS v. RIGBY* (1863), 33 Beav. 198; 3 New Rep. 22; 33 L. J. Ch. 149; 9 L. T. 308; 9 Jur. N. S. 1144; 12 W. R. 32; 55 E. R. 343.

Annotations:—*Fold. Re Williams' Estate, Williams v. Williams* (1872), L. R. 15 Eq. 270. *Reid. Re Bentinck, Bentinck v. Bentinck* (1897), 66 L. J. Ch. 359.

4214. —.]—By 32 & 33 Vict., c. 46, the distinction between specialty & simple contract debts in the administration of assets of deceased persons is abolished, but a creditor who first takes legal proceedings against the legal personal representative, & obtains judgment, is, though it be not registered, entitled to be paid his debt in full in priority over all other creditors.—*Re WILLIAMS' ESTATE, WILLIAMS v. WILLIAMS* (1872), L. R. 15 Eq. 270; 42 L. J. Ch. 158; 28 L. T. 17; 21 W. R. 160.

Annotations:—*Distd. Re Stubbs' Estate, Hanson v. Stubbs* (1878), 8 Ch. D. 154; *Re Jones, Calver v. Laxton* (1885), 31 Ch. D. 440; *Re Bentinck, Bentinck v. Bentinck*, [1897] 1 Ch. 673; *Re Hankey, Cunliffe Smith v. Hankey*, [1899] 1 Ch. 541. **Consd. Re Samson, Robbins v. Alexander, [1906] 2 Ch. 584. *Reid. Crowder v. Stewart* (1880), 16 Ch. D. 368; *Smith v. Morgan* (1880), 5 C. P. D. 337.**

D. Debts due upon Recognisance.

4215. Priority over bond debt.—Statute to perform covenants—Covenants unbroken.]—HARRISON'S CASE, No. 4165, *ante*.

4216. Necessity for enrolment.]—A recognisance not enrolled shall be looked upon as a bond, paid as a debt by specialty.—*BOTTOMLY v. FAIRFAX (LORD)* (1716), 1 Eq. Cas. Abr. 141; 1 P. Wms. 334; 2 Vern. 750; 21 E. R. 413, L. C. **Annotation:—***Reid. R. v. Bingham* (1829), 3 Y. & J. 101.

4217. What are debts due upon recognisance—Money not accounted for & due from receiver.]—Money not accounted for & due from a receiver under the ct. is, by his recognisance, made a debt of record, although the balance due has not been ascertained.—*SEAGRAM v. TUCK* (1881), 18 Ch. D. 206; 50 L. J. Ch. 572; 44 L. T. 800; 29 W. R. 784.

E. Specialty and Simple Contract

See Administration of Estates Act, 1800 (c. 40); Administration of Estates Act, 1925 (c. 23), ss. 32, 34.

4218. Right of representative to prefer simple contract creditors—Landlord's claim for rent.]—Rent is a specialty debt within Administration of Estates Act, 1800 (c. 40), & therefore, a landlord has no preferential claim against the estate of a deceased tenant for rent in arrear at the death of the tenant as against the simple contract creditors.—*Re HASTINGS, SHURREFF v. HASTINGS* (1877), 6 Ch. D. 610; 47 L. J. Ch. 137; 25 W. R. 842.

4219. —.]—The effect of Administration of Estates Act, 1800 (c. 40), being to place simple

contract creditors & specialty creditors on an equal footing in the administration of an estate, an exor. may, in exercise of his right of preference, pay a simple contract creditor in priority to a specialty creditor of his testator.—*Re ORSMOND, DRURY v. ORSMOND* (1887), 58 L. T. 24; 4 T. L. R. 73.

Annotation:—*N.F. Re Hankey, Cunliffe Smith v. Hankey*, [1899] 1 Ch. 541.

4220. —.]—Insolvent estate.]—(1) An exor.'s or administrator's right of preference stands on the same footing as his right of retainer, & notwithstanding Administration of Estates Act, 1800 (c. 46), can only be exercised as between creditors of equal degree.

(2) Simple contract debts cannot be paid in preference to specialty debts in the case of an insolvent estate.—*Re HANKEY, CUNLIFFE SMITH v. HANKEY*, [1899] 1 Ch. 541; 68 L. J. Ch. 242; 80 L. T. 47; 47 W. R. 444; 15 T. L. R. 162.

Annotation:—*As to (2) Overd. Re Samson, Robbins v. Alexander*, [1906] 2 Ch. 584.

4221. —.]—An exor.'s right of preference of one creditor over another before a judgment for administration has not been abolished by Administration of Estates Act, 1800 (c. 46), & as a result of that Act can now be exercised as against specialty & simple contract creditors on an equal footing, so that a simple contract creditor of testator may be preferred by the exor. to a specialty creditor.—*Re SAMSON, ROBBINS v. ALEXANDER*, [1906] 2 Ch. 584; 76 L. J. Ch. 21; 95 L. T. 633, C. A.

Annotations:—*Consd. Re Jenness, Oetzer v. Jenness* (1909), 53 Sol. Jo. 376. *Apld. Re Harris, Davis v. Harris*, [1914] 2 Ch. 395. *Reid. Re Laycock, Laycock v. Income Tax Special Comrs.*, [1910] 1 Ch. 241.

Priority over voluntary bonds.]—See Sub-sect. 3, F.

4222. Effect of payment before suit for administration.]—A creditor having five bonds, one of which had been paid before the bill filed & afterwards a decree being made that the specialty creditors should abate in proportion, shall not be called upon to bring back what he has received, but shall only abate on the outstanding debt.—*LOWTHIAN v. HASEL* (1793), 4 Bro. C. C. 167; 29 E. R. 834.

Annotation:—*Mentd. Re Midland Express, Pearson v. The Co.*, [1913] 1 Ch. 499.

4223. Effect of creditor obtaining personal decree against representative.]—B. died equitably indebted to A. After B.'s death it was arranged between C., who was his exor. & devisee, & A., that C., who admitted that he took under the devise real assets enough to pay B.'s debts, & that he was liable to pay A.'s claim out of them, should not be called upon for immediate payment of the principal, but should pay interest on it. A. afterwards filed a bill to enforce payment either by C. or out of B.'s assets, & obtained a decree against C. personally for payment of the money due, which decree reserved further consideration & liberty to apply, but did not give any remedy against the assets. A suit was subsequently instituted by a mtgee., to whom C. had mortgaged one of the devised estates, & the estate was sold in this latter suit:—*Held*: A. had not, by obtaining a personal decree against C., lost her rights as a creditor against the assets of B., & her claim against the surplus proceeds of the sale in the mtgor.'s suit had priority over that of a judgment

PART IV. SECT. 2, SUB-SECT. 3.—E.

1. Mortgage debt—Preferred to simple contract debt.]—In payment of debts, a mtgee., not due, must be preferred before simple contract debts, & *plfd.* may show that simple contract debts have been first paid, under the

replication of assets in hand when action brought, & need not reply specially.—*FORSTY v. JOHNSTON* (1841), 9 Ont. Dig. 8747.—**CAN.**

2. Executor transfers of mortgage—To secure principal & further advances—Payment of debt due by testator—After

administration judgment.]—The transferee of a mortgage made to secure present indebtedness and future advances became, on the death of the mortgagor, the executor of the latter, & a party to a suit to administer the mortgagor's estate. After the date

creditor of O., though the judgment was prior in time to the decree in A.'s suit.—*DE SORBEIN v. BLAND, TRITTON v. BLAND, CUNLIFFE v. BLAND* (1858), 2 De G. & J. 158; 31 L. T. O. S. 140; 4 Jur. N. S. 959; 44 E. R. 948, L. J.J.

4224. Effect of creditor attaching assets of deceased.]—A creditor who after his debtor's death, obtains an attachment in the Lord Mayor's Ct., against part of the assets, gains no priority over the fund attached as against the other creditors of deceased.—*REDHEAD v. WELTON* (1861), 29 Beav. 521; 30 L. J. Ch. 577; 4 L. T. 230; 9 W. R. 473; 54 E. R. 730.

Annotations:—Folld. Barnfather v. Barrow, Barrow, Page & Draper (1877), 37 L. T. 231; *Levy v. Lovell* (1880), 14 Ch. D. 234.

F. Voluntary Bonds.

See, generally, MAYOR'S COURT, LONDON.

4225. When preferred to other debts.]—The husband before marriage gave a bond to leave his wife £1,500 if she survived; they married, & he died in debt to others, & made no provision for her:—*Held*: this bond should be satisfied before other creditors.—*HODGKIN v. BLACKMAN* (1075), *Cas. temp. Finch*, 232; 23 E. R. 128.

4226. — Effect of assignment for value.]—Power of appointment over a sum of money, to be raised under a trust term, executed in favour of volunteers, is assets for creditors. But the equity of a purchaser from a party, taking under a voluntary deed of appointment, was preferred to that of general creditors, having no specific charge.—*GEORGE v. MILBANKE* (1803), 9 Ves. 190; 32 E. R. 575, L. C.

Annotations:—Consd. Daubeny v. Cockburn (1816), 1 Mer. 626; *Apld. Houlditch v. Wallace* (1838), 5 Cl. & Fin. 629; *Aldborough v. Trye* (1840), 7 Cl. & Fin. 437; *Payne v. Mortimer* (1859), 4 De G. & J. 447. **Consd.** Halifax Joint Stock Banking Co. v. Gledhill, [1891] 1 Ch. 31. **Refd.** Skeels v. Shearly (1837), 3 My. & Cr. 112; *Clarke v. Willott* (1872), L. R. 7 Exch. 313; *Judd v. Green* (1875), 45 L. J. Ch. 108; *Re Williams & Parry's Contract* (1895), 72 L. T. 869; *Cloutte v. Storey*, [1911] 1 Ch. 18; *Harrods v. Stanton*, [1923] 1 K. B. 516.

4227. — Of equitable interest in money payable under bond.]—The assignee for value of an equitable interest in the money payable under a voluntary bond:—*Held*: entitled to rank as a specialty creditor for value against the assets of the obligor.—*PAYNE v. MORTIMER* (1859), 4 De G. & J. 447; 28 L. J. Ch. 716; 33 L. T. O. S. 203; 5 Jur. N. S. 749; 7 W. R. 646; 45 E. R. 173, L. J.J. *Annotations:—Consd.* Halifax Joint Stock Banking Co. v. Gledhill, [1891] 1 Ch. 31; *Re Williams & Parry's Contract* (1895), 72 L. T. 869.

4228. —.]—In the administration of assets a voluntary bond is to be preferred to interest upon debts not by law carrying interest.—*GAIRARD v. DINORBEN (LORD)* (1846), 5 Hare, 213; 15 L. J. Ch. 439; 7 L. T. O. S. 338; 10 Jur. 772; 67 E. R. 891.

— Priority over legacies.]—See Nos. 4233-4240, post.

4229. — Priority over legal expenses.]—The payment of the expenses of the reconveyance of mortgaged premises to the real representative, & of the costs of an ejectment to recover the mortgaged premises, ought to be postponed to the claim of an annuity creditor by voluntary deed.—*EDWARDS v. EDWARDS* (1834), 2 Cr. & M. 612; 4 Tyr. 438; 3 L. J. Ex. 204; 149 E. R. 905.

4230. — Priority over promissory note without consideration.]—The payee of a promissory note given without consideration is not, even in

the administration of a solvent estate, in the same position as the payee of a voluntary bond, so as to be entitled to claim against the estate after creditors for value. A lunatic, while sane, had given a promissory note for £50,000, payable in instalments of £5,000 each, in discharge of what he considered was a moral obligation, & had paid three of such instalments. Upon a claim made against his estate, which was a very large one, after he had been found lunatic, by the holder of the note for the sum of £35,000, being the amount of the unpaid instalments thereon, to which claim the next of kin consented:—*Held*: although, as the gift was voluntary, the payee of the note was not entitled to claim as a creditor against the lunatic's estate, the ct. in the exercise of its discretion would order the payment to be made thereout, by way of bounty & as in discharge of a debt of honour on the part of the lunatic, which, under the circumstances, it ought to recognise.—*Re WHITAKER (A PERSON OF UNSOUND MIND)* (1880), 42 Ch. D. 119; 58 L. J. Ch. 487; 61 L. T. 102; 37 W. R. 673; 5 T. L. R. 424, C. A.

4231. When postponed to other debts. To debt of record.]—*BERRINGTON v. EVANS*, No. 4176, *ante*.

4232. — To specialty debts.] *BEDFORD v. GIBSON* (1743), 9 Mod. Rep. 412; 88 E. R. 511, L. C.

4233. — To simple contract debts.—Real debts.]—A voluntary bond shall not be paid in a course of administration, so as to take place of real debts, though by simple contract; but such voluntary bond shall be paid before legacies.—*JONES v. POWELL* (1712), 1 Eq. Cas. Abr. 84; 21 E. R. 890, L. C.

Annotations:—Refd. Bedford v. Gibson (1743), 9 Mod. Rep. 412; *Blount v. Doughty* (1747), 3 Atk. 481; *Whitaker v. Wright* (1843), 2 Hare, 310; *Jeffries v. Alexander* (1860), 8 H. L. Cas. 594.

4234. —.] Where a voluntary bond is given by the husband to trustees for his wife's benefit, a ct. of equity will postpone such bond even to debts on simple contract, but will admit it to be paid before legacies.—*WILLIAMS v. SAWYER* (1730), Kel. W. 6; 25 E. R. 466.

4235. —.]—*Bedford v. Gibson* (1743), 9 Mod. Rep. 412; 88 E. R. 511, L. C.

4236. —.] Testator had given a voluntary bond. Bill filed for the payment of it. Payment was ordered, but not till after all the debts of testator for valuable considerations were paid; & then to be paid in preference to the legatees.—*SAUNDERS v. GRAVES* (1743), 1 Dick. 93; 21 E. R. 203.

4237. —.]—Creditors by voluntary contract have a right to marshal the assets of a testator as against legatees & devisees, but not as against creditors for value; & therefore, where the personal estate has been exhausted by mtges. & specialty creditors for value, the voluntary creditors have a right to stand in their place against the real estates.—*LOMAS v. WRIGHT* (1833), 2 My. & K. 769; 3 L. J. Ch. 68; 39 E. R. 1138.

Annotations:—Apld. Morse v. Tucker (1816), 5 Hare, 79. **Refd.** Watson v. Parker (1843), 6 Beav. 283. **Mend.** Northern v. Carnegie (1859), 4 Drew. 587.

4238. — Promissory note.]—In an administration suit a voluntary bond is treated, not according to its legal force as a specialty debt, nor even as equal to a simple contract debt for valuable consideration, but as payable in priority of any legacy; & this principle would seem to

of the judgment for administration the executor was compelled to pay, under a guarantee, a debt due by the deceased mortgagor, & thereupon claimed to rank as a secured creditor against the

lands comprised in the mortgage under the said mortgage, & the transfer thereof to him.—*Held*: affirming the decision of Barton, J., that, notwithstanding the payment having been

made subject to the judgment for administration, the executor was entitled to rank as a secured creditor in respect of the sum so paid by him.—*GANNON v. GANNON*, [1909] 1 L. R. 47.—*IR.*

Sect. 2.—Payment of debts presently due: Sub-sect. 3, F., G., H. & I.; sub-sect. 4, A. (a) & (b).]

apply as much to a promissory note by which testator had voluntarily bound himself as to the voluntary obligation by bond.—*DAWSON v. KEARNTON* (1856), 3 Sm. & G. 186; 25 L. J. Ch. 166; 26 L. T. O. S. 256; 2 Jur. N. S. 113; 4 W. R. 222; 65 E. R. 617.

Annotation:—Consd. Re Whitaker (1889), 42 Ch. D. 119.

4239. ———.]—A. executed a voluntary settlement of personal property, upon trust after his death to pay thereout his debts, & also any legacies or sums of money, not exceeding in the whole the sum of £400, which the settlor by will, or by any writing signed by him, should direct, & subject thereto, upon trust for B. A. subsequently, & with intent to defeat the settlement, executed voluntary bonds for sums exceeding £400:—*Held*: the bonds constituted debts within the meaning of the settlement, & were payable, in the administration of assets, after simple contract debts for value.—*MARKWELL v. MARKWELL*, *MARKWELL v. BULL* (1864), 31 Beav. 12; 34 L. J. Ch. 55; 10 L. T. 834; 10 Jur. N. S. 816; 12 W. R. 1095; 55 E. R. 535.

4240. ——— *Position of volunteer under contract.*—A mere voluntary charge on an equitable reversionary interest, although coupled with covenants for payment & further assurance, cannot be held equivalent to an assignment *pro tanto* so as to give the volunteer claiming thereunder priority as against creditors for value.—*Re LUCAN (Estate)*, *HARDINGE v. COBDEN* (1890), 45 Ch. D. 470; 60 L. J. Ch. 40; 63 L. T. 538; 39 W. R. 90.

G. Debts due by Deceased as Overseer of Poor.

See Poor Relief Act, 1743 (c. 38), s. 3; & generally, *POOR LAW*.

4241. What debts—Poor rates.—*Re BOOTH*, *FISHER v. SHIRLEY*, [1879] W. N. 108.

H. Debts due by Deceased as Officer of Friendly Society.

See BANKRUPTCY, Vol. IV., pp. 471–473, Nos. 4250–4271; *FRIENDLY SOCIETIES*.

I. Debts due by Deceased as Officer of Savings Bank.

See Trustee Savings Bank Act, 1863 (c. 87), s. 14; *Savings Banks Act*, 1891 (c. 21), s. 13.

4242. Priority over other debts owing by officer.—Under Savings Bank Act, 1833 (c. 14), s. 28, the *ex. will*, on petition, order payment of a debt due to a savings bank, from the treasurer of such savings bank, out of the first moneys to be received, before any report made, in a suit for the administration of the estate of such treasurer; but the *ex.* will not make any order for the payment of the costs of the petition.—*HATCH v. LEE* (1841), 10 L. J. Ch. 223.

4243. ———.]—*THOMPSON v. HOWARTH* (1851), 17 L. T. O. S. 108.

4244. ——— *Administration of insolvent estate.*—The actuary of a savings bank died insolvent, owing the bank money received in his capacity of actuary. In an action in the Ch. Div. for the administration of the actuary's estate:—*Held*:

such payment.—*TILLAKCHAND HINDU-MAL v. TILAMAL SUDARAM* (1873), 10 Bom. 306.—*IND.*

4245 II. ———.]—*Exors. or administrators may retain for debts barred by Stat. Limitations though it is set up by legatees or next of kin.*—*CLINTON*

the bank would be entitled to priority by Trustee Savings Banks Act, 1863 (c. 87), s. 14, but *Bkpcy. Act*, 1883 (c. 52), s. 40, took away the right to such priority in *bkpcy. proceedings*.—*Re WILLIAMS, JONES v. WILLIAMS* (1887), 36 Ch. D. 573; 57 L. J. Ch. 264; 57 L. T. 756; 36 W. R. 34; 3 T. L. R. 805.

In bankruptcy proceedings.—*See BANKRUPTCY*, Vol. IV., pp. 473, 474, Nos. 4272–4276.

SUB-SECT. 4.—DEBTS NOT RECOVERABLE AT LAW.

A. Debts barred by Statutes of Limitation.

(a) Right to Pay.

4245. General rule.—(1) Where one of two joint *exors.* was applied to for payment of a debt of his testator, who had been dead twenty years, & as against whom the debt was barred by Stat. Limitations, & said, "I believe the debt is a just one, & has never been paid. I should be happy to serve you in the matter if I could, but I cannot do anything without the consent of testator's family." In an action against both the *exors.*:—*Held*: there was no such acknowledgment of the debt, as took the case out of Stat. Limitations, as against them, there being no promise, express or implied, to pay the debt.

(2) An *exor.* is not justified in waiving a legal defence, to a claim made against the estate, & if he voluntarily pay a debt, which is barred by Stat. Limitations, he cannot charge it against those who are interested in testator's property.—*MCULLOCH v. DAWES* (1826), 9 Dow. & Ry. K. B. 40; 5 L. J. O. S. K. B. 56.

Annotations:—As to (1) Refd. Scholey v. Walton (1844), 12 M. & W. 510; *Briggs v. Wilson* (1853), 5 De G. M. & G. 12; *Re Macdonald, Dick v. Fraser*, [1897] 2 Ch. 181. *As to (2) Dtd. Hill v. Walker* (1858), 4 K. & J. 166. *N.F. Midgley v. Midgley*, [1893] 3 Ch. 282. *Refd. Re Rowson, Field v. White* (1885), 29 Ch. D. 358.

4246. ———.]—An *exor.* may pay as debt proved to be justly due by his testator, although barred by Stat. Limitations; & on the same principle may have a right to retain his own just debt, although barred by the statute.

Semble: the *exor.*'s right to retain for his own debt may be asserted, not only after the assets have been paid by him into *ct.*, but at any time before the distribution of the estate.—*STAHL-SCHMIDT v. LETT* (1853), 1 Sm. & G. 415; 1 Eq. Rep. 407; 21 L. T. O. S. 208; 65 E. R. 182.

Annotations:—Foll. Hill v. Walker (1858), 4 K. & J. 166. *Refd. Coombs v. Coombs* (1866), L. R. 1 P. & D. 288; *Trevor v. Hutchins*, [1896] 1 Ch. 844; *Re Rhoades, Ex p. Rhoades*, [1899] 1 Q. B. 905.

4247. ——— *Insufficiency of personal estate immaterial.*—An *exor.* may, in the exercise of his discretion, pay a debt barred by Stat. Limitations, notwithstanding that the personal estate of testator is insufficient; & he will be allowed the payment as against the devisees of real estate, upon which other debts are in consequence thrown.—*LOWIS v. RUMNEY* (1867), L. R. 4 Eq. 451; 32 J. P. 19.

4248. ——— *Judicial declaration that debt statute-barred.*—Although it has been established as a general rule that an *exor.* may pay a debt barred by Stat. Limitations without being guilty of a *devastavit*, he may not pay such a debt after it has

r. BROPHY (1847), 10 I. Eq. R. 139.—*IR.*

b. Intervention of rights of third parties.—*See last will of R. v. certain land to his son J., charged with a legacy bequeathed to two daughters, in the event of land directed to be sold*

PART IV. SECT. 2, SUB-SECT. 4.—A. (a).

4245 I. General rule.—An *exor.* may pay a debt justly due by his testator, though barred by the Stat. Limitations, & will in equity be allowed credit for

been judicially declared by a ct. of competent jurisdiction that it is barred by the statute.

Qu.: whether an exor. may pay a debt barred by the statute against the declared wish of his co-exor.

If an action is brought against several exors. for the recovery of a debt due to testator & they plead different inconsistent pleas, that plea is to be enforced by the ct. which is most for the benefit of the estate. An administration summons was taken out by an alleged creditor against two exors., S. & M. S. filed an affidavit stating that the debt was owing, & that he was willing to pay it. M., who was also general legatee, filed an affidavit pleading Stat. Limitations. The judge decided that the debt was barred by the statute, & dismissed the summons. S. then, by the advice of his solr., notwithstanding this judgment, paid the debt out of the assets to the solr., who paid it to the creditor. In an action by M. against S., the creditor, & the solr.:—*Held*: S. committed a *devastavit* by payment of the debt, & S., the creditor, & the solr. were liable to repay the money to testator's estate.—*Re MIDGLEY, MIDGLEY v. MIDGLEY*, [1893] 3 Ch. 282; 62 L. J. Ch. 905; 69 L. T. 211; 41 W. R. 659; 9 T. L. R. 565; 37 Sol. Jo. 616; 2 R. 561, C. A.

Annotations:—*Reid*. Budgett v. Budgett, [1895] 1 Ch. 202; Trevor v. Hutchins, [1896] 1 Ch. 811; *Re Macdonald*, Dick v. Fraser (1897), 76 L. T. 713.

4249. Judgment recovered in respect of debt barred by lapse of time.—*Right of representative to be allowed payment of debt.*—Exors. had confessed judgment in an action brought against them to recover a debt barred by lapse of time & had paid the debt. In an administration suit: *Held*: they were entitled to be allowed such payment. *Re FREER'S ESTATE, HUNTER v. BAXTER* (1861), 3 Giff. 214; 31 L. J. Ch. 432; 5 L. T. 16; 66 E. R. 388.

Annotation:—*Reid*. *Re Lacy*, Howard v. Lightfoot (1906), 51 Sol. Jo. 67.

(b) *Setting up Statutes of Limitation after Order for Administration.*

4250. By beneficiary—Failure of representative to set up statute.—If a man devises all the rest & residue of his personal estate, after debts & legacies paid, to J. & several of the creditors are barred by Stat. Limitations, who, notwithstanding, bring actions against the exor., & he refuses to plead the statute, yet Equity will not, in favour of J. to whom the surplus is devised, compel the exor. to plead the statute.—*CASTLETON (LORD) v. FANSHAW (LORD)* (1699), 1 Eq. Cas. Abr. 305; 2 Eq. Cas. Abr. 254; *Proc. Ch.* 99; 21 E. R. 1064.

Annotations:—*Expld.* Shewen v. Vanderhorst (1831), 1 Russ. & M. 347. *Reid*. *Re Wenham*, Hunt v. Wenham, [1892] 3 Ch. 59.

4251. ———.]—Under the common decree in an administration suit, a creditor applied to prove a debt which was barred by lapse of time, & the exors. refusing to interfere, pltf., a residuary legatee, insisted on setting up the objection of the statute:—*Held*: it was competent for pltf., or any other party interested in the fund, to take advantage of the statute before the master, notwithstanding the refusal of the exors.—*SHEWEN v. VANDERHORST* (1831), 1 Russ. & M. 347; 1 L. J. Ch. 107; 39 E. R. 134.

Annotations:—*Consd.* Fuller v. Redman (No. 2) (1859), 26 Beav. 614. *Apld.* Phillips v. Beal (No. 2) (1863), 32

Beav. 26. *Reid*. *Beeching v. Morphen* (1850), 8 Hare, 139; *Briggs v. Wilson* (1853), 5 De G. M. & G. 12; *Trevor v. Hutchins*, [1896] 1 Ch. 844; *Re Fleetwood & District Electric Light & Power Syndicate*, [1915] 1 Ch. 486. *Mentd.* Tomlin v. Tomlin (1811), 1 Hare, 236.

4252. ———.]—(1) Where an indorsement on a promissory note of payment of interest, made by the authority of a deceased holder, appears to have been made after Stat. Limitations had run, it is not evidence to exclude the operation of the statute.

(2) Where Stat. Limitations had run against a debt, due from a testator before his death, & the exor. wrote thus to the creditor: "The legatees object to my paying the claim though I think it just"; & "I not only do not dispute the claim, but admit it, thinking it just, but am compelled to refuse payment without an order of the ct.": *Held*: the debt was not revived, & the real estate could not be subjected to it by any act of the devisees in trust, though they were also exors.

(3) Where an exor. does not set up Stat. Limitations on a creditor's administration summons, the residuary legatees cannot set it up against pltf. *BRIGGS v. WILSON* (1851), 5 De G. M. & G. 12; 2 Eq. Rep. 153; 23 L. T. O. S. 136; 13 E. R. 772, L. J.

Annotations:—*As to* (1) *Reid*. Taylor v. Witham, Witham v. Taylor (1876), 24 W. R. 877; Newbould v. Smith (1885), 29 Ch. D. 882. *As to* (3) *Reid*. Fuller v. Redman (No. 2) (1859), 26 Beav. 614; *Re Lacy*, Howard v. Lightfoot (1907), 76 L. J. Ch. 316. *Generally*, *Mentd.* Coope v. Crosswell (1866), L. R. 2 Eq. 106.

4253. ———.] A testator devised two estates, one to pltf., his exor., charged with the payment of debts, the other to deft., unencumbered. The exor. was a creditor of testator. Pltf., as such exor., had applied all testator's personal assets in the satisfaction of one specially debt. He next sold the estate devised to himself, & expended all the proceeds in payment of other debts; but did not retain his own out of these. There was still a deficiency, & he then sought to have deft.'s estate sold under 3 & 4 Will. 4, c. 101, & presented a petition praying a declaration that he might be entitled to retain out of the proceeds of the sale of this estate, the amount of his debt. Part of his debt was barred by Stat. Limitations at the death of testator: *Held*: deft., the devisee of the estate sought to be sold under 3 & 4 Will. 4, c. 101, might set up Stat. Limitations in opposition to pltf.'s debt. *DRING v. GRIETHAM* (1853), 1 Eq. Rep. 442; 23 L. J. Ch. 156; 22 L. T. O. S. 10; 1 W. R. 528.

4254. ———.] *FORDHAM v. WALLIS*, No. 4283, *post*.

4255. ———.]—(1) The acknowledgment provided for by Civil Procedure Act, 1833 (c. 42), s. 5, in order to take a specially debt out of the operation of that statute, need not be made by the person chargeable to the person entitled, or amount to a promise to pay:—*Held*: therefore, an admission of a bond debt, contained in the answer of the exors. of the obligor in a suit to which the obligee was not a party, was sufficient to take the bond debt out of the operation of that statute.

(2) A residuary legatee may set up Stat. Limitations as against creditors in an administration suit, though the exors. do not take the objection.—*MOODIE v. BANNISTER* (1859), 4 Drew. 432; 28 L. J. Ch. 881; 32 L. T. O. S. 376; 4

to raise money for payment of the legacy not proving sufficient for that purpose. The proceeds of the land when sold were insufficient to pay the legacy in full, & J., who was the exor. of the will, before making up the

deficiency, made an assignment under the provisions of the *Assignment Act* to F., & subsequently applied in the Ct. of Probate for an order to sell land for the purpose of paying the balance of the legacy:—*Held*: there being

merely a charge upon the share of the estate given to J., & no payment within 20 years, the legatees were barred from resorting to the land in question. *Re RUNCIMAN'S ESTATE* (1905), 38 N. S. R. 89.—*CAN.*

Sect. 2.—Payment of debts presently due: Sub-sect. 4. A. (b) & (c) i.]

5 Jur. N. S. 402; 7 W. R. 278, 318; 62 E. R. 166.

Annotations:—As to (1) *Reid*. Gopeekishen Goshamee v. Brindabunchunder Sircar Chowdhry (1869), 13 Moo. Ind. App. 37. As to (2) *Reid*. Fuller v. Redman (No. 2) (1859), 26 Beav. 614; Trevor v. Hutchins, [1896] 1 Ch. 844. *Generally, Mentd.* Lucas v. Dixon (1889), 58 L. J. Q. B. 161; *Re Lacey*, Howard v. Lightfoot, [1907] 1 Ch. 330.

4256. By creditor—Against debt on which decree for administration founded.]—In taking the accounts in an administration suit, any creditor may object that another creditor's debt is barred by Stat. Limitations. *Semble*: such an objection cannot be taken to pltf.'s debt, which is the foundation of the decree.—*FULLER v. REDMAN* (No. 2) (1859), 26 Beav. 614; 53 E. R. 1035.

Annotations:—*Consd.* Fox v. Garrett, Miles v. Fox (No. 1) (1860), 28 Beav. 16. *Reid.* *Re Lacey*, Howard v. Lightfoot (1906), 51 Sol. Jo. 67.

4257. ———.]—Where an exor. has not in the pleadings set up Stat. Limitations against pltf.'s claim, it is not competent for a creditor to do so at chambers after the decree.—*ADAMS v. WALLIS* (1860), 35 L. J. Ch. 727; 14 L. T. 727; 14 W. R. 789.

4258. By court—On behalf of absent beneficiary—Failure of representative & other beneficiaries to set up statute.]—After decree in an administration suit, the ct. is not bound, on behalf of an absent party beneficially interested in the estate, to disallow claims against the estate barred by Stat. Limitations, if the personal representative, & such of the persons beneficially interested as are parties to the suit or have come in under the decree, do not set up the statute.—*Re ALSTON*, ALSTON v. THORLORPE (1866), L. R. 2 Eq. 205; 35 Beav. 460; 35 L. J. Ch. 846; 14 L. T. 451; 14 W. R. 722; 55 E. R. 976.

Annotation:—*Reid.* *Re Wenham*, Hunt v. Wenham, [1892] 3 Ch. 59.

4259. On originating summons.]—Upon the hearing of an originating summons taken out by the exor., under R. S. C., Ord. 55, r. 3, to determine whether a deft. is a creditor or not, it is competent for the residuary legatee, also a deft., to set up the objection of Stat. Limitations, notwithstanding the refusal of the exor. to interfere. *Re WENHAM*, HUNT v. WENHAM, [1892] 3 Ch. 59; 61 L. J. Ch. 565; 67 L. T. 618; 40 W. R. 636; 36 Sol. Jo. 540.

Annotations:—*Reid.* Budgett v. Budgett, [1895] 1 Ch. 202; Trevor v. Hutchins, [1896] 1 Ch. 844; *Re Fleetwood & District Electric Light & Power Syndicate*, [1915] 1 Ch. 486.

4260. On further consideration of action.]—*Re COUCHMAN*, COLLYER v. COUCHMAN (1915), 130 L. T. Jo. 158.

(c) Keeping Debt Alive.

i. By Acknowledgment or Promise.

See, generally, LIMITATION OF ACTIONS.

4261. By deceased—In will.]—Debts, though beyond Stat. Limitations, ordered to be paid, because directed to be paid by will.—*HALSTED v. LITTLE* (1632), Toth. 53; 21 E. R. 121.

4262. ———.]—Testator by his will declared that one-fifth of the residue of his personal estate should be divided amongst certain of his creditors named in a schedule to his will. The

schedule contained both the names of the creditors, & the debts due to them respectively:—*Held*: the direction so given for payment of these debts prevented the operation of Stat. Limitations.—*WILLIAMSON v. NAYLOR* (1838), 3 Y. & C. Ex. 208; 160 E. R. 676.

Annotations:—*Follid.* Philips v. Philips (1844), 3 Hare, 281. *Reid.* Turner v. Martin (1857), 7 De G. M. & G. 429. *Mentd.* Courtenay v. Williams (1844), 3 Hare, 539; Wild v. Banning (1866), L. R. 2 Eq. 577; Ashley v. Ashley (1877), 4 Ch. D. 757; Stevens v. King, [1904] 2 Ch. 30; Wilson v. Church (1911), 106 L. T. 31.

4263. ———.]—Testator gave the residue of his estate to trustees, upon trust, to divide the same amongst the several persons who were his creditors at the time he executed a certain conveyance for their benefit, their exors. & administrators, such payment & provision to be made to & amongst such persons respectively, their respective exors. or administrators, ratably & in proportion to the quantum or amount of the original debt or debts due from him to such person or persons respectively; & if any person or persons claiming under such bequest should not give notice of such claim to the trustees within two years of testator's decease, such share or shares of the residue to go to certain residuary legatees. *Semble*: the will must be read as, to some extent, directing payment of debts.

Testator acknowledged the existence of the original debts: he does not suggest, nor is it suggested as a fact, that the debts had been extinguished at the date of the will; & in this case, as in *Williamson v. Naylor*, No. 4262, *ante*, he directs his trustees to pay & divide an indefinite residue amongst the creditors ratably, & in proportion to the amount of their original debts. This alone I should have thought sufficient (*WIGRAM, V.-C.*)—*PHILIPS v. PHILIPS* (1814), 3 Hare, 281; 13 L. J. Ch. 445; 67 E. R. 388.

Annotations:—*Consd.* Smith v. Thorne (1852), 18 Q. B. 134. *Reid.* Stevens v. King, [1904] 2 Ch. 30. *Mentd.* Buckmaster v. Russell (1861), 10 C. B. N. S. 745; Chasemore v. Turner (1875), L. R. 10 Q. B. 500; Lusher v. Hassard (1903), 20 T. L. R. 31; Spencer v. Hemmerde, [1922] 2 A. C. 507.

4264. ——— In letter written in deceased's lifetime.]—A. having employed B. as his solr. & agent for some years, on Apr. 23, 1813, wrote to him a letter in these words: "I have for a length of time been in expectation of receiving the account of whatever I may stand indebted to you, let me again request you will oblige me with it, that everything may be settled." A. died on Aug. 27, 1814, having made his will, by which he devised his real & personal estates, in trust for sale, & directed his trustees to stand possessed of the monies to arise by the sale thereof, after paying his debts, & the charges & expenses attending his will, upon the trusts therein mentioned. B., shortly after A.'s death, delivered his bill, the last item of which, was on Aug. 19, 1808, & on Nov. 18, 1820, he filed his bill on behalf of himself & the other creditors of testator:—*Held*: the debt was taken out of Stat. Limitations by testator's letter of Apr. 23, 1813, & was continued to be kept out of that statute by the devise in testator's will.—*RENDELL v. CARPENTER* (1828), 2 Y. & J. 484; 14 E. R. 1009.

Annotation:—*Distd.* Jones v. Meares (1848), 10 L. T. O. S. 391.

PART IV. SECT. 2, SUB-SECT. 4.—A. (c) i.

c. By representative—What amounts to promise to pay.]—Pltf's. in 1876 supplied goods to deft.'s husband & after the appointment of deft. as administratrix to the estate of her

late husband they supplied other goods to deft. in her individual character. For some time pltf's. furnished deft. with separate accounts of the money due by her as administratrix & in her individual character respectively. Deft. in her replies asked for time & did not deny her liability

but did not make an express promise to pay the debt due by her as administratrix. Afterwards pltf's. sent the two claims in one account not distinguishing the debts due by deft. in her two capacities. Deft. in reply made general promises to pay but did not specifically promise to pay the

4265. — [—]—Testator, whose exors. defts. were, had employed pltf. to do work for him, & he afterwards wrote to pltf., "Send me your account, made up to Christmas last":—*Held*: Stat. Limitations was barred.—**QUINCEY v. SHEARPE** (1876), 1 Ex. D. 72; 45 L. J. Q. B. 347; 34 L. T. 495; 40 J. P. 328; 24 W. R. 373.

Annotations:—*Mentd.* Skeet v. Lindsay (1877), 2 Ex. D. 314; Green v. Humphreys (1884), 26 Ch. D. 474; Firth v. Slingsby (1888), 58 L. T. 481; Bartley v. Lees (1895), 11 T. L. R. 243; Kessissoglou v. Balli (1903), 47 Sol. Jo. 738; Fettes v. Robertson (1921), 37 T. L. R. 581; Spencer v. Hemmerde, [1922] 2 A. C. 507.

4266. — [—]—On July 24, 1882, K. gave a promissory note payable on demand for £3,000 to B. The money was not actually advanced till Sept. 8, 1882. The money was intended to buy a seat for K. on the New York Stock Exchange, & between July 24 & Sept. 8, 1883, K. had gone to New York. In 1883, K. returned to England. On Apr. 16, 1884, B. died having by his will appointed his exors., & pltf. his residuary legatee. On Nov. 19, 1885, K. wrote to pltf. in the following terms: "The great kindness of your father on every occasion, & more especially the money that he loaned me to purchase my seat on the New York Stock Exchange place me now in your debt. . . . I must now leave it entirely to your generosity whether you will have me liquidate the loan I have mentioned on the sale of my seat in New York." K. sold his seat in 1887, & died in Apr. 1888. In Dec. 1888, pltf. brought this action on the promissory note against the extrix. of K. to recover £3,000 & interest:—*Held*: the letter of Nov. 19, 1885, was an acknowledgment of the debt sufficient to take the case out of Stat. Limitations.—**BUCCLEUCH (DUKE) v. EDEN** (1889), 61 L. T. 300; 5 T. L. R. 690.

4267. — *Indorsement on negotiable instrument—Made by authority of deceased.*—**BRIGGS v. WILSON**, No. 4252, *ante*.

4268. *By representative—General rule.*—(1) A. devised his real estate, charged with the payment of his debts, to B. in fee. In 1811 B. contracted to sell part of testator's real estate to C. who was immediately let into possession, although the purchase-money was not paid. In 1812, C. sold part of the estate to D. who was let into possession of that part, but never paid his purchase-money. B. became bkpt., & in 1814 his assignees filed a bill against the trustees of the will of C. & the parties claiming under him, seeking to establish a lien on the estate for the purchase-money & interest; suits had previously been instituted for the administration of the estates of A. & C.:—*Held*: the right of the vendor was not barred, a letter from the solr. of the parties representing the purchaser to pltf. taking the case out of the operation of Stat. Limitations.

(2) The person liable to the payment of the money means the person who is equitably entitled to the land on which the charge is sought to be fixed (*per CUR.*).

(3) The acknowledgment by an exor. will keep a debt alive against the parties beneficially interested, & the same principle prevails in the case of devisees of real estate in trust for payment of debts (*per CUR.*).—**TOFT v. STEPHENSON** (1851), 1 De G. M. & G. 28; 21 L. J. Ch. 129; 18 L. T. O. S. 114; 15 Jur. 1187; 42 E. R. 461, L. J.J.; *subse-*

proceedings (1854), 5 De G. M. & G. 735, L. J.J.

Annotations:—*As to* (2) *Refd.* Pears v. Laing (1871), L. R. 12 Eq. 41; Adam v. Sandwich (1877), 46 L. J. Q. B. 612. *As to* (3) *Refd.* Fortham v. Wallis (1853), 1 W. R. 118. *Generally, Mentd.* Lowin v. Wilson (1886), 11 App. Cas. 639.

4269. — *Advertisement of intention to pay debts justly due.*—*Scmble*: notice in a newspaper by a personal representative, that he will pay all debts justly due from his testator, will prevent a debt from being barred by Stat. Limitations.—**JONES v. SCOTT** (1831), 1 Russ. & M. 255; 9 L. J. O. S. Ch. 252; 39 E. R. 98, L. C.; *on appeal sub nom.* **SCOTT v. JONES** (1838), 4 Cl. & Fin. 382, H. L.

Annotations:—*Refd.* Evans v. Tweedy (1838), 1 Beav. 55; Frazer v. Cranefeldt (1838), 3 My. & Cr. 499; Briggs v. Wilson (1853), 17 Beav. 330; O'Connor v. Hadam (1855), 5 H. L. Cas. 170; Cadbury v. Smith (1869), L. R. 9 Eq. 37; *Re* Hepburn, *Ex p.* Smith (1884), 14 Q. B. D. 394; *Re* Stephens, Warburton v. Stephens (1889), 43 Ch. D. 39; *Re* Balls, Trewby v. Balls, [1909] 1 Ch. 791.

4270. — *Advertisement for creditors.*—(1) A debt which, at the death of a testator, is not barred by Stat. Limitations, may become so afterwards as to the exors. & legatees, notwithstanding a charge by testator of his debts upon his personal estate; nor will the operation of the statute be prevented though testator, erroneously supposing part of his personal estate to be real estate, has so described it in his will, & charged his debts upon it.

(2) An exor.'s advertisement to creditors to send in an account of their claims for examination, does not amount to a promise sufficient to revive the debt already barred by Stat. Limitations.—**SCOTT v. JONES** (1838), 4 Cl. & Fin. 382; 7 E. R. 117; *sub nom.* **JONES v. SCOTT**, 7 L. J. Ch. 212, H. L.

Annotations:—*As to* (1) *Refd.* Evans v. Tweedy (1838), 1 Beav. 55; Frazer v. Cranefeldt (1838), 3 My. & Cr. 499. *Distd.* Briggs v. Wilson (1853), 17 Beav. 330. *Apld.* *Re* Hepburn, *Ex p.* Smith (1884), 14 Q. B. D. 394. *Consd.* *Re* Stephens, Warburton v. Stephens (1889), 43 Ch. D. 39. *Refd.* O'Connor v. Hadam (1855), 5 H. L. Cas. 170; Cadbury v. Smith (1869), L. R. 9 Eq. 37; *Re* Balls, Trewby v. Balls, [1909] 1 Ch. 791. *Generally, Mentd.* *Re* Lyon, *Ex p.* Robinson (1814), 2 L. T. O. S. 440; *Re* Jennings (1849), 14 L. T. O. S. 208.

4271. — *Inclusion of debt in inventory & account.*—In 1835, A. filed a creditor's bill, against the administrator of his debtor, founded on a debt due on a promissory note but in respect of which no payment of either principal or interest had been made since 1823. In 1832, the administrator, on the citation of a third person, signed & exhibited, in the Ecclesiastical Ct., an inventory & account of the late debtor's assets & debts, in which A.'s debt was entered:—*Held*: that entry was a sufficient acknowledgment, within Statute of Frauds Amendment Act, 1828 (c. 14), to take the debt out of Stat. Limitations.—**SMITH v. POOLE** (1841), 12 Sim. 17; 10 L. J. Ch. 192; 59 E. R. 1036.

Annotations:—*Distd.* Spollan v. Magan (1851), 18 L. T. O. S. 200. *Foldd.* *Re* Emmett, Jenkins v. Emmett (1906), 95 L. T. 755. *N.F.* *Re* Beavan, Davies, Banks v. Beavan, [1912] 1 Ch. 196.

4272. — *Inclusion of debt in probate affidavit—Debt due by testator to executor.*—Claim in an administrative action for £2,000 lent by a father to his son. No payment in respect of capital or interest had been made since 1898, so that the claim was *prima facie* statute barred. In 1905 the

debt due by her as administratrix. She also paid small sums on account:—*Held*: there was no evidence of a promise to pay the debt due by deft. as administratrix sufficient to meet a plea of Stat. Limitations. In order to take a debt due by an administrator

in her representative character out of the operation of the statute there must be an express promise in writing to pay such debt. An acknowledgment of indebtedness from which in the case of a debt due by a person in his individual character, a promise to pay

the same may be implied is not sufficient to prevent the operation of the statute where the debt is lent by a person as administrator.—**FROG v. MORGAN** (1883), 4 N. S. W. L. R. 93.—**AUB.**
d. — [—]—A mere acknowledgment of a debt by an administrator

Sect. 2.—Payment of debts presently due: Sub-sect. 4, A. (c) i.

son, as exor. of his father's will, signed the Inland Revenue affidavit for probate in which appeared an item of £2,000 stated to have been lent to him by his father:—*Held*: the item in the affidavit was an acknowledgment within Statute of Frauds Amendment Act, 1828 (c. 14), to take the debt out of Stat. Limitations.—*Re EMMETT, JENKINS v. EMMETT* (1906), 95 L. T. 755.

Annotation:—*Consd. Re Beavan, Davies, Banks v. Beavan*, [1912] 1 Ch. 196.

4273. ———.]—A statute-barred debt was set out in the schedule of debts of a testator's estate in the Inland Revenue affidavit for probate by the exors.:—*Held*: it was not a sufficient acknowledgment within Statute of Frauds Amendment Act, 1828 (c. 14), to take the debt out of Stat. Limitations.—*Re BEAVAN, DAVIES, BANKS & CO. v. BEAVAN*, [1912] 1 Ch. 196; 81 L. J. Ch. 113; 105 L. T. 784.

Annotation:—*Follid. Lloyd v. Coote & Ball*, [1915] 1 K. B. 242.

4274. ———.]—(1) Deft., a solr., acted for pltf., a widow in the administration of her husband's estate, of which she was the extrix. The husband had for many years had dealings with deft. & had employed him as solr. in a number of matters, but deft. had never delivered any bills of costs to the husband. After his death deft. delivered to pltf. an account of his dealings with her husband showing a balance of £563 due to deft. from the husband's estate. The account contained a number of items for the costs which were statute-barred. Pltf., in ignorance of Stat. Limitations, & without having any independent advice, gave to deft. at his request acknowledgments in writing of the indebtedness of the estate to deft. In an action by pltf. for an account:—*Held*: deft. by receiving these acknowledgments had obtained a benefit from his client within the well-settled rule of equity with regard to a person who is in a fiduciary position & deft. was, therefore, not entitled to rely on the acknowledgments for the purpose of taking the statute-barred items in the account out of Stat. Limitations.

(2) An exor.'s affidavit for probate which includes in the list of testator's debts a statute-barred debt does not operate as an acknowledgment of the debt so as to take it out of the statute.—*LOYD v. COOTE & BALL*, [1915] 1 K. B. 242; 84 L. J. K. B. 567; 112 L. T. 344.

4275. ———.]—*In letter to creditor*.—*McCulloch v. DAWES*, No. 4245, *ante*.

4276. ———.]—*BRIGGS v. WILSON*, No. 4252, *ante*.

4277. ———.]—*Request for account*.]—The following letter, written by deft., sued as exor. of his father, to pltf.'s testator, held not to be a sufficient acknowledgment to satisfy Stat. Limitations: "If you have any account against my late father that remains unsettled, forward the same to G. As soon as matters are put a little in order, it shall have my first attention."—*JONES v. MEARES* (1848), 10 L. T. O. S. 391.

4278. ———.]—*Effect of settled account*.]—A parol

is not sufficient to take the case out of Stat. Limitations; there must be an express promise to pay.—*GIBBS v. SEWELL* (1833), N. B. Dig. 6.—*CAN.*

e. ———.]—An admission by an exor. that a note barred by statute is due, coupled with a statement that it could not be paid for want of assets, & that if there were assets it should be paid, is a conditional promise merely & not sufficient.—*LAMPMAN v. DAVIS*

(1844), 1 U. C. R. 179.—*CAN.*

f. ———.]—An acknowledgment in an answer by an exor. of the existence of testator's debt, & that he had paid interest on that debt, coupled with a verbal promise to pay or secure the amount due, is sufficient to raise an implied promise, & to take a debt out of the operation of Stat. Limitations.—*SPOLLAN v. MAGAN* (1851), 18 L. T. O. S. 200.—*IR.*

agreement was entered into between the respective exors. of L. & T., that various old accounts of their testators should be settled on a certain fixed day, without reference to the time that they had been running. The accounts were settled accordingly, & the exors. of L. received the value of a promissory note that would have been barred by Stat. Limitations. The exors. of T. afterwards discovered a note from L. to T. on which nothing had been done for more than six years before the death of T.:—*Held*: the exors. of T. were entitled to have the benefit of this note.—*LADE v. TRILL, TRILL v. LADE* (1842), 11 L. J. Ch. 102; 6 Jur. 272.

4279. ———.]—(1) To an action by the payee of a promissory note for £300 against defts., as surviving exors. of W., the maker, pltf., to take the case out of Stat. Limitations, proved he had been supplied by J., the deceased exor., with malt & other articles, & he put in evidence an account between them, signed as follows: "Settled, J."; on one side of which pltf. was charged with various quantities of malt, & on the other side had credit for payments, there being, amongst others, the following item: "To one year's interest, £15":—*Held*: this settlement of account was evidence of payment of the £15 by J., but not in his representative character.

(2) *Semble*: payment by one exor. will not take the case out of Stat. Limitations as against a co-exor.—*SCHOLEY v. WALTON* (1844), 12 M. & W. 510; 13 L. J. Ex. 122; 2 L. T. O. S. 331; 8 Jur. 319; 152 E. R. 1299.

Annotations:—*As to (1) Consd. Spollan v. Magan* (1851), 18 L. T. O. S. 200. *As to (2) Consd. Re Macdonald, Dick v. Fraser*, [1897] 2 Ch. 181. *Generally, Mentd. Callander v. Howard* (1850), 10 C. B. 290; *Nash v. Hodgson* (1855), 6 De G. M. & G. 474.

4280. ———.]—*To party other than creditor*.]—*MOODIE v. BANNISTER*, No. 4255, *ante*.

4281. ———.]—An acknowledgment in writing signed by the exor. of a deceased obligor, who was at the date of his death jointly & severally liable with other obligors on a bond, is an acknowledgment of the several liability of the deceased obligor, & not of the joint liability of the surviving obligors, & is not therefore as against the surviving obligors an acknowledgment by a party liable by virtue of the specialty within Civil Procedure Act, 1833 (c. 42), s. 5, so as to take out of the operation of sect. 3 of the Act an action founded on the joint liability of the surviving obligors.—*READ v. PRICE*, [1909] 2 K. B. 724; 78 L. J. K. B. 1137; 101 L. T. 60; 25 T. L. R. 701, C. A.

4282. ———.]—*Creditor in fiduciary position*.]—*Acknowledgment obtained without proper explanation*.]—*LOYD v. COOTE & BALL*, No. 4274, *ante*.

By one of several representatives.]—*See* Subsect. 4, A. (c) iii., *post*.

ii. By Part Payment and Payment of Interest.

See, generally, LIMITATION OF ACTIONS.

4283. General rule.]—(G., by his will, dated in 1837, devised a particular estate, for providing for the payment of his debts, to his trustees, who were also his exors., & beneficially interested under

g. ———.]—*Right to deduct from value of estate for probate*.]—A debt of testator barred by the Stat. Limitations, but acknowledged by the exor., is a debt due by deceased, within Administration & Probate Act, 1890, s. 97, & may be deducted from the assets of deceased in calculating the final balance upon which duty is payable.—*Re ELFORD'S WILL*, [1914] V. L. R. 609.—*AUS.*

other parts of his will. G. died in Feb. 1843. In Aug. 1849, a creditors' suit was instituted by F., claiming as personal representative of the payee of a joint & several promissory note made by testator & another person, & dated 1826; & payments were proved to have been made, on account of interest due on such promissory note, on several different occasions in 1843, 1846, & 1847, by T. & Co., "as the agents & on behalf of the exors., defts." One of the exors. of testator had become bkpt.; the other two were stated to be now insolvent. The estate devised for payment of debts had not been sold with proper expedition; & though debts of testator remained unsatisfied, considerable sums were alleged to have been paid on account of the legacies. The present bill sought to fix the exors. for wilful default & breach of trust, & to get back the amounts paid to the legatees. All defts., except the exors. & one other deft., set up Stat. Limitations:—*Held*: (1) the exors., who had not set it up, were bound in their beneficial as well as representative capacities, by the part payments on account proved to have been made; (2) the other deft., who had not set up the statute, was also bound by the implied admission by the exors.; (3) it was open to the other defts., except the residuary legatees, to avail themselves of the statute, & those who had set it up were accordingly entitled to have the bill dismissed as against them, but without costs; (4) as to the residuary legatees, the payments to them while there were debts outstanding being a breach of trust, they could not set up the statute, but must refund the sums received. —*FORDHAM v. WALLIS* (1853), 10 Hare, 217; 22 L. J. Ch. 518; 21 L. T. O. S. 190; 17 Jur. 228; 1 W. R. 118; 68 E. R. 905.

Annotations:—*As to* (1) *Consd.* *Re Macdonald, Dick v. Fraser*, [1897] 2 Ch. 181; *Asbury v. Asbury*, [1898] 2 Ch. 111. *Reid*. *Pease v. Laid* (1871), L. R. 12 Eq. 41; *Re Hollingshead, Hollingshead v. Webster* (1888), 37 Ch. D. 631. *As to* (3) *Reid*. *Cooper v. Crosswell* (1866), L. R. 2 Eq. 106. *As to* (4) *Consd.* *Re Marsden, Bowden v. Layland, Gibbs v. Layland* (1884), 26 Ch. D. 783. *Generally*. *Mentd.* *Briggs v. Wilson* (1853), 5 De G. M. & G. 12; *Roddam v. Morley* (1857), 1 De G. & J. 1; *Ridgway v. Newstead* (1860), 2 Giff. 192; *Hunter v. Young* (1879), 4 Ex. D. 256.

4284. By executor in personal capacity.—A. & B. made a joint & several promissory note, & after the lapse of six years A. died, leaving B. one of his exors.; & B. subsequently paid interest on the note, not in his executorial character, but personally as a maker of the note. In an action by the exors. of the payee of the note, against A.'s exors., alleging, first, a promise by testator in his lifetime, & second, a promise by the exors. after his death:—*Held*: the payment within six years, of interest by B., who suffered judgment by default, was not sufficient to take the case out of Stat. Limitations as against the exors.—*ATKINS v. TREGGOLD* (1823), 2 B. & C. 23; 3 Dow. & Ry. K. B. 200; 1 L. J. O. S. K. B. 228; 107 E. R. 291.

Annotations:—*Appl.* *Slater v. Lawson* (1830), 1 B. & Ad. 396; *Way v. Bassett* (1845), 5 Hare, 55. *Consd.* *Re Wolmershausen, Wolmershausen v. Wolmershausen* (1890), 62 L. T. 541. *Reid*. *Braithwaite v. Britain* (1836), 1 Keen, 206; *Channell v. Ditchburn* (1839), 5 M. & W. 494; *Crallan v. Oulton* (1840), 3 Beav. 1; *Scholey v. Walton* (1844), 12 M. & W. 510; *Fordham v. Wallis* (1853), 10 Hare, 217; *Re Macdonald, Dick v. Fraser*, [1897] 2 Ch. 181; *Asbury v. Asbury*, [1898] 2 Ch. 111. *Mentd.* *Perham v. Rayns* (1821), 2 Bing. 396; *Nash v. Hodgson* (1855), 6 De G. M. & G. 474.

4285. By executor of joint & several debtor—Joint & several promissory note.—After the death of one maker of a joint & several promissory note signed by two, a payment upon it by the exor. of the deceased party will not take the debt out of Stat. Limitations as against the survivor.—*SLATER*

v. LAWSON (1830), 1 B. & Ad. 396; 9 L. J. O. S. K. B. 4; 109 E. R. 835.

Annotations:—*Appl.* *Way v. Bassett* (1845), 5 Hare, 55. *Consd.* *Fordham v. Wallis* (1853), 10 Hare, 217; *Itod v. Price*, [1909] 1 K. B. 577. *Reid*. *Braithwaite v. Britain* (1836), 1 Keen, 206; *Crallan v. Oulton* (1840), 3 Beav. 1; *Re Wolmershausen, Wolmershausen v. Wolmershausen* (1890), 62 L. T. 541; *Asbury v. Asbury*, [1898] 2 Ch. 111. *Mentd.* *Channell v. Ditchburn* (1839), 5 M. & W. 494.

4286. By executor partner—Payment of interest.]

—(1) Where introductory words in a will directing payment of all testator's just debts were followed by specific devises to two of the exors., it was held, upon the whole context of the will, that testator had not charged his real estate generally with the payment of debts.

(2) The claim of a creditor against the assets of a deceased partner was held not to be barred under the circumstances, by the Stat. Limitations.

It is said, that *pltf.* is precluded from relief by Stat. Limitations. Considering that one of the surviving partners was one of the exors. of the deceased partner, acting as such, & also one of the legatees of the interest of deceased partner in the concern, & that testator had made charges on his real estate, for the payment of his debts, I think that the case, considering all its circumstances, does not fall within the operation of the statute (*LORD LANGDALE, M.R.*). —*BRAITHWAITE v. BRITAIN* (1836), 1 Keen, 206; 18 E. R. 285.

Annotations:—*As to* (2) *Consd.* *Winter v. Innes* (1838), 1 My. & Cr. 101. *Reid*. *Way v. Bassett* (1845), 5 Hare, 55; *Fordham v. Wallis* (1853), 10 Hare, 217.

4287. —[A. deposited moneys with B., C., & D., who were bankers in partnership, & received from them notes, in which they promised to pay him the amount three months after sight, with interest. B. died in Mar. 1837, having appointed C. & another his exors. C. & D. continued the banking business in the same name until 1842, & interest was regularly paid on the notes by the firm until that time, the payment being indorsed upon the notes, & signed by one of the partners or their clerk. In Dec. 1843, the exors. of A. filed their bill against the exors. of B., & the devisees under his will, for payment of the amount of the notes out of the personal or real estate of B.: *Held*: the acts of the surviving partners of B. had not the effect of taking the debt upon the notes out of the operation of Stat. Limitations as against the real or personal estate of deceased partner.

Acts done by one of the surviving partners, who was exor. of deceased partner & which the surviving partners were in that character bound to do cannot *prima facie* be considered to have been done in the character of exor.—*WAY v. BASSETT* (1845), 5 Hare, 55; 15 L. J. Ch. 1; 6 L. T. O. S. 118; 10 Jur. 89; 67 E. R. 825.

Annotations:—*Reid*. *Brown v. Gordon* (1852), 16 Beav. 302; *Fordham v. Wallis* (1853), 10 Hare, 217; *Re Macdonald, Dick v. Fraser*, [1897] 2 Ch. 181.

4288. —[R. deposited £110 with H., C., E., & F., bankers, upon a deposit note, payable twenty days after sight. In June, 1833, H. died, having by his will, devised his real & personal estate to trustees, one of whom was his son, L., upon trust to raise money to pay his debts, etc., & subject thereto upon trust for L., whom he appointed sole exor. L. was admitted a partner in the bank. In 1835, E. died, & in 1843 C. died. F. & L. continued the business, but became bkpts. in 1847. R., from the death of H., received interest at the bank upon his deposit note until the bkpcy., when he proved his debt against bkpt.'s estate; & on a bill filed to make the real & personal estate of H. liable to the payment of

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the £110:—*Held*: all claim against the real & personal estate was barred by Stat. Limitations in six years.—*BROWN v. GORDON* (1852), 16 Beav. 302; 22 L. J. Ch. 65; 20 L. T. O. S. 75; 1 W. R. 2; 51 E. R. 795.

Annotations:—*Mentd.* *Lee v. Flood* (1854), 2 W. R. 348; *Rouse v. Bradford Banking Co.* (1894), 63 L. J. Ch. 337.

4289. ——— **Mercantile Law Amendment Act, 1856 (c. 97), s. 13.**—A. & B., partners, gave a promissory note in the name of the firm. A. died, leaving B. his sole exor., & no proceedings were taken against his estate for more than six years; but B., who continued the business, made payments of interest, & then became bkpt.:—*Held*: the payments were made in his character of surviving partner, & not as exor. of A., & having regard to above Act, the debt was barred as against the estate of A.—*THOMPSON v. WAITHMAN* (1856), 3 Drew. 628; 26 L. J. Ch. 134; 28 L. T. O. S. 95; 2 Jur. N. S. 1080; 5 W. R. 30; 61 E. R. 1043.

Annotations:—*Refd.* *Tucker v. Tucker*, [1894] 1 Ch. 724. *Mentd.* *Cornill v. Hudson* (1857), 3 Jur. N. S. 1257; *Jackson v. Woolley* (1858), 8 E. & B. 778; *Williams v. Smith* (1859), 4 H. & N. 559; *Pardo v. Bingham* (1860), 4 Ch. App. 735; *Watson v. Woodman* (1875), L. R. 20 Eq. 721.

4290. ———.]—The payment of interest upon a loan to two partners, by the surviving partner, who is also exor. of the other partner, is to be attributed to the surviving partner in his individual capacity, & does not operate to preserve the remedy of the lender against the estate of the deceased partner.—*Re TUCKER, TUCKER v. TUCKER*, [1894] 3 Ch. 429; 63 L. J. Ch. 737; 71 L. T. 453; 12 R. 141, C. A.

4291. By executor devisee—Payment of interest.—Payment by a devisee for life of interest on a simple contract debt of his testator's is a sufficient acknowledgment to keep the right of action alive against all parties interested in remainder.

The just inference is that she made the payments in her character of tenant for life of the real estate as well as in her character of extrix. She paid the interest because she was in possession of assets of testator: there is no sufficient reason for attributing the payments to her character of extrix. only. An elaborate argument was delivered at the bar as to the effect of payment of interest on a simple contract debt by one only of two exors. in regard to the other exor. & testator's personal estate. It was said that the payment of interest by one exor. affected him only & did not in any way affect his co-exor., & the argument was pushed to the extreme length of saying that the payment involved the exor. who made it in a personal liability to pay the debt. Therefore, it was urged that where one of two exors., having assets in his hand, applies those assets, so far as they extend, in payment of interest on a simple contract debt, the result is that after the lapse of six years from testator's death not only is the co-exor. absolved, but testator's personal estate, whether in the hands of the co-exor. or outstanding, is exempted from all liability to pay the debt, & that the creditor's sole remedy is against the exor. personally who made the payment. I dissent altogether from the proposition that the exor. by whom the payment is made is thereby involved in any personal liability. The promise to pay the debt arising from the payment of interest, whether such promise is an inference of fact or an implication of law, is a promise to pay as exor., that is, out of the personal assets of testator. The inference or implication must be

consistent with the facts from which it is drawn or raised, & it would be wholly inconsistent with the facts to hold that in such a case as that supposed the exor. has incurred any personal liability (*CHITTY, J.*).—*Re HOLLINGSHEAD, HOLLINGSHEAD v. WEBSTER* (1888), 37 Ch. D. 651; 57 L. J. Ch. 400; 58 L. T. 758; 36 W. R. 660; 4 T. L. R. 275.

Annotations:—*Consd.* *Dibb v. Walker*, [1893] 2 Ch. 429; *Re Macdonald, Dick v. Fraser*, [1897] 2 Ch. 181; *Re Chant, Bird v. Godfrey*, [1905] 2 Ch. 225. *Refd.* *Edwards v. Walters*, [1896] 2 Ch. 157; *Astbury v. Astbury*, [1898] 2 Ch. 111; *Re Lacey, Howard v. Lightfoot*, [1907] 1 Ch. 330.

Part payment by heir or devisee generally, *see* LIMITATION OF ACTIONS.

By one of several representatives—Payment of interest.—*See* Sub-sect. 4, A. (c) iii., *post*.

4292. By executor debtor—Payment of interest.—*Re COUCHMAN, COLLYER v. COUCHMAN* (1915), 139 L. T. Jo. 158.

4293. By receiver of deceased mortgagor.—A receiver appointed under the terms of a power in a mtge. deed, which extends the powers conferred by Conveyancing Act, 1881 (c. 41), s. 24, to manage & carry on a business, is authorised to pay business debts of the mtgor. This authority is not affected by the death of the mtgor., & payment by the receiver of an instalment of a business debt contracted by the mtgor. operates as an acknowledgment of the whole debt by the extrix. of the mtgor., & prevents time running under Stat. Limitations.—*Re HALE, LITLEY v. FOAD*, [1899] 2 Ch. 107; 68 L. J. Ch. 517; 80 L. T. 827; 47 W. R. 579; 15 T. L. R. 389; 43 Sol. Jo. 528, C. A.

iii. *Where Several Representatives.*

4294. Right of co-representative to plead statute—Admission of debt by other representatives.—*CHAFFE v. KELLAND* (1637), 1 Roll. Abr. 929.

Annotation:—*Refd.* *Midgley v. Midgley*, [1893] 3 Ch. 282.

4295. ———.]—*VAUGHAN v. GUY* (1729), 1 Barn. K. B. 271; Mos. 245; 94 E. R. 185, L. C.

Annotation:—*Refd.* *Burke v. Jones* (1813), 2 Ves. & B. 275.

4296. ——— **Payment of debt by other representatives—Devastavit.**—*Re MIDGLEY, MIDGLEY v. MIDGLEY*, No. 4248, *ante*.

Devastavit generally, *see* Part VI., Sect. 3, sub-sect. 4, *post*.

4297. Mere acknowledgment by all.—In an action against several exors., pleas, general issue & Stat. Limitations:—*Held*: neither a mere acknowledgment of the debt by all the exors., nor an express promise by one of them, took the case out of the statute, but there must have been an express promise by all.—*TULLOCK v. DUNN, ETC. (EXECUTORS OF HANLEY)* (1826), Ry. & M. 416, N. P.

Annotations:—*Consd.* *Smith v. Poole* (1841), 12 Sim. 17; *Scholey v. Walton* (1844), 12 M. & W. 510; *Spollan v. Magan's Exor.* (1851), 18 L. T. O. S. 200; *Re Macdonald, Dick v. Fraser*, [1897] 2 Ch. 181.

4298. Express promise by one.—*TULLOCK v. DUNN, ETC. (EXECUTORS OF HANLEY)*, No. 4297, *ante*.

4299. Acknowledgment by one.—*M'CULLOCH v. DAWES*, No. 4245, *ante*.

4300. ———.]—An acknowledgment of a debt within Statute of Frauds Amendment Act, 1828 (c. 14), made by one of several exors. as exor. binds testator's estate, & on the death of the exor. who makes the acknowledgment an order may be made in an administration action for payment of the debt out of assets remaining unadministered in the hands or under the control of the surviving exors.—*Re MACDONALD, DICK v. FRASER*, [1897] 2 Ch. 181; 66 L. J. Ch. 630; 76 L. T. 713; 45 W. R. 628.

4301. —[—]—An acknowledgment by one of two exors. & devisees in trust of real estate against the wishes of the other that more than six years' interest is due on a mtge. created by their testator cannot be treated as the valid act of the two in their capacity of trustees, & is not a good acknowledgment within Real Property Limitation Act, 1833 (c. 27), s. 42.—*ASTBURY v. ASTBURY*, [1898] 2 Ch. 111; 67 L. J. Ch. 471; 78 L. T. 494; 46 W. R. 536.

Annotation.—*Reid. Re Lacey*, *Howard v. Lightfoot*, [1907] 1 Ch. 330.

4302. Payment by one—Not in representative capacity.—*ATKINS v. TREDGOLD*, No. 4284, *ante*.

4303. —[—]—*SCHOLEY v. WALTON*, No. 4270, *ante*.

4304. —[—]—*WARREN v. IRESON* (1855), 24 L. T. O. S. 237.

4305. —[—]—*Re HOLLINGSHEAD*, *HOLLINGSHEAD v. WEBSTER*, No. 4291, *ante*.

4306. —[—]—*Re MIDGLEY*, *MIDGLEY v. MIDGLEY*, No. 4218, *ante*.

iv. As Against Real Estate.

4307. Real estate vested in devisee.—An admission of a debt by the extrix. of a trader, within six years before the filing of a creditor's bill, will not take the debt out of Stat. Limitations, so as to enable the creditor, under 47 Geo. 3, c. 74, to claim payment out of the real estate in the hands of a devisee.—*PUTNAM v. BATES* (1826), 3 Russ. 188; 38 E. R. 517.

Annotations.—*Apld. Fordham v. Wallis* (1853), 10 Harc. 217. *Consd. Coope v. Cresswell* (1866), L. R. 2 Eq. 106.

Reid. Roddam v. Morley (1857), 1 De G. & J. 1; *Atsbury v. Atsbury*, [1898] 2 Ch. 111; *Re Lacey*, *Howard v. Lightfoot*, [1907] 1 Ch. 330.

4308. —[—]—*ASTBURY v. ASTBURY*, No. 4301, *ante*.

4309. —[—]—Payment of interest by the specific devisee of part of a testator's real estate, which was subject to a mtge. created by testator, is sufficient to keep the mtgee.'s right of action alive against the specific devisees of other parts of the real estate which was not subject to the mtge. & thus entitle the mtgee. to an order for administration of the whole of testator's real estate.

By Administration of Estates Act, 1833 (c. 104), real estate was made assets to be administered by a ct. of equity for payment of his just debts. In order to reach real estate, a creditor would, no doubt, have to sue & bring before the ct., not the exor. only, but the devisee also, & I assume that even if the exor. had admitted the debt, or allowed judgment to go for the debt, so that as regards the personal estate it could not be said that Stat. Limitations applied, yet the devisee could in that action have pleaded Stat. Limitations (*BUCKLEY, L.J.*).—*Re LACEY*, *HOWARD v. LIGHTFOOT*, [1907] 1 Ch. 330; 76 L. J. Ch. 316; 96 L. T. 306, C. A.

Annotations.—*Consd. Read v. Price*, [1909] 2 K. B. 724. *Reid. Re Atkinson*, *Proctor v. Atkinson*, [1908] 2 Ch. 307.

4310. Real estate vested in representatives as trustees for payment of debts.—*COOPE v. WELL*, No. 5003, *post*.

(d) When Time runs against Creditor.

See, generally, LIMITATION OF ACTIONS.

4311. Whether before probate.—If the creditor is beyond sea, Stat. Limitations will not take place. . . . Nor will the statute take place if there be no exor., until administration be taken out.—*JOLLIFFE v. PITT* (1715), 2 Vern. 694; 23 E. R. 1050, L. C.

Annotations.—*Consd. Douglas v. Forrest* (1828), 4 Bing. 686; *Rhodes v. Smethurst* (1840), 6 M. & W. 351. *Rhodes v. Smethurst* (1840), 6 M. & W. 351.

4312. — *Effect of intermeddling.*—Plea of Stat. Limitations by an exor., testator having died in 1786, though probate was not taken till 1802, allowed; the allegation of the bill upon a fair construction being, that deftd. had possessed the personal estate, & therefore might have been sued as exor. *de son tort*, previously, to 1792.—*WEBSTER v. WEBSTER* (1804), 10 Ves. 93; 32 E. R. 778, L. C.

Annotations.—*Consd. Douglas v. Forrest* (1828), 4 Bing. 686; *Rhodes v. Smethurst* (1840), 6 M. & W. 351; *Flood v. Patterson* (1861), 29 Beav. 295; *Re Lovett*, *Amber v. Lindsay* (1876), 3 Ch. D. 198. *Reid. Sykes v. Sykes* (1870), L. R. 5 C. P. 113; *Boatwright v. Boatwright* (1873), L. R. 17 Eq. 71; *Coote v. Whittington* (1873), L. R. 16 Eq. 531.

4313. —[—]—Where testator resided & died abroad:—*Held*: his exor. in England might be sued within six years after taking out probate.—*DOUGLAS v. FORREST* (1828), 4 Bing. 680; 1 Moo. & P. 603; 6 L. J. O. S. C. P. 157; 130 E. R. 933.

Annotations.—*Consd. Rhodes v. Smethurst* (1840), 6 M. & W. 351. *Reid. Towns v. Mend* (1855), 16 C. B. 123; *Musurus Bey v. Gadban*, [1894] 2 Q. B. 352. *Mentd. Don v. Lippmann* (1837), 5 Cl. & Fin. 1; *Cowan v. Braddwood* (1840), 9 Dowl. 26; *Schibasy v. Westenholtz* (1870), L. R. 6 Q. B. 155; *Rousillon v. Rousillon* (1880), 11 Ch. D. 351; *Mohamud Mohideen Hadjiar v. Pichey*, [1894] A. C. 437; *Emanuel v. Symon*, [1908] 1 K. B. 302; *Gavin, Gibson v. Gibson*, [1913] 3 K. B. 379.

4314. —[—]—A simple contract creditor of a testator, who died in 1857, filed a bill on Dec. 1, 1870, for administration of testator's estate. Testator, by his will, gave all his real & personal estate to his widow during widowhood, & appointed two of his children his exors. The will was retained by the widow, who refused to produce it, until compelled to do so by proceedings being taken against her in the Ct. of Probate, but she entered into possession of testator's property, & regularly paid the interest on the amount due to plff. until Feb. 1, 1864, after which time no interest was paid. The will was not proved until Sept. 27, 1870; *Held*: plff.'s claim was barred by Stat. Limitations. — *BOATWRIGHT v. BOATWRIGHT* (1873), L. R. 17 Eq. 71; 43 L. J. Ch. 12; 29 L. T. 603; 38 J. P. 228; 22 W. R. 147.

4315. Whether before constitution of representative.—A suit for an account of the rents & profits of real estate having become abated by plff.'s death, after answer, but before decree, plff.'s personal representative, more than six years afterwards, filed a bill of revivor, to which the personal representative of the original deftd., who had also died, pleaded Stat. Limitations, but did not state in his plea that six years had elapsed since representation had been taken out to the original plff.; the plea was overruled.—*PERRY v. JENKINS* (1836), 1 My. & Cr. 118; 5 L. J. Ch. 82; 40 E. R. 321.

Annotation.—*Consd. Rhodes v. Smethurst* (1840), 6 M. & W. 351.

4316. —[—]—Stat. Limitations does not begin to run until there is a personal representative of debtor.—*HYDE v. PRICE*, *HART v. CRADOCK* (1837), 8 Sim. 578; *Coop. Pr. Cas.* 193; 6 L. J. Ch. 358; 1 Jur. 735; 59 E. R. 229.

Annotations.—*Reid. Re Powell's Trust* (1852), 10 Harc. 134. *Mentd. Morse v. Tucker* (1816), 5 Harc. 79; *A.-G. v. Ludlow Corp.* (1849), 1 H. & Tw. 216.

4317. —[—]—*FRAKE v. CRANFELDT*, No. 4330, *post*.

4318. — *Necessity for constitution in England.*—A person resident in Jersey died in 1850 indebted to a person resident in England. He appointed his wife extrix., & she proved the will in Jersey alone. The extrix. had in 1851 been in England for three weeks, & had, while in Jersey, received a sum due to her testator in this country:—*Held*: in 1860 Stat. Limitations did not apply, the

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extrix, not having been liable to be sued in this country, & having done no act here to constitute herself an English extrix.—*FLOOD v. PATTERSON* (1861), 29 Beav. 295; 30 L. J. Ch. 486; 4 L. T. 78; 7 Jur. N. S. 324; 9 W. R. 294; 54 E. R. 640.

Annotation:—Mentd. Musurus Bey v. Gadban (1893), 38 Sol. Jo. 59.

When Statutes of Limitation run against estate.]
—*See* Part III., Sect. 1, sub-sect. 9, *ante*.

(c) Effect of Trust for Payment of Debts.

4319. General rule.]—*VAUGHAN v. GUY* (1729), 1 Barn. K. B. 271; Mos. 245; 94 E. R. 185, L. C. *Annotation:—Consd.* Burke v. Jones (1813), 2 Ves. & B. 275.

4320. —.]—Time does not run against a creditor after the death of testator in case of a trust or charge for the payment of debts.—*HARGREAVES v. MICHELL* (1822), 6 Madd. 326; 56 E. R. 1115.

Annotations:—Consd. Tulloch v. Simpson (1810), 9 L. J. Ch. 145. *Refd.* Blower v. Blower (1858), 28 L. J. Ch. 181.

4321. —Effect of laches of creditor.]—A trust for the payment of debts will not prevent time from operating as a bar to a claimant who has been guilty of laches in making his claim.—*HARCOURT v. WHITE* (1860), 28 Beav. 303; 30 L. J. Ch. 681; 3 L. T. 4; 6 Jur. N. S. 1087; 8 W. R. 715; 54 E. R. 382.

Annotation:—Refd. Carey v. Cuthbert (1873), 22 W. R. 249.

4322. Out of realty.]—A devise for payment of debts shall include debts, the remedy whereof is barred by Stat. Limitations, the duty remaining, though the remedy be gone.—*GOFTON v. MILLS* (1690), Prec. Ch. 9; 2 Vern. 141; 24 E. R. 5.

Annotation:—Consd. Burke v. Jones (1813), 2 Ves. & B. 275.

4323. —.]—Where lands are devised to pay debts, debts barred by Stat. Limitations shall be paid.—*ANON.* (1707), 1 Salk. 154; 1 Eq. Cas. Abr. 288; 91 E. R. 112.

Annotations:—N.F. Burke v. Jones (1813), 2 Ves. & B. 275. *Refd.* Vaughan v. Guy (1729), 1 Barn. K. B. 271.

4324. —.]—A. devised his lands to his exors., willing them to pay his debts:—*Held*: debts barred by Stat. Limitations were not within this devise.—*LEGASTICK v. COWNE* (1730), Mos. 391; 25 E. R. 457, L. C.

Annotation:—Consd. Burke v. Jones (1813), 2 Ves. & B. 275.

4325. —.]—Devise in trust for payment of debts does not revive a debt, upon which Stat. Limitations had taken effect by the expiration of the time before testator's death.—*BURKE v. JONES* (1813), 2 Ves. & B. 275; 35 E. R. 323.

Annotations:—Consd. Hargreaves v. Michell (1822), 6 Madd. 326. *Apld.* Jones v. Scott (1831), 1 Russ. & M. 255. *Apprvd.* O'Connor v. Haslam (1855), 5 H. L. Cas. 170.

4326. —.]—The existence of a trust by devise of real estate for the payment of debts, prevents the application of Stat. Limitations as against such debts; & 5 Geo. 2, c. 7, s. 4, does not so convert real estate situated in the American plantations into personal estate, as to take it out of the operation of that principle.—*TULLOCH v. SIMPSON* (1840), 9 L. J. Ch. 145.

4327. —.]—*TOFT v. STEPHENSON*, No. 4268, *ante*.

4328. —Devise in trust to pay legacies charged by testator's father.]—A. by will bequeathed pecuniary legacies to plffs., & he thereby charged all his freehold estates at X. or Y. or elsewhere with the payment of the said legacies, & subject thereto, devised all his real & personal estate to his son B., whom he made his sole exor., & died in

1830. B. by will devised the said estate at X. another estate at X., & the said estate at Y. to trustees & their heirs upon trust for his sons as therein mentioned, with powers to let the said estates & apply the proceeds to the maintenance of his children; & as to the estate at Y. to sell, & in the meantime to apply the rents in payment of the legacies "charged thereon by his late father's will"; & in case the said rents & proceeds of sale should be insufficient, then to raise such deficiency by mtge. of the estates at X. B. died in 1832. The sole acting trustee under his will sold the estate at Y. in 1833, part paid the legacies in 1834, mortgaged, & ultimately, with the concurrence of the *cestui que trust*, sold, the estates at X., & died in 1853. Upon a suit against the representatives of the trustee for the unpaid legacies:—*Held*: this case was not one of a mere legacy charged on land within Stat. Limitations, s. 40, but one of an express trust, the remedy for which was not barred by the statute; & the legatees were entitled to recover with arrears of interest for the whole period from one year after the death of B.—*WATSON v. SAUL* (1859), 1 Giff. 188; 33 L. T. O. S. 55; 5 Jur. N. S. 404; 7 W. R. 197; 65 E. R. 880.

Annotation:—Consd. Re Jordison, Itaine v. Jordison, [1922] 1 Ch. 440.

4329. —Effect of payment of debts of executrix out of own money—Real Property Limitation Act, 1874 (c. 57), s. 8.]—An extrix. tenant for life of the real & residuary personal estate under the will of testator, who died in 1885, part of the real estate called S. being devised upon trusts which caused it to be liable for payment of debts, shortly after testator's death applied out of her own moneys in payment of testator's creditors, the personal estate being insufficient, sums amounting together to £975. She remained in possession of the real estate, & took no steps to recover the moneys so paid until her death in 1915, when the question was raised whether her exor. was entitled to have recouped to her estate the moneys so paid by her out of the proceeds of sale of testator's real estate, which since her death had been sold by the newly appointed trustees thereof:—*Held*: her right to repayment was long since statute-barred as to the real estate, other than S., by above sect.; she had no lien or charge on that real estate, but only a right by administration proceedings to recover payment thereof; & from the time she made the payments, hers was the present hand to receive, & those entitled to the real estate were the hands to pay; & as to S., under sects. 8 & 10 of the Act, the extrix. was also barred, being in the position of an assignee of the debts & in no better position than the creditors she had paid off.—*Re WELCH, MITCHELL v. WILDER*, [1916] 1 Ch. 375; 85 L. J. Ch. 500; 114 L. T. 685; 32 T. L. R. 314; 60 Sol. Jo. 308.

4330. Out of personal estate.]—(1) A direction for the payment of debts, in a will of persona estate, will not stop the running of Stat. Limitations.

(2) If time has once begun to run against a debt in the debtor's lifetime, it does not afterward cease to run during the period which may elapse between his death & the time at which a persona representative to him is constituted.—*FRAKE v. CRANFELDT* (1838), 3 My. & Cr. 499; 8 L. J. Ch. 61; 2 Jur. 1080; 40 E. R. 1019.

4331. —.]—A trust for the payment of debts in a will of personal estate, will not prevent the operation of Stat. Limitations.—*EVANS v. TWEED* (1838), 1 Beav. 55; 8 L. J. Ch. 46; 48 E. R. 859.

4332. —.]—*SCOTT v. JONES*, No. 4270, *ante*.

4333. Out of blended fund.]—RENDALL v. CARPENTER, No. 4264, ante.

4334. — Recovery out of arrears of interest on wages left in testator's hands.]—Testator, by his will, gave all his real & personal property to his wife, out of which he desired that she would discharge all his legal debts & enjoy the surplus for her life; & at her decease the property was to be divided as in the will mentioned. A farm servant of testator left his wages from time to time in his master's hands, & it was agreed between them that the debt thus due should carry interest. Testator died in 1837. In a suit instituted after the death of the widow of testator, in 1854, for the administration of his estate:—*Held*: Stat. Limitations did not operate as a bar to arrears of interest upon the sum left by the servant in his master's, testator's hands.—*BLOWER v. BLOWER* (1858), 28 L. J. Ch. 181; 32 L. T. O. S. 193; 23 J. P. 227; 5 Jur. N. S. 33; 7 W. R. 101.

4335. — No real estate.]—SCOTT v. JONES, No. 4270, ante.

4336. — .]—A devise of real estate upon trust to pay debts does not prevent the operation of Stat. Limitations when testator leaves no real estate to support the trust.—*Re HEBURN, Ex p. SMITH* (1884), 14 Q. B. D. 304; 54 L. J. Q. B. 422. *Annotation*:—*Consd. Re Stephens, Warburton v. Stephens* (1889), 43 Ch. D. 39.

4337. — Effect on real estate.]—(1) Testator gave all his property upon trust for sale & conversion into money, & "after payment thereof" of his debts & funeral & testamentary expenses, to be held upon certain trusts. The exor. advertised for creditors, & a creditor sent in a claim. More than six, & less than twelve, years after the alleged debt was incurred, the exor., having applied for & failed to obtain from the creditor particulars of the claim, took out a summons asking that the claim might be adjudicated upon by the ct.:—*Held*: as to the real estate, testator's debts being by his will charged thereon, the period of limitation was twelve years, & consequently the claim was not barred.

(2) *Qu.*: whether as to such proportion of the debt as was properly attributable to personal estate the claim ought not to be considered as barred.—*Re STEPHENS, WARBURTON v. STEPHENS* (1889), 43 Ch. D. 39; 59 L. J. Ch. 109; 61 L. T. 609.

Annotations:—*As to (1)* *Held. Barnes v. Glenon*, [1899] 1 Q. B. 885; *Re Balls, Trewby v. Balls*, [1909] 1 Ch. 791. *As to (2)* *Consd. Re Raggi, Brass v. Young*, [1913] 2 Ch. 206.

4338. — Land Transfer Act, 1897 (c. 65), s. 2.]—A testator devised & bequeathed "all the real & personal estate to which at my death I shall be entitled" to his trustees upon trust for sale & conversion & out of the proceeds to pay "my debts, & funeral & testamentary expenses" & to hold the residue thereof in trust for certain residuary legatees. He then bequeathed certain pecuniary legacies. Testator died in 1901. His only asset was a reversionary share of real estate which fell into possession in 1905 & was sold in 1908. The legacies & certain simple contract debts incurred more than six but less than twelve years ago being still unpaid:—*Held*: (1) notwithstanding sub-sect. 2 of the above sect. the charge of debts on the real estate was not nugatory, but had the effect of bringing the debts within Real Property Limitation Act, 1874 (c. 57), s. 8, so that as against the real estate the period of limitation was twelve years, & they were still recoverable; (2) notwithstanding the absence of the words "rest & residue" the general devise & bequest of the real & personal estate as a mixed fund in one mass was clearly residuary, so that the legacies

were charged upon & payable out of the real estate.—*Re BALLS, TREWBY v. BALLS*, [1909] 1 Ch. 701; 78 L. J. Ch. 341; 100 L. T. 780.

4339. — .]—Testator, by his will, devised & bequeathed her residuary real & personal estate to trustees upon trust for sale & conversion, & out of the moneys produced from such sale & conversion to pay his funeral & testamentary expenses & debts, & to hold the residue upon certain trusts. He died in Nov. 1907. Shortly after his death deft. co. made a claim for £902 against his estate in respect of a debt, which, as the ct. held, arose in & subsequently to 1903, but took no steps to enforce it. On a summons by the trustees to determine the question whether deft. co. were creditors of testator to any &, if so, what amount:—*Held*: testator by creating a mixed fund & imposing a duty not on the exors. but on the trustees of paying his debts out of that mixed fund had created a charge not of a part but of the whole of the debts on the real estate, & it could not be said that any part of the debts was attributable to the personal estate; & therefore, no part of deft. co.'s debt was barred by Stat. Limitations. *Re RAGGI, BRASS v. YOUNG* (H.) & CO., LTD., [1913] 2 Ch. 206; 82 L. J. Ch. 390; 108 L. T. 917.

4340. — Effect on personal estate—Real Property Limitation Act, 1874 (c. 57), s. 10.]—Where an annuity is charged upon real & personal estate, whether secured by an express trust or not, only six years' arrears of the annuity are by Real Property Limitation Act, 1833 (c. 27), s. 42, & Real Property Limitation Act, 1874 (c. 57), s. 10, recoverable against the real estate, & the same limitation applies to the personal estate although there is no direct statutory bar.

Testator, who died in 1803, by his will gave his real & personal estate to trustees upon trust for sale & conversion, with discretionary power to postpone the sale & conversion, & directed his trustees to invest the net proceeds of such sale & conversion & out of the income thereof to pay A. the annual sum of £700 for her life, &, subject thereto, testator directed his trustees to stand possessed of the trust estate for his children. Testator had some real estate, but the bulk of his property was personally. His real estate was not sold until 1915. On the death of A. in 1916 considerable arrears of the annuity were due to her, & her exor. claimed payment of all the arrears on the ground that, the annuity being charged on the trust estate & secured by an express trust, no Stat. Limitations applied. On summons by the trustees to determine the matter:—*Held*: by sect. 42 of the Act of 1833 & sect. 10 of the Act of 1874, only six years' arrears of the annuity from the death of the annuitant were recoverable against the trust estate.—*Re TURNER, KLAFFENBERGER v. GROOMBRIDGE*, [1917] 1 Ch. 422; 86 L. J. Ch. 290; 116 L. T. 278; 61 Sol. Jo. 300.

Annotation:—*Overd. Re Jordaan, Itaine v. Jordaan*, [1922] 1 Ch. 440.

4341. — .] (1) By the above sect., "After the commencement of this Act no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, & secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable & so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust":—*Held*: the sect. did not extend to any annuity charged upon real estate

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& secured by an express trust where the trustee still remained in possession of the property upon which it was charged.

(2) Testator, who died in 1898, devised & bequeathed his real & personal estate to trustees upon trust for sale & conversion & investment of the proceeds, & directed them out of the income to pay his wife an annuity of £500 a year for her life & subject thereto to stand possessed of the corpus of the fund upon certain trusts for his children. Testator had one child, who became absolutely entitled to the trust fund subject to the annuity. The widow died on Jan. 20, 1908. At her death there were large arrears of the annuity unpaid, the income of the estate never having been sufficient to pay it in full, & no payment having been made out of capital. No payment in respect of the arrears had ever been made nor had any acknowledgment of a right thereto been given. Early in 1921 part of the residuary real estate was sold, & the surviving trustee thereupon presented an originating petition in the Lancaster Palatine Ct.:—*Held*: the claim to the arrears of the annuity was not barred by the above sect. & the interest of the son was therefore subject not only to the apportioned part of the last payment of the annuity due to the widow at her death, but also to the full arrears of the annuity. Inasmuch, however, as applt. had by her notice of appeal, confined her claim to the arrears for the six years immediately preceding the death of the widow the order in the present case would be similarly confined.

It is not disputed that if the remedy is barred as to the real estate it is barred as to the personal estate also (WARRINGTON, L.J.). *Re Turner, Klaffenberger v. Groombridge*, No. 4340, *ante*, over.—*Re JORDISON, RAINE v. JORDISON*, [1922] 1 Ch. 440; 81 L. J. Ch. 497; 126 L. T. 490; 66 Sol. Jo. 282, C. A.

B. Debts barred by Statute of Frauds.

4342. Right to pay.]—An administrator is not bound to set up Stat. Frauds in respect of the payment of the balance of a sum of money promised by deceased to be paid to his daughter on her marriage.—*Re GARRATT'S TRUST* (1870), 18 W. R. 684.

4343. —.]—An exor. or administrator would commit a *devastavit* who paid a debt to a creditor who is prevented from enforcing it by the Stat. Frauds, & for the same reason an exor. or administrator cannot retain such debt if due to himself. A father in consideration of the marriage of his daughter made a verbal promise to pay his daughter & her husband £500. He died intestate without performing his promise, & the daughter took out administration to his estate:—*Held*:

the administratrix could not retain the debt out of the assets.—*Re ROWNSON, FIELD v. WHITE* (1885), 29 Ch. D. 358; 54 L. J. Ch. 950; 52 L. T. 825; 49 J. P. 759; 33 W. R. 604, C. A.
Annotations:—*Reid, Midgley v. Midgley*, [1893] 3 Ch. 282; *Wilson v. Wilson*, [1911] 1 K. B. 327.

SUB-SECT. 5.—RIGHT TO PREFER CREDITOR.

A. Nature of Right.

See Administration of Estates Acts, 1869 (c. 40); 1925 (c. 23), s. 34.

4344. Right to prefer any creditor in equal degree.]—Exors. in equity, as well as at law, may prefer any creditor in equal degree; or, after an action at law brought by one creditor, may confess judgment to another.—*WARING v. DANVERS* (1715), 1 P. Wms. 295; 24 E. R. 396.
Annotation:—*Reid, Maltby v. Russell* (1825), 2 Sim. & St. 227.

4345. — Rent & bond debt.]—ANON. (*circa* 1691), Nels. 191; 21 E. R. 823.

4346. — English & foreign creditors—English & foreign assets.]—Where a testator dies, leaving creditors & assets in England as well as in India, the creditors in England are not entitled to be satisfied out of the assets in England in priority of the Indian creditors.—*REYNOLDS v. LEWIS, Re BRETT* (1860), 29 L. J. Ch. 296; 8 W. R. 272.

4347. — Simple contract creditors & specialty creditors—Simple contract debt not bearing interest—Sufficiency of assets.]—*TURNER v. TURNER*, No. 3980, *ante*.

4348. — Effect of Administration of Estates Act, 1869 (c. 46).]—*Re ORSMOND, DRURY v. ORSMOND*, No. 4219, *ante*.

4349. —.]—*Re HANKEY, CUNLIFFE SMITH v. HANKEY*, No. 4220, *ante*.

4350. —.]—*Re SAMSON, ROBBINS v. ALEXANDER*, No. 4221, *ante*.

4351. — By creditor's administrator—Effect of form of administrator's bond.]—The personal representative may still retain his own debt, notwithstanding a decree for administration made in a suit by other creditors, notwithstanding the assets out of which he seeks to retain came to his hands after the decree, & notwithstanding the present form of a creditor's administration bond, which provides for a due course of administration "ratably & proportionably & according to the priority required by law & not unduly preferring his own debt or the debts of any other of the creditors of deceased by reason of being an administrator."—*DAVIES v. PARRY*, [1899] 1 Ch. 602; 68 L. J. Ch. 346; 47 W. R. 429; 15 T. L. R. 186.
Annotations:—*Dbtd. but Follid. In the Goods of Belham, Richardes v. Yates* (1901), 84 L. T. 300. *Apprvd. Re Belham, Richardes v. Yates*, [1901] 2 Ch. 52. *Reid, Creditors' Bonds* (1899), 16 T. L. R. 122; *Re Rhoades, Er v. Rhoades v. Official Receiver* (1899), 80 L. T. 742; *Re Benett, Ward v. Benett*, [1906] 1 Ch. 216.

this respect upon the same footing.—*CHAMBERLEN v. CLARK* (1883), 9 A. R. 273; 1 O. R. 135.—CAN.

4344 iii. —.]—An exor. or administrator is entitled to prefer one creditor at the expense of another. He may even confess judgment to a creditor in equal degree with another suing him pending the action & plead it in bar, & that although done for the express purpose of depriving plft. of his debt.—*MCCARTHER v. MACDONNELL* (1885), 3 Man. L. R. 9.—CAN.

4344 iv. —.]—When debts are of the same degree the exor. may prefer one to the other.—*MOUNT PLEASANT UNDERTAKING CO. v. MCDUFFEE*, [1923] 4 D. L. R. 1200; 3 W. W. R. 937.—CAN.

PART IV. SECT. 2, SUB-SECT. 5.—A.

4344 i. Right to prefer any creditor in equal degree.]—This action was brought to contest the validity of a judgment by the A. Bank against debts, exors. of Z., on a confession for £217,637 9s., plft. contending that the judgment was recovered in fraud of them & other creditors. It appeared in evidence that nearly half of the judgment was for a debt due by Z. to the bank; the remainder was for debts of Z. assumed & paid by the bank at debts. request, & for the advance of £60,000 to defts., to enable them to complete a branch railway:—*Held*: the debt on which this judgment was obtained, was not unjust or illegal, it being clear that exors. may pay a debt of equal degree,

in preference to another of the same degree, or allow or confess judgment to one creditor in preference to another.—*HAMILTON v. WOODRUFF* (1863), 14 C. P. 22.—CAN.

4344 ii. —The effect of R. S. O. 1877, c. 107, s. 30, is to disable an exor. from giving preference to one creditor over another, so that where he pays one creditor in full the presumption is that he has assets sufficient to pay all; & if, upon a final adjustment of the accounts of his estate, it is made to appear that one creditor has received payment in full, either voluntarily or by process of law, & that there is a deficiency of assets, such creditor will be ordered to refund at the instance of the other creditors, the statute thus placing creditors & legatees in

4352. Right to borrow amount of debt from creditor—Acceptance by creditor of personal security of executor & release of debt against estate.]—An exor. having assets of his testator, either in money or goods, before any bill had been filed for the administration of the estate, applied to a creditor of testator for a loan of a sum of money equal in amount to the debt; & the creditor accepted the personal security of the exor. for the amount, & released his debt against the estate:—*Held*: the exor. having, by such substitution of his own security for that of the estate, discharged the debt, as against the estate, should not be treated as a mere purchaser of the debt of the creditor, & as such, entitled only to stand in the place of the creditor; but the exor. was entitled to be allowed, in his own discharge, the amount of the debt as a debt of testator preferred & paid.—*HEPWORTH v. HESLOP* (1849), 6 Hare, 501; 18 L. J. Ch. 352; 13 Jur. 166; 67 E. R. 1286.

Annotations:—*Consd.* *Re Jones*, Peak v. Jones, [1914] 1 Ch. 742. *Reid*. Vane v. Ridgen (1870), 5 Ch. App. 603.

4353. Right to advance money to pay preferred creditor—Estate insolvent—Right to be recouped.]—To entitle an exor. to insist on his right to prefer a creditor & to be allowed the amount paid by him out of the assets of testator's estate, it is not necessary for him, in the event of the estate proving insolvent, to establish that at the time he made the payment he had assets of testator in hand. He may if he pleases himself advance the money to the estate for the purpose of such payment, & if he does so he will be entitled to recoup himself out of subsequent assets of the estate which may come into his hands.—*Re JONES, PEAK v. JONES*, [1914] 1 Ch. 712; 83 L. J. Ch. 568; 58 Sol. Jo. 579.

Right to retain.]—*See* Sect. 4, *post*.

B. Time for Exercise of Right.

4354. After action brought.]—*TERREY v. FOWLER* (circa 1600), Toth. 88; 21 E. R. 132.

4355. — Effect of false plea.]—After the suit begun the exor. may not excuse himself by any voluntary payments; he may use legal delays, as imparlance & essoins, etc., to prefer one creditor before another, but he may not do it by false pleading of what lieth in his own knowledge; otherwise, if the falsity lie not in his knowledge, as *non est factum testatoris* (per CUR.).—*PARKER v. DEE* (1674), 2 Cas. in Ch. 200; 3 Swan. 529, n.; 22 E. R. 910.

Annotations:—*Reid*. Pigott v. Nower (1677), 3 Swan. 534, n.; Solley v. Gower (1688), 2 Vern. 61. *Mentd.* Ray v. Sherwood & Ray (1836), 1 Curt. 173.

4356. —.]—Bond creditor brings a bill against an exor. for recovery of his debt & pending this suit, the exor. confesses a judgment to another bond creditor, the exor. may pay this judgment before the bond debt.—*GOODFELLOW v. BURCHETT* (1693), 2 Vern. 298; 23 E. R. 702.

Annotations:—*Mentd.* Devese v. Pontet (1785), 1 Cox. Eq. Cas. 188; Hinchcliffe v. Hinchcliffe (1797), 3 Ves. 516; Roper v. Bartholomew (1822), 12 Price, 707.

4357. —.]—*ORFORD (EARL) v. DASTON* (1702), Colles, 229; *Cas. temp. Talb.* 223, n.; *Preced.* Ch. 188; 3 P. Wms. 401, n.; 1 E. R. 262, H. L.; *revers.* S. C. *sub nom.* DASTON v. OXFORD (EARL) (1701), 1 Eq. Cas. Abr. 10, L. C.

Annotations:—*Follid.* Maltby v. Russell (1825), 2 Sim. & St. 227; *Re Radcliffe, European Assoc. Soc. v. Radcliffe* (1878), 7 Ch. D. 733. *Reid.* Morris v. Bank of England (1736), *Cas. temp. Talb.* 217; *Re Wells, Molony v. Brooke* (1890), 45 Ch. D. 569.

4358. — Preference by confession of judgment to another creditor.]—*WARING v. DANVERS*, No. 4344, *ante*.

4359. —.]—In an action against an exor. for breaches of covenants in an indenture made by his testator, deft. having pleaded in chief *plene administravit* & a retainer for a simple contract debt, upon which issues were taken & joined, & then *puis darrein continuance*, a judgment recovered upon a bond of testator's after the last continuance (being the last day of Trinity term), to wit, on Aug. 2, as of Trinity term preceding; to which pltf. replied that defts. had notice of the bond before the commencement of the action:—*Held*: upon demurrer to the replication, the plea was well pleaded, & was an answer to the action.

Among creditors of equal degree, he [an exor.] may pay one in preference to another. He may even, after actions are commenced against him by a creditor on simple contract, confess a judgment in favour of another creditor of equal degree, & thus give the latter a preference (*ANNOTT, C.J.*).—*LYTTLETON v. CROSS* (1821), 3 B. & C. 317; 5 Dow. & Ry. K. B. 175; 3 L. J. O. S. K. B. 2; 107 E. R. 751.

Annotations:—*Consd.* *In the Goods of Belham*, Richardes v. Yates (1901), 84 L. T. 300.

4360. —.]—An exor. or administrator may, after a suit is instituted against him for an account, pay any simple contract or specialty creditor, & will be allowed such payment in passing his accounts.—*MALTBY v. RUSSELL* (1825), 2 Sim. & St. 227; 3 L. J. O. S. Ch. 85; 57 E. R. 333.

Annotations:—*Follid.* Wood v. Westall (1831), You. 305. *Reid.* Neeves v. Burrage (1849), 14 L. T. O. S. 394.

4361. — — Rule of equity prevails.]—(1) Where an exor. or administrator, after the commencement of a creditors' administration action & before judgment, has voluntarily paid any creditor in full the rule in equity, & not at law must now prevail, under Jud. Act, 1873 (c. 66), s. 25 (11), & he will accordingly be held to have made a good payment, & will be allowed it in passing his accounts, even though he may have had notice of the action before payment.

(2) To prevent such payments being made in any such action, pltf. should, immediately upon issuing the writ, apply for & obtain a receiver. *Re RADCLIFFE, EUROPEAN ASSURANCE SOCIETY v. RADCLIFFE* (1878), 7 Ch. D. 733; 20 W. R. 417.

Annotations:—*As to* (1) *Follid.* Vibart v. Coles (1890), 24 Q. B. D. 364. *Apld.* *Re Wells, Molony v. Brooke* (1890), 45 Ch. D. 569. *As to* (2) *Dtd.* Phillips v. Jones (1884), 28 Sol. Jo. 360. *N.F.* *Re Wells, Molony v. Brooke* (1890), 45 Ch. D. 569. *Consd.* *Re Waight* & Luncey & Hallstone (1895), 39 Sol. Jo. 770.

4362. —.]—An exor. or administrator is entitled, after action brought against him by a creditor of deceased for his debt, to apply the assets in payment of the debt of another creditor, inasmuch as, the rules of law & equity on the subject having been in conflict, the equity rule must now prevail.

Deft., an administratrix, after action brought against her for money lent to the intestate by pltf., consented to a judge's order for judgment in a subsequent action by another creditor for a debt due from the intestate, & judgment was signed accordingly. The judgment was void as against creditors, though not as between the parties, because the judge's order was not filed as required by the Debtors Act, 1869 (c. 62), s. 27. Deft. having paid the amount of that debt which exhausted the assets:—*Held*: as between her & pltf., the original debt was not merged in the judgment, & she was entitled to make the payment in respect of such debt.—*VIBART v. COLES* (1890), 24 Q. B. D. 364; 59 L. J. Q. B. 152; 62 L. T. 551; 38 W. R. 359, C. A.

Sect. 2.—Payment of debts presently due: Sub-sect. 5, B. & C. Sect. 3: Sub-sects. 1 & 2.]

4363. — Effect of Administration of Estates Act, 1869 (c. 46).—*Re SAMSON, ROBBINS v. ALEXANDER, No. 4221, ante.*

4364. After decree—For administration.]—Exor. will not be allowed payments to creditors made after a decree for administering the debtor's estate.

Where an exor. has paid a creditor part of his debt, the ct. will not make any further payment to him out of either the legal or the equitable assets of the debtor, until all the other creditors are paid proportionably.—*MITCHELSON v. PIPER* (1836), 8 Sim. 64; *Donnelly*, 80; 5 L. J. Ch. 294; 47 E. R. 246.

*Annotations:—**Reid. Neeves v. Burrage* (1849), 14 L. T. O. S. 394; *Spackman v. Holbrook* (1860), 6 Jur. N. S. 881. *Mentd. Re Midland Express, Pearson v. The Co.*, [1914] 1 Ch. 41.

4365. — — —.]—Exors., before suit commenced, paid some of testator's creditors a certain proportion of their debts:—*Held*: they were not entitled to any further payment, until the other creditors had been paid proportionably.—*WILSON v. PAUL* (1836), 8 Sim. 63; 59 E. R. 25.

*Annotation:—**Reid. Re Midland Express, Pearson v. The Co.* (1913), 109 L. T. 697.

4366. — — —.]—(1) When, after a decree directing a legal personal representative to admit assets or account, he pays debts, he will be allowed them, though the estate should prove deficient.

(2) When such a payment is made after a decree for the administration of the estate the rule is otherwise.—*GEORGE v. GEORGE* (No. 1) (1865), 35 Beav. 350; 55 E. R. 931.

4367. — For account.]—Administratrix not allowed for debts paid after a decree to account; but shall stand in the place of the creditors paid.—*JONES v. JUKES* (1704), 2 Ves. 518; 30 E. R. 753. *Annotation:—**Consd. Re Barrett, Whitaker v. Barrett* (1889), 43 Ch. D. 70.

4368. — — —.]—*IRBY v. IRBY* (No. 3), No. 5166, *post*.

4369. — — —.]—*GEORGE v. GEORGE* (No. 1), No. 4366, *ante*.

4370. — — —.]—*R. S. C., Ord. 15, r. 1.]—**Re BARRETT, WHITAKER v. BARRETT*, No. 4500, *post*.

After appointment of receiver.]—*See* Sub-sect. 5, C., *post*.

C. Appointment of Receiver.

4371. Effect of—Termination of right to prefer.]—*Re RADCLIFFE, EUROPEAN ASSURANCE SOCIETY v. RADCLIFFE*, No. 4361, *ante*.

4372. Grounds for—Not merely to prevent exercise of right to prefer.]—*PHILIPS v. JONES* (1884), 28 Sol. Jo. 360, C. A.

*Annotations:—**Reid. Re Wells, Molony v. Brooke* (1890), 45 Ch. D. 569; *Re Waight's Estate, Pugh v. Lindley & Hailstone* (1895), 39 Sol. Jo. 770.

4373. — — —.]—A pltf. in a creditor's action for administration of an insolvent estate is not entitled, on an *ex p.* application, to a receivership order on the ground merely that the exor. or administrator is preferring one creditor to another.—*Re HARRIS, HARRIS v. HARRIS* (1887), 56 L. J. Ch. 754; 56 L. T. 507; 35 W. R. 710.

*Annotation:—**Consd. Re Wells, Molony v. Brooke* (1890), 45 Ch. D. 569.

4374. — — —.]—*Re WRIGHT'S ESTATE, PUGH v. LINDLEY & HAILSTONE* (1895), 39 Sol. Jo. 770.

SECT. 3.—DISCHARGE OF LIABILITIES NOT PRESENTLY DUE.

SUB-SECT. 1.—IN GENERAL.

4375. Future liability certain—Priority over speciality & simple contract debts.]—*ROBSON v. FRANCIS* (1617), 1 Roll. Rep. 405; 81 E. R. 568; *sub nom. ROBINSON v. FRANCIS, J. Bridg.* 79.

*Annotation:—**Reid. Bank of England v. Morrice* (1736), *Lee temp. Hard.* 219.

4376. — — —.]—*Assumpsit* against an exor.; he pleaded an obligation payable at a future day:—*Held*: an exor. is not bound to pay a simple contract debt before the debt due on an obligation payable at a day not yet come.—*LEMUN v. FOOKE* (1082), 3 Lev. 57; 83 E. R. 574.

*Annotation:—**Reid. Bank of England v. Morrice* (1736), *Lee temp. Hard.* 219.

4377. — — —.]—Under contract.]—Exor. bound to set apart a fund to answer future demands under a contract.—*JOHNSON v. MILLS* (1749), 1 Ves. Sen. 282; 27 E. R. 1033, L. C.

*Annotation:—**Consd. Re Hall, Foster v. Metcalfe*, [1903] 2 Ch. 226.

4378. Future liability contingent—Whether bar to action of debt.]—In debt against exors., if debts, plead that testator was bound in a recognisance in such a sum, beyond which they have not anything in their hands, it is a good replication to say that the recognisance was entered into for performance of covenants contained in certain indentures of which covenants none are yet broken (*per CUR.*).—*FOSTER'S CASE* (1588), 2 Leon. 212; 74 E. R. 486.

*Annotation:—**Reid. Hunt v. Bourne* (1702), 1 Salk. 339.

4379. — — —.]—(1) W. brought an action of debt against H., exor. of S. Debt. pleaded, that testator in his lifetime made a statute staple to one K. in the sum of £1,000 & above that he had nothing; & if this plea be good or not was the question.

(2) The plea is good without question. I have heard divers learned men doubt of that; for, if testator were bound in a statute to perform covenants which are not yet broken, & it may be they will never be broken, & then he shall never be chargeable by this statute, & yet he shall never be compelled to pay any debts, which will be a great inconvenience; & again, I think there will be a greater mischief of the other part; for, put the case if the exors. do pay this debt, & the statute is broken, after he shall be chargeable by a *devastavit* of his own proper goods, the which will be a greater inconvenience (*GAWDIE, J.*).—*WOODCOCK v. HERN* (1601), Gouldsb. 142, pl. 57; 75 E. R. 1052.

4380. — Right of creditor of inferior degree to be paid in full—Effect of part or probable misapplication of assets.]—When an annuity is secured by a covenant & warrant of attorney, & all the arrears have been paid, the ct. will not restrain the exors. of the grantor from paying his simple contract debts until they have set apart a fund to answer the future payments, unless a case of past or probable misapplication of assets is made out.—*READ v. BLUNT* (1832), 5 Sim. 567; 58 E. R. 451.

*Annotations:—**Follid. Collins v. Crouch* (1849), 13 Q. B. 342. *Distd. Atkinson v. Grey* (1853), 23 L. T. O. S. 184. *Consd. Henderson v. Gilchrist* (1853), 22 L. J. Ch. 970. *Follid. Wentworth v. Chevill* (1857), 26 L. J. Ch. 760. *Reid. Whitmore v. Oxborrow* (1842), 2 Y. & C. Ch. Cas. 13.

4381. — Liability as surety.]—A. as principal, & B. as surety, by indenture of Dec. 21, 1848,

PART IV. SECT. 3, SUB-SECT. 1.
h. Future liability certain—Personal liability of executor—Where pro-

vision not made.]—An exor. who pays out inheritances without providing for a continuing liability of the estate incurs a personal liability to the

creditors.—*UNION BANK (LIQUIDATORS) v. KIVER* (1891), 8 S. C. 146; 1 C. T. R. 64.—*S. AF.*

jointly & severally covenanted with C. & D. that A., his heirs, exors., or administrators, or B., his heirs, exors., or administrators, would pay to C. & D., or the survivor of them, £2,000 in two instalments of £1,000, the former in 1853, & the latter on May 13, 1858, with interest at 5 per cent. B., the surety, having died insolvent, his estate was administered under a decree of the ct. On a claim by D., the survivor of C. & D., to have a fund set aside for the payment of the second instalment of £1,000:—*Held*: the exors. of B., the surety, ought to set aside a fund for the future payment of the £1,000.—*ATKINSON v. GREY* (1853), 1 Sm. & G. 577; 23 L. T. O. S. 181; 18 Jur. 282; 65 E. R. 253.

4382. — *In respect of shares—Retained unsold.*—The exors. of a shareholder in a joint stock co., which was a going concern at the time of testator's death, paid a legacy under his will without providing for any contingent liability in respect of the shares which they retained unsold. The co. was subsequently wound up, & the exors. were placed on the list of contributories:—*Held*: they were liable to pay the amount of the legacy in satisfaction of calls.—*TAYLOR v. TAYLOR* (1870), L. R. 10 Eq. 477; 39 L. J. Ch. 676; 23 L. T. 134; 18 W. R. 1102.

Annotations:—*Apld.* *Re Bewley's Estate, Jefferys v. Jefferys* (1871), 21 L. T. 177. *Mentd.* *Jervis v. Wolferstan* (1874), L. R. 18 Eq. 18.

4383. — *Release of liability in testator's lifetime—Release subsequently set aside.*—Testator who had been a shareholder in a co., but had before his death been released from all liability in respect of his shares in consideration of a certain payment, by his will gave certain legacies, which his exors. duly paid. The co. afterwards endeavoured to set aside the release, & they failed in the first instance, but on appeal succeeded in setting aside the release:—*Held*: the exors. were personally liable to refund the amount paid to the legatees, to meet the calls made upon testator's estate in respect of the shares.—*Re BEWLEY'S ESTATE, JEFFERYS v. JEFFERYS* (1871), 24 L. T. 177.

4384. — *Accepted after testator's death.*—Testator bequeathed residuary personality to trustees, with permission to continue existing investments, upon trust to convert, & invest in, amongst other securities, the stock or shares of any co. in Great Britain, & pay the income to a tenant for life, with remainder over. He declared that "the calls, if any, which at or after my decease may be or become due in respect of any shares for the time being constituting part of my residuary personal estate, shall be paid by" the trustees out of income, & not out of capital. Testator at his death held waterworks & railway shares, upon which some instalments were due, but not yet payable. After testator's death the trustees sold some shares on which a call was actually payable, & allowed the brokers to retain the amount of the call out of the sale moneys, for the benefit of the purchaser. After testator's death the trustees accepted allotments of valuable shares offered to them in respect of their proprietorship in the co.:—*Held*: (1) the instalments due on shares accepted by testator in his lifetime, when payable, & the amount of the call moneys deducted on the occasion of the sale, were calls within the meaning of the will, & hence payable out of income; (2) the shares accepted by the trustees did not constitute

part of testator's residuary personal estate at his death, & hence the calls on such shares were payable out of capital.—*BEVAN v. WATERHOUSE* (1876), 3 Ch. D. 752; 46 L. J. Ch. 331.

4385. — *Contingent creditor not entitled to administration order.*—Testator by deed covenanted with trustees to pay an annuity to a woman during her life, to be considered as accruing from day to day, by equal quarterly payments. Testator's estate was not sufficient to pay the estimated value of the annuity as well as his other debts & liabilities, & the trustees took out an originating summons under R. S. C., 1883, Ord. 55, r. 3, as creditors for administration of the estate. At the time when the summons was taken out no quarterly payment of the annuity was due:—*Held*: the trustees of the annuitant were not creditors of testator, & could not take out a summons for the administration of the estate; although if an administration order was obtained by some other person they would be entitled to prove for the estimated value of the annuity.—*Re HARGREAVES, DICKS v. HARE* (1890), 41 Ch. D. 236; 59 L. J. Ch. 375; 62 L. T. 819; 6 T. L. R. 264, C. A.

Annotations:—*Refd.* *Re Beeman, Fowler v. James*, 1 Ch. 48; *Re Blow, St. Bartholomew's Hospital v. Camblen*, [1914] 1 Ch. 233; *Re Hall, Hope v. Hall*, [1918] 1 Ch. 562.

4386. *When court will order retransfer of indemnity fund—Effect of lapse of time.*—J. in his lifetime received moneys to pay custom house duties for H. & M., & there being reason to believe the duties were not paid, H. & M. called upon the administrator of J. to invest in the funds in the name of trustees a sum sufficient to answer the duties, if H. & M. should be called upon to pay them. Many years elapsed without any claim of the duties, & plff. called for a retransfer of the funds, but no other relief was given, except a direction that the dividends which had accrued on the fund should be paid to plff.—*LINTON v. HYDE* (1817), 2 Madd. 94; 56 E. R. 269.

SUB-SECT. 2.—IN RESPECT OF LEASEHOLDS.

See Law of Property Amendment Act, 1859 (c. 35), s. 27; Trustee Act, 1925 (c. 19), s. 26.

4387. *Whether necessary to retain assets to meet contingent liabilities.*—In an action by extrix. of assignor of a lease against extrix. of assignee, upon a covenant by assignee to perform the covenants in the lease, & indemnify assignor for the breach of any of them, deft. pleaded *plene administravit* & at the trial proved that the entire assets including the consideration money for a sale by him of the lease in question had before the breach of covenant complained of been applied to the payment of simple contract debts:—*Held*: a sufficient defence; for the exor. was not bound to retain the proceeds of such sale for the purpose of indemnifying against any future breach of covenant although some of the breaches in question were by non-payment of rent.—*COLLINS v. CROUCH* (1849), 13 Q. B. 542; 18 L. J. Q. B. 209; 13 L. T. O. S. 90; 13 Jur. 361; 116 E. R. 1370.

4388. — *Claim by a lessor for the administration of the estate of his lessee, & to have a sufficient part of the assets impounded to answer*

PART IV. SECT. 3. SUB-SECT. 2.
4387.1. *Whether necessary to retain assets to meet contingent liabilities.*—Where exors. of an original grantee of a fee-farm grant assigned to a purchaser, & subsequently, on the demand

of the head landlord, set apart & retained out of the assets of testator a sum sufficient to meet any future liability in respect of the covenant for rent in the fee-farm grant:—*Held*: under 22 & 23 Vict. c. 35, ss. 27, 28,

the exors. could not retain, & the head landlord could not require them to retain, any such sum, & the same should be distributed among the persons entitled.—*MILLAR v. SINCLAIR*, [1903] 1 I. R. 150.—*IR.*

Sect. 3.—Discharge of liabilities not presently due:
Sub-sects. 2 & 3. Sect. 4: Sub-sects. 1, 2 & 3.]

future possible breaches of covenant in the lease, dismissed.

It is not a part of the contract between a lessor & lessee that, on the death of the lessee, his assets shall be impounded to answer the future rent & covenants; & if any portion of the assets are retained or appropriated for that purpose, it is from the right of the exor. to indemnity, & not from any right which the lessor has to require such security.—*KING v. MALCOTT* (1852), 9 Hare, 692; 22 L. J. Ch. 157; 19 L. T. O. S. 19; 16 Jur. 237; 68 E. R. 691.

*Annotations:—**Distd.* *Atkinson v. Grey* (1853), 1 Sm. & G. 577; *Norman v. Johnson* (1860), 29 Beav. 77. *Consd.* *Dodson v. Sammell* (1861), 1 Drew. & Sm. 575. *Apd.* *Re Parry, Scott v. Leak* (1889), 42 Ch. D. 570. *Consd.* *Re Hall, Foster v. Metcalfe*, [1903] 2 Ch. 226; *Re Nixon, Gray v. Bell*, [1904] 1 Ch. 638. *Expld.* *Re King, Mellor v. South Australian Land Mortgage & Agency Co.*, [1907] 1 Ch. 72. *Reid.* *Thomas v. Griffith* (1860), 2 De G. F. & J. 555; *Re Haytor Granite Co.* (1865), L. R. 1 Eq. 11; *Harbin v. Masterman*, [1896] 1 Ch. 351; *Re Blow, St. Bartholomew's Hospital v. Cambden*, [1914] 1 Ch. 233. *Mentd.* *Re London & Colonial Co., Horsey's Claim* (1868), L. R. 5 Eq. 561.

4389. —.]—On the sale of a leasehold before the passing of the 22 & 23 Vict. c. 35, the purchaser covenanted to indemnify the vendor against the covenants of the lease. He bequeathed the leasehold to his widow & appointed her his extrix. — *Held*: the Act applied, & the exors. of the widow were at liberty to distribute her estate without setting apart any fund to provide against the liability under the covenants.—*Re GREEN* (1860), 2 De G. F. & J. 121; 45 E. R. 568, L. J.J.

4390. —.]—It is competent to an exor. in certain circumstances to distribute his testator's estate without retaining any fund to meet future contingent liabilities in respect of leaseholds.—*Re SALER, POWSLAND v. ROBERTS* (1920), 64 Sol. Jo. 308.

4391. Administration by court—Direction for retention of assets to meet contingent liabilities.]—In an administration suit it appeared that testator & his surviving partners were lessees of certain iron works & premises for a term of years, of which eleven were unexpired, & as such lessees, were subject to covenants for rent, repairs, insurance, etc.; & that, by the articles of partnership, the exors. of a deceased partner might elect to become partners in the concern or to withdraw the capital of deceased therefrom:—*Held*: although the exors. had elected not to become partners, & no breach of the covenants appeared to have happened, yet, as such covenants, if broken, might leave the estate of testator liable to demands sufficient to absorb it, the interest as well as the principal of the residuary estate must be retained to answer any such possible demands, until the extent of the liability could be ascertained; or, if any part of the interest or income should be paid to the tenant for life, it could only be on security to refund same, if required to satisfy any such future demand.—*FLETCHER v. STEVENSON* (1844), 3 Hare, 360; 13 L. J. Ch. 202; 8 Jur. 307; 67 E. R. 420.

*Annotations:—**Expld.* *Dodson v. Sammell* (1861), 1 Drew. & Sm. 575; *Re Nixon, Gray v. Bell*, [1904] 1 Ch. 638; *Re King, Mellor v. South Australian Land Mortgage & Agency Co.*, [1907] 1 Ch. 72. *Reid.* *Hickling v. Boyer* (1851), 3 Mac. & G. 635; *Dean v. Allen* (1855), 20 Beav. 1; *Waller v. Barrett* (1857), 24 Beav. 413; *Vario v. Faden* (1859), 1 De G. F. & J. 211; *Re Dawson, Arathoon v. Dawson*, [1906] 2 Ch. 211.

SUB-SECT. 3.—RIGHT OF REPRESENTATIVE TO INDEMNITY.

See Part V., Sect. 7, *post*.

SECT. 4.—RIGHT OF RETAINER.

SUB-SECT. 1.—IN GENERAL.

See Administration of Estates Act, 1925 (c. 23), s. 34.

4392. Nature of right.]—(1) How a creditor, being exor. to his debtor, may retain goods to pay himself.

(2) The exor. may retain assets to pay himself notwithstanding he may not bring an action to recover; . . . because in judgment of law . . . if the exor. has as much goods in his hands as his own debt amounts to, the property of those goods is altered & vested in himself, that is, he has them as his own proper goods in satisfaction of his debt, & not as exor. (*per CUR.*)—*WOODWARD v. DARCY (LORD)* (1558), 1 Plowd. 184; 75 E. R. 282.

*Annotations:—**As to* (1) *Consd.* *R. & Waller v. Hanger* (1615)* 3 Bulst. 1; *Re Gilbert, Ex p. Gilbert*, [1898] 1 Q. B. 282. *Reid.* *Wankford v. Wankford* (1704), 1 Salk. 299; *Farr v. Newman* (1792), 4 Term Rep. 621; *R. v. Wade* (1817), 5 Price, 621. *As to* (2) *Expld.* *Re Rhoades, Ex p. Rhoades*, [1899] 2 Q. B. 347. *Reid.* *Wankford v. Wankford* (1704), 1 Salk. 299; *Ford v. Beech* (1848), 11 Q. B. 852. *Generally*, *Mentd.* *Wirral v. Brand* (1665), 1 Sid. 259; *R. v. Hornby* (1695), 5 Mod. Rep. 29; *Cage v. Acton* (1699), 1 Ld. Raym. 515.

4393. — No presumption of retainer of sufficient assets to pay debt.]—Where debtor makes his creditor exor. of his will, the law raises no presumption that creditor has retained enough to pay his debt, until it be shown by evidence that he has received enough for that purpose.—*WHITE v. FITCH* (1820), 7 L. J. O. S. K. B. 223.

4394. — Necessity for assets in hands of representative.]—*LOWE v. PESKETT*, No. 4068, *ante*. — *Actually or constructively.]*—See Nos. 4134–4438, *post*.

4395. — Right to set off debt of legatee against legacy.]—(1) The exor's right of retainer must be only to retain money against money. Where testator had specifically bequeathed sums of colonial stock to a person who had borrowed money from her:—*Held*: although the gift to debtor was of something like money or which might easily be turned into money, the exor. had no right to retain any part of the stocks to answer the debt to testator's estate.

(2) This right which the exor. can exercise in certain circumstances is properly called a right of retainer.—*Re SAVAGE, CULL v. HOWARD*, [1918] 2 Ch. 146; 87 L. J. Ch. 599; 119 L. T. 337; 62 Sol. Jo. 620.

— *When right exercisable.]*—See Sect. 5, sub-sect. 12, B., *post*.

4396. Effect of Administration of Estates Act, 1869 (c. 46).]—One of three exors. who is also one of two joint creditors has a right of retainer in respect of his joint debt. The right of retainer is not affected by the above Act abolishing the distinction between specialty & simple contract debts.—*Re STEWART, CROWDER v. STEWART* (1880), 16 Ch. D. 368; 50 L. J. Ch. 136; 29 W. R. 331.

*Annotations:—**Consd.* *Re Jones, Calver v. Laxton* (1885), 31 Ch. D. 440. *Reid.* *Re Williams, Holder v. Williams*, [1904] 1 Ch. 52.

— *See, also*, No. 4162, *ante*, Nos. 4417–4419, 4421, 4511, *post*.

PART IV. SECT. 4. SUB-SECT. 1.

k. Not assertable in Nova Scotia.]—The exor. has no right of retainer in Nova Scotia.—*Re McNUTT'S ESTATE* (1892), 24 N. S. R. (12 It. & G.) 264.—CAN.

4397. Pleading—Debt due under marriage settlement.—An administratrix claiming under a marriage settlement to retain her debt, need not, in pleading the articles to an action brought against her for a simple contract debt, due from the intestate, state that they were in writing or under seal, or plead them with a *proferat*, or set out the consideration more particularly, the object of such a plea being merely to show her right to retain a debt accruing to her thereby, against other creditors of equal degree, & to let in evidence in support of such retainer, on the plea of *plene administravit*.—*HARRY v. JONES* (1817), 4 Price, 89; 146 E. R. 403.

4398. Duty to exercise—Executor of defaulting trustee.—The sole trustee of a fund misappropriated it & died insolvent. His exor. had never acted in the trust, & desired to be discharged therefrom:—*Held*: he was entitled to decline to act in the trust, & was not bound to exercise his right of retainer for the benefit of the *cestuis que trust* in respect of the debt due to him as trustee of the fund.—*Re RIDLEY, RIDLEY v. RIDLEY*, [1904] 2 Ch. 774; 91 L. T. 189; 48 Sol. Jo. 641; *sub nom. Re RIDLEY'S TRUSTS*, 73 L. J. Ch. 696. *Annotation*:—*Apprvd. & Foll'd. Re Bennett, Ward v. Bennett* [1906] 1 Ch. 216.

SUB-SECT. 2.—BY WHOM EXERCISABLE.

4399. Executor not proving—Executor renouncing probate.—An exor. who renounces probate is not entitled to retain a debt due to him from testator out of assets in his hands.—*SMITH v. NORTH* (1849), 13 L. T. O. S. 380; 13 Jur. 998.

4400.—*T*estator, who died in 1833, bequeathed two cottages to his exor., in trust to sell & retain a debt due to him from testator, & hold the surplus for other persons. The exor. never proved the will, but retained the property in discharge of his debt. He bequeathed it by his will, & it was enjoyed by the tenant for life thereunder until 1852. A legatee in remainder under the second testator afterwards instituted a suit to recover the cottages, which was resisted by a person claiming under the will of the first testator. The exor.'s debt was alleged to be £300, & the value, according to one side, was £300, & on the other, £360, but the value of the property had lately greatly increased from local circumstances. The ct., notwithstanding the lapse of time, granted relief by ordering a sale.—*SMITH v. BAKES* (1855), 20 Beav. 568; 52 E. R. 723.

4401. Executor devisee.—An exor. may retain his own debt, or the debt of his trustee; & therefore, a devisee may retain for his own specialty debt, or the debt of his trustee; & if the devisee be also the exor. of a deceased creditor he may first retain for his own debt, & next for the debt of his testator (*LEACH, V.-C.*).—*LOOMES v. STOTHEIRD* (1823), 1 Sim. & St. 458; 1 L. J. O. S. Ch. 220; 57 E. R. 183.

Annotation:—*Consd. Re Hayward, Tweedie v. Hayward*, [1901] 1 Ch. 221.

4402. Executor trustee for payment of debts.—An exor. has, in equity, same right of retainer of his debt as at law, & his right is not affected by the circumstance of his being appointed a trustee to pay the debts of testator.—*DRUCE v. JARVIS* (1835), 4 L. J. Ch. 163.

Executor de son tort.—*See* Part I., Sect. 15, sub-sect. 3, B., *ante*.

4403. Co-executor.—If there are two exors. creditors to testator, & one gets all the assets into his hands, equity will not suffer him to retain against his companion.—*CHAPMAN v. TURNER* (1739), 2 Eq. Cas. Abr. 450, 464; 9 Mod. Rep. 268; 22 E. R. 383, 396.

Annotation:—*Reid. Re Gilbert, Ex p. Gilbert*, [1898] 1 Q. B. 282.

4404.—*O*ne of two exors. has a right to retain his own debt out of a balance due from both to testator's estate.—*KENT v. PICKERING* (1837), 2 Keen, 1; 6 L. J. Ch. 375; 48 E. R. 528.

Annotation:—*Apld. Re Morris's Estate, Morris v. Morris* (1874), 30 L. T. 596.

4405.—*J*oint debt.—*Re STEWART, CROWDER v. STEWART*, No. 4396, *ante*.

4406. Administrator.—An administrator may retain to satisfy a debt due to himself (*per cur.*).—*BOND & GREEN'S CASE* (1613), Godb. 216; 78 E. R. 132.

Effect of form of administration bond.—*See* Nos. 2618–2621, *ante*.

4407.—*U*ndischarged bankrupt.—An administrator who is an undischarged bkpt. has no right to retain out of the assets received by him as administrator a debt due to him from deceased intestate.—*WILSON v. WILSON*, [1911] 1 K. B. 327; 80 L. J. K. B. 296; 104 L. T. 96; 18 Mans. 18.

Representative surety for debt of testator.—*See* Sub-sect. 6, A., *post*.

4408. Representative of representative—Debt due to representative personally.—The representative of deceased exor., in accounting for the exor.'s receipts of the trust estate:—*Held*: not to be entitled, by way of discharge, to the amount of a debt owing to the exor. from his testator, without evidence of retainer of the debt by the exor. in his lifetime: the amount can only be claimed as a debt against the estate.—*BURGE v. BRUTTON* (1843), 2 Hare, 373; 12 L. J. Ch. 368; 7 Jur. 988; 67 E. R. 153.

Annotations:—*Reid. Re Rhoades, Ex p. Rhoades*, [1899] 2 Q. B. 347; *Walters v. Walters* (1881), 44 L. T. 769.

4409.—*A*Administrator of deceased exor. of testator in the cause held entitled, as against specialty creditors of such testator, to retain assets of his intestate, who had died indebted to the estate of testator, towards payment of a judgment debt recovered by himself against his intestate in his lifetime.—*HORNE v. SHEPHERD, HORNE v. DENDY* (1857), 26 L. J. Ch. 817; 3 Jur. N. S. 806.

Debt due to representative as representative.—*See* Sub-sect. 6, F., *post*.

4410. Person obtaining grant on behalf of another.—*FRANKS v. COOPER*, No. 4504, *post*.

4411.—*L*etters of administration were granted to a person described as manager of a bank; he was himself not a creditor:—*Held*: he could not as administrator retain the amount of a debt due to the bank.—*Re RICHARDS, LAWSON v. HARVEY*, [1901] 2 Ch. 399; 70 L. J. Ch. 699; 85 L. T. 273; 50 W. R. 57; 17 T. L. R. 650; 45 Sol. Jo. 671.

SUB-SECT. 3.—AGAINST WHOM EXERCISABLE.

4412. Whether against creditor of different degree—Simple contract debt against judgment

Sect. 4.—Right of retainer: Sub-sect. 3.]

debt.]—BATHURST'S CASE (1686), 2 Vent. 40; 80 E. R. 296.

4413. — Specialty debt against judgment debt —Decree of court of equity.]—A decree was had against deft.'s intestate by plff. for £400 for the profits of lands received by him; & the intestate, before the decree, was indebted to deft. by bond. The intestate dying, deft. got administration; & the question was, whether deft. could retain to satisfy his own bond against this decree, there being not assets to satisfy both:—*Held*: he might, & deft. should pay plff., in case he had assets, in the first place.—**STASBY v. POWELL** (1693), Freem. Ch. 333; Freem. K. B. 333; 22 E. R. 1237.

4414. — Simple contract debt against specialty debt.]—Under a covenant to a retiring partner as soon as conveniently could be to pay the debts & indemnify him against them, broken by the death of the covenantor, leaving debts undischarged, those debts, paid by the other, a debt by specialty; against which the administrator cannot retain his own simple contract debt; as he may a debt in equal degree.—**MUSSON v. MAY** (1814), 3 Ves. & B. 194; 35 E. R. 452. *Annotations:—Mentd.* **Watson v. Parker** (1843), 6 Beav. 283; **Powdrell v. Jones** (1854), 2 W. R. 513.

4415. — —.]—An administrator in India, being a creditor of the intestate by specialty, & also by simple contract, possesses himself of assets not sufficient to discharge the two debts which are due to him, & claims against the assets possessed by another administrator in England:—*Held*: his right of retainer must be exercised in satisfaction of the specialty debt; & he will rank only as a simple contract creditor upon the assets in England.—**JOHNSON v. WARD** (1824), 2 L. J. O. S. Ch. 137.

4416. — —.]—(1) Testator died leaving a deficient estate, his wife & daughter being extrices. The wife having real estate settled on her for life, with a general power of appointment, had appointed it as collateral security for a mtge. debt of testator. This debt had not been paid at the date of the decree:—*Held*: the right of the widow as surety to be indemnified created a simple contract debt only, & did not entitle her to retain as against specialty creditors.

(2) The daughter was absolutely entitled under a settlement, subject to testator's life interest, to funds out of which the trustees had power to advance £2,000 to testator on his bond, which they did. They afterwards made large further advances to him on promissory notes:—*Held*: the daughter had a right to retain as against specialty creditors the £2,000 & interest from testator's death, but not the subsequent advances.—**FERGUSON v. GIBSON** (1872), L. R. 14 Eq. 370; 41 L. J. Ch. 640.

Annotations:—As to (1) Consd. **Re Illidge, Davidson v. Illidge** (1884), 27 Ch. D. 478. *Reid.* **Re Giles, Jones v. Pennefather**, [1896] 1 Ch. 956. *As to (2) Consd.* **Re Illidge, Davidson v. Illidge** (1884), 27 Ch. D. 478.

PART IV. SECT. 4, SUB-SECT. 3.

4414 i. Whether against creditor of different degree.—Simple contract debt against specialty debt.]—It has never been the practice in Ireland in the administration of assets, to form two funds, one in respect of specialty debts & the other in respect of simple contract debts, for the purpose of postponing an exor.'s simple contract debt to specialty debts. The exor. may retain his simple contract debt as against both specialty & simple contract creditors, inasmuch as, by **Hinde Palmer's Act**, both classes of creditors

are made of equal degree as regards priority of payment in the administration of estates.—**OLIPHANTS v. CORYTON**, [1913] 1 L. R. 211.—**IR.**

4414 ii. —.]—Where Act 26 Geo. III., c. 11, s. 18, directing exors., where an estate is insolvent, to divide it in due proportion to & among the creditors, it is their duty to pay debts according to the common law priority of classes, & *pari passu* in each class, & they have no right to pay any one creditor in preference, nor to retain for the whole of their own debts of the same class.—**JOSEPH v. McLEOD** (1833),

Generally, Reid. **Re Beavan, Davies, Banks v. Beavan**, [1913] 2 Ch. 595. *Mentd.* **Re Mitchell, Freelove v. Mitchell**, [1913] 1 Ch. 201.

4417. — — Effect of Administration of Estates Act, 1869 (c. 46).]—(1) The right of retainer by an exor. has not been abolished by above Act, nor has it been enlarged so as to enable the exor. to retain his debt as against a creditor of higher degree than himself. Notwithstanding above Act, an exor. who is only a simple contract creditor of his testator cannot retain his debt as against a specialty creditor.

(2) If an exor. dies after having claimed a right of retainer, but without having actually exercised it, leaving another exor. of the original testator surviving, the exors. of deceased exor. have the right of retainer for the benefit of his estate.

(3) A right of retainer being claimed on behalf of the estate of an exor. who was a simple contract creditor of testator, & there being a specialty creditor:—*Held*: the assets must, after payment of costs, be apportioned on the footing of giving an equal dividend to all the creditors, specialty & simple contract; the dividend must be paid in full to the specialty creditor; the exor. must then retain his debt out of the residue; & the surplus, if any, must be divided equally among the simple contract creditors.—**WILSON v. COXWELL** (1883), 23 Ch. D. 764; 52 L. J. Ch. 975.

Annotations:—As to (1) Reid. **Re Hankey, Cumliffe Smith v. Hankey**, [1899] 1 Ch. 541. *As to (2) N.F.* **Re Compton, Norton v. Compton** (1885), 30 Ch. D. 15. *As to (3) Consd.* **Re Jones, Calver v. Laxton** (1885), 31 Ch. D. 440. *Appl.* **Re Bentinck, Bentinck v. Bentinck**, [1897] 1 Ch. 673. *Generally, Mentd.* **Re Rhoades, Ex p. Rhoades v. Official Receiver** (1899), 80 L. T. 742.

4418. — — —.]—(1) In a creditor's administration action brought against an extrix., who was also a creditor of testator, a receiver was appointed, who obtained possession of certain legal assets as to which the extrix. would have had a right of retainer if they had come to her hands:—*Held*: after the appointment of the receiver the extrix. could not claim retainer out of any assets got in by him.

(2) The estate was insolvent, there were both specialty & simple contract creditors, & the extrix., who was a simple contract creditor, had got in certain legal assets before the receiver was appointed:—*Held*: she could only exercise her right of retainer as against creditors of equal degree with herself; & accordingly, the assets being treated as divided ratably among the specialty & simple contract creditors, she could retain her debt against the dividends payable to the simple contract creditors to the extent of the legal assets received by her.

(3) Above Act, the object of which was only to place specialty & simple contract creditors on an equal footing *inter se* for the purpose of distribution, ought not to be so construed as to give incidentally to an exor. the power to defeat specialty as well as simple contract creditors; although above Act, by augmenting the fund for the payment of simple contract debts, has to that extent enlarged the

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4414 iii. —.]—An exor. or administrator cannot, by paying off creditors of the estate, create a demand in his own favour that will give him a right of retainer in priority to other creditors. All that he would, in such circumstances, be entitled to would be to stand in the place of the creditors he has paid off, & if there prove to be a deficiency of assets, he will only be entitled to be paid *pro rata* with the general creditors of the estate.—**WILLIS v. WILLIS** (1873), 20 Gr. 396.—**CAN.**

right of retainer.—*Re JONES, CALVER v. LAXTON* (1885), 31 Ch. D. 440; 55 L. J. Ch. 350; 53 L. T. 855; 34 W. R. 249; 2 T. L. R. 207.

Annotations:—*As to* (1) *Reid*. *Batten, Proffitt & Scott v. Dartmouth Harbour Comrs.* (1890), 45 Ch. D. 612; *Trevor v. Hutchins*, [1896] 1 Ch. 841; *As to* (2) *Fold*. *Re Briggs, Earp & Huggins v. Briggs* (1894), 38 Sol. Jo. 662. *Apld.* *Re Bentinck, Bentinck v. Bentinck*, [1897] 1 Ch. 673. *As to* (3) *Reid*. *Re Hankey, Cunliffe Smith v. Hankey*, [1899] 1 Ch. 541; *Re Williams, Holder v. Williams*, [1904] 1 Ch. 52; *Re Samson, Robbins v. Alexander*, [1906] 2 Ch. 584.

4419. ————.]—*Re BRIGGS, EARP & HUGGINS v. BRIGGS* (1894), 38 Sol. Jo. 662.

Annotations:—*Apld.* *Re Bentinck, Bentinck v. Bentinck*, [1897] 1 Ch. 673. *Reid.* *Re Hankey, Cunliffe Smith v. Hankey*, [1899] 1 Ch. 541.

4420. ————.]—*Re BENTINCK,*

TINCK v. BENTINCK, No. 4162, *ante*.

4421. ————.]—An exor. of an insolvent estate claimed to retain a simple contract debt due by the estate to a firm of which he was a partner against a specialty debt due by the estate to deft.:—*Held*: (1) the exor.'s right to retain a partnership debt was not affected by R. S. C., Ord. 48A; (2) the exor. had no right to retain the simple contract debt against the specialty debt. *Qu.*: whether there is any distinction in principle between the exor.'s right to prefer creditors & his right to retain his own debt.—*Re JENNES, OETZES v. JENNES* (1909), 53 Sol. Jo. 376.

Annotation:—*As to* (2) *Reid.* *Re Harris, Davis v. Harris*, [1914] 2 Ch. 395.

4422. ————.]—*Re HARRIS, DAVIS v. HARRIS*, No. 4511, *post*.

4423. ————.]—Effect of administration of Estates Act, 1869 (c. 46), on exor.'s right of retainer.

We have been pressed with a long series of cases which deal with the question of the right of retainer which an exor. possesses in administration of an estate with respect to a debt due to himself. Now I wish to say that, although I cannot deny that I have formed an opinion on the subject, I hold that it does not come before us on this occasion, & I do not express any opinion with regard to the question whether the right of retainer is affected in any & what way by the above Act; but I am of opinion that so far as the cases that have been quoted to us suggest that under the present law two funds ought to be formed, one in respect of the specialty debts & the other in respect of the simple contract debts, those decisions are erroneous, & are in direct conflict with the provisions of the Act (*FLETCHER MOULTON, L.J.*).—*Re SAMSON, ROBBINS v. ALEXANDER*, [1906] 2 Ch. 581; 76 L. J. Ch. 21; 95 L. T. 633, C. A.

Annotations:—*Consd.* *Re Jennes, Oetztes v. Jennes* (1909), 53 Sol. Jo. 376; *Re Harris, Davis v. Harris*, [1914] 2 Ch. 395. *Reid.* *Re Laycock, Laycock v. Income Tax Special Comrs.*, [1919] 1 Ch. 241.

4424. ————.]—Where a mtgee. dies insolvent, & the mtgee. then realises his security, & after paying himself the mtge. debt out of the proceeds, has a surplus in his hands, he cannot retain that surplus in payment of a simple contract debt due to him from the mtgor., & so give himself a preference over the other creditors, but must hand it over to the mtgor.'s legal personal representative as part of his estate, the mtgee. being merely in the position of a trustee of the surplus for the estate; & if the mtgee. in such a case happens to be the exor. of the mtgor., still he cannot, under an exor.'s general right of retainer or preference, retain the surplus in payment of the simple contract debt, to the prejudice of a creditor of a higher degree, whether the debt is due to himself individually or to a partnership of which he happens to be a member. —

TALBOT v. FRERE (1878), 9 Ch. D. 568; 27 W. R. 148.

Annotations:—*Apld.* *Re Gregson, Christison v. Bolam* (1887), 36 Ch. D. 223. *Reid.* *Re Hankey, Cunliffe Smith v. Hankey*, [1899] 1 Ch. 541; *Re Godney, Smith v. Grummitt*, [1908] 1 Ch. 804; *Re Sutherland, Mitchell v. Bubna*, [1914] 2 Ch. 720; *Re Thorne*, [1914] 2 Ch. 438. *Mentd.* *Ioxburgh v. Cox* (1881), 17 Ch. D. 520.

4425. ————]—Representative without notice of existence of creditor of higher degree.]—The settled rule that an exor. who pays creditors without notice of the existence of a creditor of higher degree, is not liable to account for the sums so paid at the instance of that creditor applies to the retainer by an exor. of a debt due to himself. By the exercise of a joint power of appointment, £112,000, representing real estate, was withdrawn from a settlement & paid to a son in the lifetime of his father. The son died in 1895, leaving an estate worth £3,200. His extrix. distributed the estate among creditors of equal degree, retaining the bulk of it in satisfaction of a debt of her own. The father having died in 1890, succession duty became payable, & the trustees of the settlement claimed that the duty on the £112,000 ought to be paid out of the son's estate in priority to the other creditors:—*Held*: (1) the extrix. having distributed the assets without notice of this debt, *bonâ fide* & without undue haste, the estate had been fully administered; (2) the trustees, though creditors of a higher degree, had no right to follow the assets retained by the extrix. in discharge of her own debt.—*Re FLUDYER, WINGFIELD v. ERSKINE*, [1898] 2 Ch. 562; 67 L. J. Ch. 620; 79 L. T. 298; 47 W. R. 5.

4426. Against plaintiff in action for administration of fund—Debt against costs of action.]—An administrator does not lose his right of retainer by paying the assets into ct. Where the fund in ct. is insufficient to discharge the administrator's debt, his right of retainer will prevail against pltf.'s right to have the costs of the suit satisfied.—*CHISSUM v. DEWES* (1828), 5 Russ. 29; 38 E. R. 938.

Annotations:—*Apld.* *Tipping v. Power* (1842), 1 Hare, 405. *Reid.* *Richmond v. White* (1879), 48 L. J. Ch. 798; *Re Rhoades, Ex p. Rhoades*, [1899] 1 Q. B. 905. *Mentd.* *Ward v. Mackinlay* (1864), 10 Jur. N. S. 1063; *King v. Mid. Ry.* (1868), 17 W. R. 113; *Pile v. Pile, Ex p. Lambton* (1876), 3 Ch. D. 36.

4427. ————.]—Bill by equitable mtgee., on behalf of himself & all other creditors, to administer the estate of testator, praying a sale. The devisees of the estate disclaimed; & the exors. claimed to retain debts due to them from testator out of the assets come to their hands. The proceeds of the estate being insufficient to satisfy the mtge. debt, & the general assets being insufficient to pay the costs of the suit:—*Held*: (1) the mtgee. was entitled to the whole proceeds of the sale, without deduction; (2) the exors. were entitled to retain their debts & their costs out of the general assets on priority; pltf.'s costs, as mtgee., was the next claim; & the surplus was to be applied *pro rata* to the costs of the other debts.—*TIPPING v. POWER* (1842), 1 Hare, 405; 11 L. J. Ch. 257; 6 Jur. 434; 66 E. R. 1090.

Annotations:—*As to* (2) *Consd.* *Tuckley v. Thompson* (1860), 1 John. & H. 126. *Reid.* *Gaunt v. Taylor* (1843), 2 Hare, 413; *Hepworth v. Heslop* (1844), 3 Hare, 485; *Ford v. Chesterfield* (1856), 21 Beav. 426; *Henderson v. Dadds* (1866), L. R. 2 Eq. 532; *Re Griffith, Jones v. Owen*, [1904] 1 Ch. 807. *Generally, Mentd.* *Milcock v. Roynon* (1843), 2 Y. & C. Ch. Cas. 376; *Talbot v. Kernhead* (1859), 32 L. T. O. S. 60; *Re Marine Mansions Co.* (1867), L. R. 4 Eq. 601; *Re Rhoades, Ex p. Rhoades*, [1899] 1 Q. B. 905.

4428. ————.]—In an action by residuary legatees against an exor. to administer an insolvent estate, after the usual administration judgment

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had been given, an order was made in chambers, on the application of plffs. & in the presence of the exor., pursuant to which an insurance co. paid certain policy moneys which formed part of the assets of testator into ct. to the credit of the cause. Upon the further consideration of the action, the exor., who was a creditor of testator, claimed to retain his own debt out of the moneys so paid in, in priority to the costs of the action & the debts of the other creditors:—**Held:** the payment into ct. was in substance a payment by the exor., & that he was entitled to a right of retainer out of the fund.—**RICHMOND v. WHITE** (1879), 12 Ch. D. 361; 48 L. J. Ch. 798; 41 L. T. 570; 27 W. R. 878, C. A.

Annotations:—Expld. & Apld. Re Langley, Johnson v. Langley (1899), 68 L. J. Ch. 361. **Reid. Re Birt, Birt v. Birt** (1883), 48 L. T. 67; *Re Jones, Culver v. Laxton* (1885), 31 Ch. D. 440; *Batten, Profit & Scott v. Dartmouth Harbour Comrs.* (1890), 45 Ch. D. 612; *Trevor v. Hutchins*, [1896] 1 Ch. 844; *Re Rhoades, Ex p. Rhoades*, [1899] 1 Q. B. 905; *Re Lance, Sharp v. Rebbeck* (1900), 44 Sol. Jo. 243; *Re Marvin, Crawler v. Marvin* (1905), 93 L. T. 699; *Re Sutherland, Michell v. Bulna*, [1914] 2 Ch. 720. **Mentd. Re Piccadilly Hotel, Paul v. Piccadilly Hotel**, [1911] 2 Ch. 534.

SUB-SECT. 4.—WHEN AND HOW EXERCISABLE.

4429. Time for exercise of right.]—An exor. who is a creditor of his testator is not bound, in order to preserve his right of retainer out of the assets he has got in, to assert his right before occasion arises, as on an attempt to take assets out of his possession: if he asserts it then, his right will be protected, unless he has done some act, by release or otherwise, to deprive himself of it.

When an order has been made under Bkcp. Act, 1883 (c. 52), s. 125 (1) (2), for the administration of the estate of an insolvent testator, thus vesting the estate in the official receiver under sub-sect. 5, the effect of the order is to vest in the official receiver so much only of the estate as is properly distributable among the creditors, & not to deprive third parties of any rights which they have acquired to withdraw from distribution assets in their possession & which they have a right to retain. Thus, such an order does not deprive an exor. creditor of his legal & equitable right of retainer out of the assets which he has got in, even though by mistake & in ignorance of his rights he has paid over the assets to the official receiver under the administration order; nor is he deprived of that right by proving for his debt in the bkcp., if on discovering his error he withdraws his proof. In that case he is entitled to be repaid the sum he would have been entitled to retain had the assets been still in his possession.—*Re Rhoades, Ex p. Rhoades*, [1899] 2 Q. B. 347; 68 L. J. Q. B. 804; 80 L. T. 742; 15 T. L. R. 407; 6 Mans. 277, C. A.; *sub nom. Re Rhoades, Ex p. OFFICIAL RECEIVER (TRUSTEE)*, 47 W. R. 561; 43 Sol. Jo. 571.

Annotations:—Consd. Fulman v. Meadows, [1901] 1 Ch. 233. **Reid. In the Goods of Belham, Richardes v. Yates** (1901), 84 L. T. 300; *Re Mellison, Ex p. Day* (1906), 94 L. T. 679; *Re Broad, Ex p. Official Receiver* (1911), 105 L. T. 719; *Wilson v. Wilson*, [1911] 1 K. B. 327; *Re Thellusson, Ex p. Abdy*, [1919] 2 K. B. 735; *Re Wigzell, Ex p. Bart*, [1921] 2 K. B. 835.

4430. Mode of exercise of right—Claiming debt before master.]—An administrator having claimed his debt before the master, that is sufficient to

entitle him to retain it.—**WINTER v. HICKS** (1830), Taml. 475; 48 E. R. 189.

4431. —Statement in answer in creditor's suit—That money retained in satisfaction of debt.]—The ct. will not order an exor. to pay into ct. money which he states, by his answer, to have retained in satisfaction of a debt due to him from testator.—**MIDDLETON v. POOLE** (1845), 2 Coll. 246; 5 L. T. O. S. 344; 63 E. R. 719.

4432. —Obtaining grant—No bond for ratable distribution of assets.]—Where administration has been granted to a creditor & no application was made at the time the grant issued that the administrator should pay the debts ratably, the ct. will not revoke such grant subsequently in order to compel such administrator to give up his right to retain assets sufficient to repay himself his own debt in full. For the future a creditor on taking out administration must, in all cases if required by the ct., enter into a bond conditional to administer the estate ratably amongst the creditors of deceased.—*In the Goods of BRACKENBURY* (1877), 2 P. D. 272; 46 L. J. P. 42; 36 L. T. 744; 41 J. P. 729; 25 W. R. 698.

Annotations:—Reid. Davies v. Parry, [1899] 1 Ch. 602; *In the Goods of Belham, Richardes v. Yates* (1901), 84 L. T. 300.

4433. —Debt exceeding value of assets—Right to retain assets in specie.]—When the debt due to the exor. of an insolvent testator exceeds the value of testator's assets, the exor. is not bound to realise the assets, i.e. convert them into money, before exercising his right of retainer, but is entitled to retain the assets *in specie* in satisfaction of his debt.—*Re GILBERT, Ex p. GILBERT*, [1898] 1 Q. B. 282; 67 L. J. Q. B. 229; 77 L. T. 775; 46 W. R. 351; 14 T. L. R. 125; 42 Sol. Jo. 118; 4 Mans. 337.

Annotations:—Consd. Re Broad, Ex p. Official Receiver (1911), 105 L. T. 719. **Reid. Re Rhoades, Ex p. Rhoades**, [1899] 2 Q. B. 347; *Wilson v. Wilson*, [1911] 1 K. B. 327.

SUB-SECT. 5.—OUT OF WHAT ASSETS.

A. In General.

4434. Right limited to assets actually or constructively in possession of representative.]—(1) An exor.'s right of retainer is restricted to so much of his testator's assets as comes into his possession or under his control during his life, including any part paid into ct. during his lifetime; & the assertion by the exor. in his lifetime of his right of retainer as against future assets of his testator will not bind assets which after his death fall into testator's estate.

(2) Where the representative of a deceased exor. does not represent the original testator, the whole foundation on which the right of retainer is based is cut away, for, having no right to receive the original testator's assets, he has no right to retain: & he does not unite in himself the two characters of the person to sue & the person to be sued.

(3) A., widow & extrix. of C., carried in claims in the administration of C.'s estate in respect of the breach of covenants by C., contained in their marriage settlement, to assign a policy on his life for £1,500, & to replace the value of some settled furniture sold, the policy money & furniture having become the absolute property of A. In her affidavit, A. asserted her right as extrix. to retain all moneys accrued, or to accrue, & forming

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4439 i. Time for exercise of right.]—Scmble: an exor. has probate.—Re Ross (1893), 14 N. S. W. L. R. (B.) 35.—**AUS.** a right of retainer in respect of debts paid before grant of

part of A.'s estate. There was paid into ct. as part of A.'s estate during her life £100, & after her death a further sum of £875, the two sums representing the whole available estate. After her death, B., who had been appointed co-exor. with A., proved C.'s will. The representatives of A. claimed to have both the sums in ct. paid out to them to meet the claims of A. as extrix. in priority to all other creditors:—*Held*: the assertion by A. of her right of retainer gave her representatives no right of priority to the sum of £875, which never came into A.'s possession or under her control during her life; but the claims being for damages for breach of pecuniary contracts, &, as such, capable of ascertainment by a certain standard or measure, could, within the authority of *Loane v. Casey*, No. 4482, *post*, be retained, & A. having a right of retainer in respect of the sum of £100, her representatives were entitled to have that sum paid out to them for the benefit of A.'s estate, & to prove as creditors for the balance of the claim.—*Re COMPTON, NORTON v. COMPTON* (1885), 30 Ch. D. 15; 54 L. J. Ch. 904; 53 L. T. 410, C. A.

Annotations:—As to (1) *Consd.* *Re Lance, Sharp v. Rebbeck* (1900), 44 Sol. Jo. 243. As to (2) *Refd.* *Re Rhoades, Ex p. Rhoades*, [1899] 2 Q. B. 347. As to (3) *Refd.* *Re Jones, Calver v. Laxton* (1885), 55 L. J. Ch. 350; *Trevor v. Hutchins*, [1896] 1 Ch. 844; *Re Gilbert, Ex p. Gilbert*, [1898] 1 Q. B. 282; *Re Hankey, Smith v. Hankey* (1899), 80 L. T. 47.

4435. —[—] (1) One of testator's exors. claimed a right of retainer in an administration action, where the estate was insolvent. The claim was for a sum of £989 5s. 10d. made up of £115 5s. 10d., due at the death of testator for which the exor. had proved, & of £700 in respect of which the exor. had been surety for testator, & which he had paid with interest amounting to £174. The creditor whom he had paid had proved for £700. A receiver had been appointed in the action, & the exor. had, previously to his appointment, had in his hands assets to a greater amount than £115 5s. 10d. & had paid them over to the receiver. He had paid the £700 & interest subsequently to the receiver's appointment:—*Held*: the exor. could enforce his right of retainer only for £115 5s. 10d. & not for £874, but in respect of the £700 he was entitled to stand in the place of the creditor who had proved.

(2) At the time he paid that sum [of £700 & interest], there was no money in his hands. No money came to his hands which he could possibly retain (*PEARSON, J.*).

(3) A surety who has been appointed exor. by his principal, & has acted as such, & who, after a creditor's action has been commenced & a receiver appointed, has paid the amount for which he was surety, with interest, is not entitled to priority for the amount for which he has so paid in respect of his right of retainer, but can only stand in the place of the creditor whom he has paid, & cannot claim for the interest if testator's estate is insolvent.—*Re HARRISON, LATIMER v. HARRISON* (1886), 32 Ch. D. 395; 55 L. J. Ch. 687; 55 L. T. 150; 34 W. R. 736.

Annotations:—As to (1) *Consd.* *Re Giles, Jones v. Pennfather*, [1896] 1 Ch. 956. *Refd.* *Trevor v. Hutchins*, [1896] 1 Ch. 844; *Re Rhoades, Ex p. Rhoades*, [1899] 1 Q. B. 905. As to (2) *Apd.* *Re Beavan, Davies, Banks v. Beavan*, [1913] 2 Ch. 595. As to (3) *Refd.* *Re Mitchell, Frelove v. Mitchell*, [1913] 1 Ch. 201.

4436. —[—] (1) An exor.'s right of retainer extends only to funds actually or constructively in his possession.

(2) The insolvent estate of a deceased person, the subject of an old administration suit, became entitled to a fund in ct. to the credit of another suit. The fund was transferred to the credit of the administration suit, & outstanding costs paid out of it:—*Held*: the present administrator of deceased, a creditor, had no right of retainer against the balance in ct.—*PULMAN v. MEADOWS*, [1901] 1 Ch. 233; 70 L. J. Ch. 97; 84 L. T. 26; 45 Sol. Jo. 151.

4437. —[—]—There can be no retainer by an executor surety in respect of a right to indemnity out of testator's estate. The right of retainer only arises when there is a debt, & a surety has no debt against his principal until he has paid off the principal debt. When an executor surety has paid off the principal debt his right of retainer arises, but only in respect of assets actually in his hands at the time he pays off the debt or assets coming to his hands thereafter.—*Re BEAVAN, DAVIES, BANKS & Co. v. BEAVAN*, [1913] 2 Ch. 595; 83 L. J. Ch. 109; 109 L. T. 538; 58 Sol. Jo. 31.

Annotation:—*Refd.* *Re Harris, Davis v. Harris*, [1911] 2 Ch. 395.

4438. Power of representative to retain whole of deceased's chattels.—No obligation to appropriate chattels of exact amount of debt.—(1) An exor. can retain the whole of his testator's chattels for the payment of a debt due to him from his testator, & is not obliged to appropriate chattels of the exact amount of his debt. When the chattels are realised the balance over, if any, goes to the other creditors.

(2) The exercise of the right of retainer by an exor., after an administration order under Bkcy. Act, 1883 (c. 52), s. 125, of chattels in his possession before the making of the order, to which he had not signified his election, is not forbidden by subsect. 9 of that sect.—*Re BROAD, Ex p. OFFICIAL RECEIVER* (1911), 105 L. T. 719; 56 Sol. Jo. 35, D. C.

—[—]—Compare No. 4525, *post*.

B. Legal Assets.

4439. Goods.—*DIVE v. LANGSTON* (1501), cited 1 Plowd. 186.

Annotations:—*Consd.* *Woodward v. Darcy* (1560), 1 Plowd. 184. *Refd.* *Chalmer v. Bradley* (1819), 1 Jac. & W. 51.

4440. First money coming into representative's hands.—*SHEPHERD v. KENT* (1702), Colles, 253; *Proc. Ch.* 190; 2 Vern, 435; 1 Eq. Cas. Abr. 142, pl. 6; 1 E. R. 273, H. L.

Annotation:—*Refd.* *Cox's Creditors' Case* (1734), 3 P. Wms. 341.

4441. Money paid into court.—(*CHISSUM v. DEWES*, No. 4426, *ante*).

4442. —[—]—If an exor. or administrator pays into ct., under an order in a cause, money which he had received from deceased's estate, his right to retain a debt due to him from deceased is not prejudiced.—*LANGTON v. HIGGS* (1832), 5 Sim. 228; 1 L. J. Ch. 150; 58 E. R. 322.

4443. —[—]—*RICHMOND v. WHITE*, No. 4428, *ante*.

4444. —[—] In lifetime of representative.]—*Re COMPTON, NORTON v. COMPTON*, No. 4434, *ante*.

4445. —[—]—(1) In an administration action an exor. does not lose his right of retainer merely by reason of delay, such as not claiming his right until after the chief clerk has made his certificate under the judgment, or by the fact of his having paid the assets into ct. or to a receiver, provided

PART IV. SECT. 4, SUB-SECT. 5.—B.

4439 I. Goods.—An exor. is entitled to take the personal property at its

value for a debt due by the estate to him, & his purchase at public auction of testator's personal estate, in lieu of

money due him, was held valid.—*YOMT v. CROMBIE* (1859), 8 C. P. 159.—*CAN.*

Sect. 4.—Right of retainer: Sub-sect. 5, B., C. & D.; sub-sect. 6, A.]

the delay can be satisfactorily explained & there are assets against which he can exercise his right.

(2) An exor. had as surety joined with his testator in a promissory note to secure a debt of testator's to his bankers. In a creditor's action for administration of testator's estate, which was insolvent:—*Held*: the exor. was entitled to retain the amount for which he was liable as surety on the promissory note out of money in ct., or in the hands of the receiver in the action, though the exor.'s claim had not been made until after the chief clerk's certificate had been filed.—*Re GILES, JONES v. PENNEFATHER*, [1896] 1 Ch. 956; 65 L. J. Ch. 419; 74 L. T. 21; 44 W. R. 283; 40 Sol. Jo. 257.

Annotations:—*N.F. Re Beavan*, Davies, Banks v. Beavan, [1913] 2 Ch. 595. *Mentd. Re Mitchell*, Freelove v. Mitchell, [1913] 1 Ch. 201.

4446. — On application of representative.]—An exor. or administrator does not lose his right of retainer out of money paid into ct. because he himself applies for the order under which the money is so paid in. The right of retainer need not be expressly reserved in the order.—*Re LANGLEY, JOHNSON v. LANGLEY* (1899), 68 L. J. Ch. 361.

Money paid to receiver.]—*See* Nos. 4418, 4435, 4445, *ante*.

4447. Balance due to estate from co-executors.]—*KENT v. PICKERING*, No. 4404, *ante*.

4448. Money in hands of representative as agent of deceased.]—Testator, at his death, was indebted to A., his attorney & general agent, in £900 & upwards; the agent had in his hands a sum of £900, & he was appointed exor. On a deficiency of assets:—*Held*: A. was entitled to retain the £900, in payment of his claim against testator.—*POTTER v. FOWLER* (1837), 6 L. J. Ch. 273.

4449. Profits made by representative in carrying on deceased's business.]—Testator bequeathed £400 to a trustee upon trust to be invested for the benefit of A. & B. his wife. Testator was engaged in trade with same trustee, & he was indebted to the partnership. He appointed his partner his exor. The exor. continued the trade, in which he used the partnership assets. A creditor's suit was instituted for the administration of testator's estate. Testator's exor. then died, having money still due to him from testator's estate:—*Held*: the representative, the administrator, of the exor. had a right of retainer, as against the remaining debtors, of all profits made during the life of the exor., notwithstanding the fact of the institution of the creditor's suit.—*THORNTON v. STOKILL* (1855), 26 L. T. O. S. 26; 1 Jur. N. S. 751.

Annotation:—*Mentd. Re Salmon*, Priest v. Uppleby (1889), 42 Ch. D. 351.

4450. Proceeds of policy of assurance.]—L. at the time of his decease was indebted to H., to whom & another he had assigned a policy of assurance, the proceeds of which were received by H. & in part applied in liquidation of his debt. In administering the estate of L., which was insolvent, H. claimed to retain the money which he had received, but the chief clerk refused to allow it. On application to vary the chief clerk's certificate, the ct. declared that the sum received by H., & applied in liquidation of his debt, was assets for the benefit of all the creditors.—*BEYER v. ADAMS, Re LAW, HOPETOUN'S CLAIM* (1857), 30 L. T. O. S. 9; 3 Jur. N. S. 710.

C. Equitable Assets.

4451. Separate estate of married woman.]—The creditors of a *feme covert* filed a bill after her death, to be paid out of a trust estate for her sole & separate use. The ct. decreed, that all the creditors should be paid *pari passu*, & a mtge. & bond creditor were not to be preferred, because a *feme covert* by law could not make a mtge. or enter into a bond. But that her exor., who was a creditor, might retain his debt, though the estate stood out in trust, but not the trustee.—*ANON.* (1730), Mos. 328; 25 E. R. 421, L. C.

4452. — Earnings—Married Woman's Property Act, 1870 (c. 93).]—The separate estate of a married woman in earnings under above Act becomes upon her death equitable assets & divisible amongst her creditors *pari passu* so that her exor. has no right to retain in full his own debt thereout.—*Re POOLE'S ESTATE, THOMPSON v. BENNETT* (1877), 6 Ch. D. 739; 46 L. J. Ch. 803; 37 L. T. 119; 25 W. R. 862.

4453. Real estate—Made equitable assets by will—Devise to representative for payment of debts.]—An exor., who is also devisee of real estate in trust to sell & pay debts, has no right, in case of a deficiency of assets, to retain in the first place his own debt in full, out of such part of the assets as arises from the sale of real estate.—*PARKER v. PARKER* (1835), 4 L. J. Ch. 285.

4454. — — — — —.]—*BAIN v. SADLER*, No. 4084, *ante*.

4455. — — — — —.]—Testator, having no real estate at the time of his death, but being entitled to the unpaid purchase money of realty contracted to be sold by him during his life, made a will by which he directed all the residue of his furniture, chattels, & effects to be sold by his exors., & after payment of his debts, funeral & testamentary expenses, he directed the balance of the proceeds of such sale & also all other moneys or securities for money of which he might die possessed, & all other his personal property, to be divided between two persons whom he appointed his exors. The estate was insolvent, & the exor. proposed to retain his own debt out of the proceeds of sale which had been paid into ct.:—*Held*: by the words of the will, the proceeds of sale were constituted equitable assets, & the exor. had no right of retainer.—*DUIGNAN v. CROOME* (1879), 41 L. T. 672.

4456. — Made equitable assets by statute—Administration of Estates Act, 1833 (c. 104).]—Real estate is by above Act made assets for the payment of debts only in equity, & an exor. has no right of retainer against it. Personal estate being the primary fund for the payment of specialty debts, the circumstance that the specialty debts of testator, whose personal estate is insufficient to pay those debts in full, have been actually paid in the first instance partly out of the proceeds of the sale of real estate, will not give the exor. a right to retain his own simple contract debt out of personal estate subsequently realised which he would not have had if the whole personal estate had been applied in the first instance in payment of the specialty debts.—*WALTERS v. WALTERS* (1881), 18 Ch. D. 182; 50 L. J. Ch. 819; 44 L. T. 769; 29 W. R. 888.

Annotations:—*Reid. Re Jones*, Calver v. Laxton (1885), 55 L. J. Ch. 350. *Mentd. Scagram v. Tuck* (1881), 29 W. R. 784.

PART IV. SECT. 4, SUB-SECT. 5.—C.

m. In general.]—The right of retainer out of legal assets applies to equitable as well as to legal debts, especially in case where there is no competition of creditors.—*KLINE v. KLINE* (1870), 3 Ch. Ch. 137.—*CAN.*

4457. — Vesting in representative as personal representative—Land Transfer Act, 1897 (c. 65).]—Above Act does not enable an administratrix out of the proceeds of sale of real estate to retain a debt due to her from the intestate's estate in priority to other creditors.—*Re WILLIAMS, HOLDER v. WILLIAMS*, [1904] 1 Ch. 52; 73 L. J. Ch. 82; 89 L. T. 580; 52 W. R. 318; 20 T. L. R. 54.

D. Effect of Appointment of Receiver.

4458. General rule.]—The retainer of his debt by an exor. as against a receiver appointed by the ct. is improper.—*DAVENPORT v. MOSS* (1806), 14 L. T. 133; 14 W. R. 453.

4459. —]—A member of a firm, solrs. to pltf. in an administration action, was administrator to, & creditor of, the intestate in the action:—*Held*: he could not retain money belonging to the estate which had come to his hands after a receiver had been nominated but had not given security.—*Re BIRT, BIRT v. BURT* (1883), 22 Ch. D. 604; 52 L. J. Ch. 397; 48 L. T. 67; 31 W. R. 334.

Annotations:—Folld. Re Jones, Calver v. Laxton (1885), 31 Ch. D. 440. *Reid. Batten, Proffitt & Scott v. Dartmouth Harbour Comrs.* (1890), 45 Ch. D. 612; *Stokes v. Prance*, [1898] 1 Ch. 212.

4460. Right to retain against funds in hands of receiver—Got in by receiver.]—*Re JONES, CALVER v. LAXTON*, No. 4418, *ante*.

4461. — Paid over by representative.]—*Re HARRISON, LATIMER v. HARRISON*, No. 4435, *ante*.

4462. —]—*Re GILES, JONES v. PENNEFATHER*, No. 4445, *ante*.

4463. Whether court will appoint receiver—To deprive representative of right to retain—Prejudice of general body of creditors.]—The ct. will not interfere with an exor.'s right of retainer by appointing a receiver at the instance of pltf. in a creditor's administration action merely because the exor. will probably exercise his right to the prejudice of the general body of creditors, nor unless it is shown that the assets are being wasted.—*Re WELLS, MOLONY v. BROOKE* (1890), 45 Ch. D. 569; 59 L. J. Ch. 810; 63 L. T. 521; 39 W. R. 139; 6 T. L. R. 312.

Annotations:—Reid. Re Stevens, Cooke v. Stevens, [1898] 1 Ch. 162; *Re Benett, Ward v. Benett*, [1906] 1 Ch. 216.

4464. — Assets not being wasted.]—*Re WELLS, MOLONY v. BROOKE*, No. 4463, *ante*.

4465. — Insolvent estate.]—*BAIRD v. WALKER* (1890), 35 Sol. Jo. 56.
See, generally, RECEIVERS.

SUB-SECT. 6.—IN RESPECT OF WHAT DEBTS.

See Administration of Estates Act, 1925 (c. 23), s. 34.

A. Debts of Deceased for which Representative is Surety.

4466. On joint bond.]—(1) Two men were bound jointly in a bond, one as principal & the other as surety; the principal died intestate; the surety took administration of his goods; & the principal having forfeited the bond, the surety made an agreement with the creditor, & took upon him to

discharge the debt. In debt brought by another creditor, the question was upon fully administered, pleaded by the administrator, if by showing of the bond, & that he had contented it with his own proper money, whether he might retain so much of the intestate's estate: & it was adjudged that he might not.

(2) By joining in the bond with the principal, it became his own debt (*FLEMMING, C.J.*).—*ANON.* (1607), Godb. 149; 4 Leon. 236; 78 E. R. 91.
Annotation:—Reid. Boyd v. Brooks, Ex p. Boyd (1865), 13 W. R. 419.

4467. —]—An exor. may plead a statute or bond outstanding, in which he himself was jointly & severally bound with testator; but not if the statute, etc., was joint only. If so be the obligation be joint & several, there it is in the election of the creditor to charge the exor. of testator, or the survivor; & so the conusce, if he had pleased, might have charged debt, as exor. to the other conusor; & debt. may, if he please, pay this debt out of the estate of testator, & plead it to the other creditors; for testator, by making him exor., had put it in his power to pay this debt first, if he pleased, for which he himself stood engaged. It is very common, when a man is bound as surety for another, to make the surety exor., that he may have power to pay the debt, & indemnify himself; & it is every day's experience, upon "fully administered," to give in evidence payment of debts, for which the party himself is jointly obliged.—*ROGERS v. DANVERS* (1673), 1 Freem. K. B. 127; 1 Mod. Rep. 165; 89 E. R. 93.

4468. —]—*BATHURST v. DE LATOUCHE* (1773), 34 Beav. 9, n.; 2 Dick. 460; 55 E. R. 534, L. C.

Annotation:—Consd. Boyd v. Brooks, Ex p. Boyd (1865), 12 L. T. 38.

4469. On promissory note.]—A., at the request of & on a verbal offer by B. to indemnify him against loss, joined with C. in a joint & several promissory note which he was afterwards compelled to pay:—*Held*: A., having afterwards become the exor. of B. was entitled to retain the amount paid by him on the note as a debt due to him from B.'s estate.—*WILDES v. DUDLOW* (1874), L. R. 19 Eq. 198; 44 L. J. Ch. 311; 23 W. R. 435.

Annotations:—Mentd. Rother v. Williams (1875), L. R. 20 Eq. 210; *Re Bolton, Morant v. Bolton* (1892), 36 Sol. Jo. 608; *Re Hoyle, Hoyle v. Hoyle*, [1893] 1 Ch. 81; *Guild v. Conrad*, [1894] 2 Q. B. 885; *Harburg India Rubber Comb Co. v. Martin*, [1902] 1 K. B. 778.

4470. —]—*Re GILES, JONES v. PENNEFATHER*, No. 4445, *ante*.

4471. Whether surety must have paid debt.]—When an exor., who has joined as surety with his testator, pays the amount of the debt after testator's death, he is entitled to retain the amount out of testator's assets, as against all creditors of equal degree.—*Re BROOKS, BOYD v. BROOKS* (1865), 34 Beav. 7; 5 New Rep. 258; 34 L. J. Ch. 605; 12 L. T. 38; *sub nom. Ex p. BOYD, BOYD v. BROOKS*, 13 W. R. 419, L. C.

Annotation:—Reid. Re Orme, Evans v. Maxwell (1883), 50 L. T. 51.

4472. —]—An action was brought by creditors for the administration of the estate of an intestate, a widow, against the administrator, who

PART IV. SECT. 4, SUB-SECT. 5.
—D.

n. Right to retain against funds in hands of receiver—Got in by receiver & paid into court.]—An exor., who was also a creditor of testator:—*Held*: in an administration action, not entitled to a right of retainer out of rents of a chattel real collected by a receiver &

lodged by him to the credit of the action, but entitled to such right out of a sum lodged in ct. to which testator was entitled in remainder, & which, having fallen into possession after his death, was in presence of the exor. transferred to the credit of the action.—*TAAPE v. TAAPE*, [1902] 1 L. R. 143.
—IR.

PART IV. SECT. 4, SUB-SECT. 6.—A.

4469 l. (On promissory note.)—One of the sureties on a promissory note, being afterwards exor. of debtor, is entitled to retain sufficient out of the assets to meet his liability as such surety, on the footing of such liability being a specialty debt of testator to him.—*CALDWELL v. PARKER* (1869), 17 W. R. 955. —IR.

Sect. 4.—Right of retainer: Sub-sect. 6, A., B., C., D., E. (a) & (b), & F.]

was her eldest son, & who was acting under letters of administration granted to him previously. Deft. had joined, as surety, with intestate in giving a security for certain loans which had been procured by her for her own purposes, & he claimed to retain out of the assets of intestate, in, or coming to his hands as administrator, a sum sufficient to repay these loans with interest. He had not in fact repaid them, although he was personally liable to do so. Deft. was at one period engaged in farming, & intestate from time to time made him small advances when he was in want of money to assist him in carrying on his business, or for his maintenance. Intestate never attempted to recover these moneys, & she took no acknowledgment for them. Pltfs. sought to charge deft. with the moneys so received by him. By the chief clerk's certificate it was certified, amongst other things, that deft. had made the claim above mentioned, which the chief clerk had allowed, & that pltfs. had brought in the set-off before referred to, but which the chief clerk had disallowed. Pltfs. took out a summons to vary the chief clerk's certificate:—*Held*: the right of the retainer existed notwithstanding the judgment for administration, & notwithstanding that deft. had not in fact repaid the loans before the judgment; & upon his repaying them, he would be permitted to retain.—*Re ORME, EVANS v. MAXWELL* (1883), 50 L. T. 51.

Annotations:—*Consd. Re Giles, Jones v. Pennefather*, [1896] 1 Ch. 956. *Apld. Re Beavan, Davies, Banks v. Beavan*, [1913] 2 Ch. 595. *Reid. Re Rhoades, E. v. Rhoades*, [1899] 1 Q. B. 905.

4473. — *No assets at time of payment.*—*Re HARRISON, LATIMER v. HARRISON*, No. 4435, *ante*.

4474. — *Re BEAVAN, DAVIES, BANKS & Co. v. BEAVAN*, No. 4437, *ante*.

In respect of what assets right of retainer available, *see, generally*, Sub-sect. 5, *ante*.

4475. — *A surety has a right to retain out of the estate of an intestate against specialty creditors the whole amount of a debt for which he is surety, where the principal debtor, whose administrator he is, has covenanted with him for the due payment thereof to the creditor, although the surety has not himself paid any part of the debt to the creditor. Qu.: whether in such case the surety has same right under a covenant only of indemnity by the principal debtor.*—*Re ALLEN, ADCOCK v. EVANS*, [1890] 2 Ch. 345; 65 L. J. Ch. 760; 75 L. T. 136; 44 W. R. 644; 40 Sol. Jo. 583. *Annotation*:—*Consd. Re Beavan, Davies, Banks v. Beavan*, [1913] 2 Ch. 595.

4476. *Nature of surety's right of indemnity—Against whom right of retainer exercisable.*—*FERGUSON v. GIBSON*, No. 4416, *ante*.

Against whom right of retainer exercisable.—*See, generally*, Sub-sect. 3, *ante*.

B. Debts due from Deceased to Firm of which Deceased was Partner.

4477. *Right of executor partner to retain.*—*A.*, being indebted in his individual capacity to a house in trade, of which he himself was a partner, in a sum of money, the amount of which could not be exactly ascertained, covenanted to pay the firm all his then debts, & such other debts as should

subsequently accrue. *A.* dies without having satisfied the original debt, & having contracted further debts subsequent to the execution of the deed:—*Held*: his exors., two of whom were partners in the house of trade, could not plead either of these debts by way of retainer, or as an outstanding specialty debt.—*DE TASTET v. SHAW* (1818), 1 B. & Ald. 604; 106 E. R. 244.

Annotations:—*Consd. Re Morris's Estate, Morris v. Morris* (1874), 10 Ch. App. 68. *Reid. Ellis v. Kerr*, [1910] 1 Ch. 529.

4478. — *Testator, who was a member of a partnership firm, appointed one of his surviving co-partners & another person his exors.:—Held*: the surviving partner was not deprived of his right to retain assets in his hands in satisfaction of the liability of testator to the firm, by the fact that the amount of the liability had not been ascertained, no accounts of the partnership having been taken.—*Re MORRIS'S ESTATE, MORRIS v. MORRIS* (1874), 10 Ch. App. 68; 44 L. J. Ch. 178; 31 L. T. 491; 23 W. R. 120, 1. JJ.

4479. — *R. S. C., Ord. 48A.*—*Re JENNES, ORTZES v. JENNES*, No. 4421, *ante*.

C. Debts due to Representative as Spouse of Deceased.

4480. *Under bond given by husband before marriage—To make provision for wife.*—*ROSCELLEY v. GODOLPHIN* (1683), T. Raym. 483; 83 E. R. 252; *sub nom. ROCKELLEY v. GODOLPHIN*, 2 Show. 403; *sub nom. BOSKELLET v. GODOLPHIN*, Skin. 214.

Annotations:—*Consd. Marriott v. Thompson* (1739), 7 Mod. Rep. 292. *Reid. Richmond v. White* (1879), 27 W. R. 878.

4481. — *If the bond, on marriage, be given to trustees, conditioned to leave the intended wife a sum of money, & the wife be made the extrix. of the obligor, she may retain the amount of the bond, & plead such retainer to an action brought against her by another bond creditor of the husband. Secus, if the bond be conditioned to pay the trustees the money in trust for the wife; but in such case the wife may pay the trustees out of the assets, or pay out of her own money & retain assets pro tanto, or confess judgment to the trustees to cover assets.*—*MARRIOTT v. THOMPSON* (1739), Willes, 186; 7 Mod. Rep. 292; 125 E. R. 1123.

4482. — *Marriage covenant with a trustee for securing a provision for the wife may be given in evidence by her, on a plea of plene administravit, in an action brought against her as extrix.; & she may retain out of the personal assets so much as is equal to the damages she has sustained by the breach of such covenant.*—*LOANE v. CASEY* (1775), 2 Wm. Bl. 965; 96 E. R. 569.

Annotations:—*Fold. Re Compton, Norton v. Compton* (1885), 30 Ch. D. 15. *Reid. Re Hayward, Tweedie v. Hayward* (1900), 70 L. J. Ch. 155.

4483. — *An extrix. gave an acceptance for a debt due from her testator, taking an engagement from the drawer, to renew the bill from time to time, until sufficient effects were received from the estate of testator:—Held*: this meant sufficient effects in the ordinary course of administration; & she had not precluded herself from first applying assets to pay £3,000 to trustees for her own use in discharge of a bond given by her husband before marriage to that

PART IV. SECT. 4, SUB-SECT. 6.—C.
o. Loan to husband.—*A* sum paid by deft. to her husband on Sept. 30, 1909, she now claimed to be entitled as extrix. to retain out of the assets, in priority to other creditors, with

interest from Sept. 30, 1909, to the date of her husband's death:—*Held*: it was a debt which she was entitled as extrix. to retain in priority to the claims of the other creditors, but as the principal only became due on the death

of her husband the deft. was only entitled to interest from that date.—*Re LYNCH, KKHOR v. LYNCH* (1915), 49 L. L. T. 78.—*IR.*

P. ——*Re CAREY, CAREY v. CAREY* (1915), 49 L. L. T. 226.—*IR.*

effect, before she paid the acceptance.—*BOWERBANK v. MONTEIRO* (1813), 4 Taunt. 844; 128 E. R. 564.

Annotations.—*Mentd. Brown v. Langley* (1842), 4 Man. & G. 466; *Maillard v. Page* (1870), L. R. 5 Exch. 312.

4484. Loan to husband—For purposes of business—Married Women's Property Act, 1882 (c. 75), s. 3
—*Judicature Act, 1875 (c. 77), s. 10.*—A woman, married after the passing of the Married Women's Property Act, 1882 (c. 75), s. 3, advanced to her husband for the purpose of his business the sum of £143 5s. The husband died intestate without having repaid the loan, & letters of administration were granted to his widow. His estate proved to be insolvent. In an action to administer his estate the widow claimed to retain her debt out of moneys in her hands as administratrix representing her husband's estate. Her claim was opposed by the creditors on the ground that, by Jud. Act, 1875 (c. 77), s. 10, & Married Women's Property Act, 1882 (c. 75), s. 3, her debt was postponed to their debts, & that therefore she could not, as against them, exercise her right of retainer.—*Held*: the widow was entitled to retain her debt.—*Re MAY, CRAWFORD v. MAY* (1890), 45 Ch. D. 499; 60 L. J. Ch. 34; 63 L. T. 375; 38 W. R. 765; 6 T. L. R. 461.

Annotations.—*Distd. Re Leng, Tarn v. Emmerson*, [1895] 1 Ch. 652. *Conrad. Re Ambler, Woodhead v. Ambler*, [1905] 1 Ch. 697. *Reid. Re Rhoades, Ex p. Rhoades* (1899), 68 L. J. Q. B. 536; *Re Whitaker, Whitaker v. Palmer*, [1900] 2 Ch. 676.

4485. ———.—*Married Women's Property Act, 1882 (c. 75), s. 3*, does not affect the right of retainer of a married woman who is the extrix. of her deceased husband in respect of a loan made by her to him for the purposes of his business. Though that sect., in combination with Jud. Act, 1875 (c. 77), s. 10, prevents a wife from proving for such a loan in the administration of her deceased husband's estate, if insolvent, in competition with his creditors for value, yet, if she is her husband's extrix., she can as against those creditors retain the amount of the loan out of assets in her hands as extrix.—*Re AMBLER, WOODHEAD v. AMBLER*, [1905] 1 Ch. 697; 74 L. J. Ch. 367; 92 L. T. 710; 53 W. R. 584; 21 T. L. R. 376; 49 Sol. Jo. 417, C. A.

D. Unascertained Debts.

4486. Damages for breach of contract—Marriage settlement.—*LOANE v. CASEY*, No. 4482, *ante*.

4487. — *Covenant to assign policy & replace furniture.*—*Re COMPTON, NORTON v. COMPTON*, No. 4434, *ante*.

4488. Owing to firm of which deceased was partner.—*DE TASTET v. SHAW*, No. 4477, *ante*.

4489. ———.—*Re MORRIS'S ESTATE, MORRIS v. MORRIS*, No. 4478, *ante*.

PART IV. SECT. 4, SUB-SECT. 6.—E. (a).

4490 i. Right to retain debt.—An exor.'s right of retainer for a debt due to him by testator extends to a debt which has, in testator's life-time become barred by Stat. Limitations, & such right of retainer may be exercised after judgment in an administration action has been given.—*MORAN v. GILMOUR* (1897), 22 V. L. R. 580.—*AUS.*

4490 ii. ———.—An exor. has a right to retain a debt barred by Stat. Limitations.—*CROOKS v. CROOKS* (1854), 4 Gr. 615.—*CAN.*

4490 iii. ———.—Stat. Limitations does not bar the claim of an exor. against the estate of testator.—*EMES v. EMES* (1865), 11 Gr. 325.—*CAN.*

4490 iv. ———.—Where in a suit to administer the estate of a deceased

intestate, pltf., who was his widow & administratrix, sought, against the wish of deft., who was one of the next-of-kin, to retain out of the assets of deceased the amount of a statute-barred debt owing by deceased to her.—*Held*: she was entitled to retain such amount.—*Re CAREY, CAREY v. CAREY* (1915), 49 I. L. T. 226.—*IR.*

PART IV. SECT. 4, SUB-SECT. 6.—F.

4494 i. Representative of two estates—One estate indebted to other.—Where an exor. of a creditor is also administrator or exor. of such creditor's debtor, the right of retainer arises when there are any assets, & he will be assumed to have exercised such right without any actual act of appropriation being established, & though his claim would otherwise be barred by statute.—*KLINE v. KLINE* (1870), 3 Ch. Ch. 161.—*CAN.*

E. Debts not recoverable at Law.

(a) Debts barred by Statutes of Limitation.

4490. Right to retain debt.—*STAHLSCHEIDT v. LETT*, No. 4246, *ante*.

4491. — *After decree for account in administration suit.*—After a decree for taking accounts in an administration suit, one of several exors. may insist upon his right of retainer in respect of a debt due more than six years before testator's death, notwithstanding Stat. Limitations.—*SHARMAN v. RUDD* (1858), 27 L. J. Ch. 844; 31 L. T. O. S. 325; 4 Jur. N. S. 527.

4492. ———.—An exor. is entitled to retain his debt, although barred by Stat. Limitations during the lifetime of testator. Therefore, where an exor., under a mistake of facts, had made yearly payments to his testatrix for twenty-five years previous to her death, he was held entitled to retain the amount out of her residuary estate.—*HILL v. WALKER* (1858), 4 K. & J. 160; 32 L. T. O. S. 71; 70 E. R. 60.

Annotations.—*Reid. Midgley v. Midgley*, [1893] 3 Ch. 282; *Budgett v. Budgett*, [1895] 1 Ch. 202; *Trevor v. Hutcheson*, [1896] 1 Ch. 844.

Right of representative to pay statute-barred debts.—*See Sect. 2, sub-sect. 4, A. (a), ante.*

(b) Debts barred by Statute of Frauds.

4493. No right to retain debt.—*Re ROWNSON, FIELD v. WHITE*, No. 4343, *ante*.

Whether representative entitled to pay debt barred by Statute of Frauds.—*See Sect. 2, sub-sect. 4, B., ante.*

F. Debts due to Representative as Representative.

4494. Representative of two estates—One estate indebted to other.—If A. be indebted to B. & C. by several obligations & dies & D. takes the administration, & after B. makes D. his exor., & dies. D. may retain the goods that he has as administrator of A. to satisfy the debt due to him as exor. of B.—*BURNER v. DIXE* (1610), 1 Roll. Abr. 922; *sub nom. BURDET v. PIX*, 2 Brownl. 50; 123 E. R. 809.

Annotation.—*Reid. Chapman v. Turner* (1739), 9 Mod. Rep. 268.

4495. ———.—*THOMPSON v. COOPER*, No. 4529, *post*.

4496. ———.—In 1848, A., who was a debtor of B., died, having appointed G. & C. his exors. A suit was instituted for the administration of A.'s estate. Before decree, B. died, having also appointed G. & C. his exors.—*Held*: G. & C. were entitled to retain out of A.'s estate the debt due to B. from A., as against all other creditors of A., standing *pari passu* with B.—*WYNCH v. GRANT* (1854), 3 Eq. Rep. 60; 24 L. J. Ch. 6; 24 L. T. O. S. 68; 3 W. R. 6.

4494 ii. ———.—The estates of A. & B. were administered in one action. The estate of B., who was A.'s exor., was entitled to the residue of the estate of A. B.'s exor., a creditor of B., brought the action as exor. & creditor on behalf of himself & all other creditors, & asserted his right of retainer. The exor. of B. died pending the suit, which was continued by substituting his exors. as pltf. After A.'s estate had been realised, an order was made & the money brought into ct. required that part of the funds in ct. which represented the residue of A.'s estate, to be transferred to the credit of B.'s estate, & declared that pltf. were entitled to exercise their right of retainer, as the exors. of B.'s exor., in respect of the amount so ascertained, in discharge of the debt due them from B.'s estate.—*OLIPHANT v. CORYTON*, [1913] 1 I. R. 381.—*IR.*

Sect. 4.—Right of retainer: Sub-sect. 6, F., G. & H.]

4497. ———.]—The same individual was the administrator both of A. & B., whose estates were being administered by the ct. A.'s estate was found indebted to B.'s:—*Held*: the administrator was entitled, & was bound, at the instance of the parties interested in B.'s estate, to retain the debt out of A.'s assets in preference to A.'s other creditors.—*FOX v. GARRETT, MILES v. FOX* (No. 1) (1800), 28 Beav. 16; 29 L. J. Ch. 423; 1 L. T. 474; 6 Jur. N. S. 208; 54 E. R. 271.

Annotations:—Consd. Re Bennett, Ward v. Bennett, [1906] 1 Ch. 216. Refd. Sander v. Heathfield (1874), L. R. 19 Eq. 21.

4498. ———.]—Deft. was the exor. of the will of F., deceased, who, as exor. of the will & legal personal representative of M., deceased, had got in & received assets of M.'s estate, which was insolvent:—*Held*: deft. could not be compelled to exercise his right of retainer over the assets of F.'s estate coming into his possession in favour of the creditors of M.'s estate.—*Re FUNNELL, DYNE v. FUNNELL* (1912), 107 L. T. 145.

4499. Representative of representative.]—An exor. of an exor. may retain, but not in this case; the land being devised to the exors. share & share alike makes a tenancy in common; but here the exor. of the exor., is not the exor. to first testator, & therefore cannot retain; & the personal assets are gone; & the question is now as to the real estate, & in equity all debts are equal & you cannot prefer yourself; & equity will never assist a retainer (*WRIGHT, LORD KEEPER*).—*HOPKIN v. DRYDEN* (1701), Prec. Ch. 179; 2 Eq. Cas. Abr. 450; 24 E. R. 87.

Annotations:—Distd. Wilson v. Coxwell (1883), 23 Ch. D. 764. Consd. Re Compton, Norton v. Compton (1885), 30 Ch. D. 15. Refd. Kent v. Pickering (1837), 2 Keen, 1; Walters v. Walters (1881), 44 L. T. 769; Re Jones, Calver v. Jaxton (1885), 31 Ch. D. 440; Re Bentinck, Bentinck v. Bentinck, [1897] 1 Ch. 673; Re Sutherland, Michell v. Bubna, [1914] 2 Ch. 720.

4500. ———.]—The exor. of an exor. is entitled to retain out of the balances of the produce of the original testator's West India plantations, received by him as assignee appointed by the ct., debts due from testator to him either in his own right or as exor. of deceased exor.—*THOMSON v. GRANT* (1823), 1 Russ. 540, n.; 38 E. R. 209.

Annotations:—Refd. Walters v. Walters (1881), 18 Ch. D. 182. Mentd. Bullen v. A'Beckett (1863), 1 Moo. P. C. C. N. S. 223.

4501. ———.]—*WILSON v. COXWELL*, No. 4117, ante.

4502. ———.]—*Re COMPTON, NORTON v. COMPTON*, No. 4434, ante.

G. Debts due to Representative as Trustee.

4503. General rule.]—(1) Administrator deft. may give evidence of retainer or plead it.

(2) In an action on a bond of intestate:—*Held*: the administrator might retain for a debt due to him as trustee under a covenant & deed of settlement.—*PLUMER v. MARCHANT* (1763), 3 Burr. 1380; 97 E. R. 884.

Annotations:—As to (1) Consd. Harry v. Jones (1817), 4 Price, 89. As to (2) Consd. Ex p. Tindal (1832), 1 Deac. & Ch. 291; Farley v. Briant (1835), 3 Ad. & El. 839. Refd. Sander v. Heathfield (1874), L. R. 19 Eq. 21.

4499 i. Representative of representative.]—O. as exor. of A. received £2,010, the amount of a policy of insurance effected by A. on his life:—*Held*: P., who was exor. of O., was bound as such to retain that sum as a security against a sum of £3,250, for which O. had made his assets liable as a security for A.—*Re OWEN* (1889), 23 L. R. Ir. 328.—*IR.*

q. Executor assignee of judgment—Entitled only to sum paid by him.]—An exor. obtains an assignment of a judgment for a less sum than was actually due upon it, & then claims to be allowed the full sum out of the assets of testator:—*Held*: he is entitled to no more than he actually paid.—*M'NAMARA v. CHURCH* (1835), 1 Ir. L. Rec. N. S. 1.—*IR.*

4504. ———.]—A right of retainer is not prejudiced by the circumstance, that the administration is granted to another for the use of the creditor, a lunatic, any more than if *durante minoritate*; nor, that a debt is due to a trustee.—*FRANKS v. COOPER* (1799), 4 Ves. 763; 31 E. R. 394, L. C.

4505. ———.]—*Re HUBBACK, INTERNATIONAL MARINE HYDROPATHIC CO. v. HAWES*, No. 4194, ante.

4506. ———.]—An order in an administration action under R. S. C., Ord. 15, r. 1, merely for an account by an extrix. & reserving further consideration does not affect the right of creditors to sue her, or her right to prefer creditors. Where an extrix. who, after such an order had been made against her, was appointed trustee of a settlement, & entitled as such trustee to a debt due from her testator's estate:—*Held*: she might apply the balance of testator's estate in part satisfaction of such debt, though other debts were unpaid.—*Re BARRETT, WHITAKER v. BARRETT* (1889), 43 Ch. D. 70; 59 L. J. Ch. 218; 38 W. R. 59.

Annotation:—Foldd. Re Harris, Davis v. Harris, [1914] 2 Ch. 395.

4507. Whether cestuis que trust can compel representative to retain.]—The administrator of a sole trustee who has died insolvent is entitled, in respect of the trusteeship which has devolved upon him as such administrator, to exercise the legal right of retainer in respect of any debt due to the trust estate, & is bound to do so if required by the *cestuis que trust*.—*SANDER v. HEATHFIELD* (1874), L. R. 19 Eq. 21; 44 L. J. Ch. 113; 31 L. T. 400; 23 W. R. 331.

Annotations:—Foldd. Re Faithfull, Re Sutton, Hardwick v. Sutton (1887), 57 L. T. 14. Consd. Re Bennett, Ward v. Bennett, [1906] 1 Ch. 216; Re Harris, Davis v. Harris, [1914] 2 Ch. 395. Refd. Crowder v. Stewart (1880), 16 Ch. D. 368; Re Ambler, Woodhead v. Ambler (1905), 74 L. J. Ch. 367.

4508. ———.]—B. was the extrix. of her late husband, whose estate was insolvent & who was indebted to the estate of A., of which he was sole trustee, in a considerable sum of money in respect of the proceeds of sale of certain real estate, & therefore the right to receive the money & the obligation to pay were centred in same person. In these circumstances B. claimed to be entitled, in priority to all other creditors upon her late husband's estate, to retain out of his personal assets which had come to, or were in her hands, or had been paid into ct., a sum in respect of the proceeds of sale of the real estate. The question was, whether an exor., or administrator was bound to retain for debts to which he was entitled as trustee when required to do so by his *cestui que trust*:—*Held*: on the authority of *Sander v. Heathfield*, No. 4507, ante, the right of retainer must be allowed.—*Re FAITHFULL, Re SUTTON, HARDWICK v. SUTTON* (1887), 57 L. T. 14.

Annotations:—Consd. Re Bennett, Ward v. Bennett, [1906] 1 Ch. 216; Re Harris, Davis v. Harris, [1914] 2 Ch. 395.

4509. — No acceptance of trust by representative.]—Where a sole trustee had misappropriated part of his trust estate, the exor. of his insolvent estate, who had not acted in the trust, was held to be at liberty to decline to exercise any right of retainer at the request of beneficiaries under the trust as against other creditors.—*Re*

PART IV. SECT. 4, SUB-SECT. 6. —G.

r Where estate insolvent.]—Where the estate of deceased is insolvent, the Act respecting trustees displaces any right on the part of the exor. to retain in full.—*Re ROSS* (1881), 29 Ir. 385.—*CAN.*

RIDLEY, RIDLEY v. RIDLEY, [1904] 2 Ch. 774; 73 L. J. Ch. 696; 91 L. T. 189; 48 Sol. Jo. 641.

Annotation:—**Apprvd.** *Re* Benett, Ward v. Benett, [1906] 1 Ch. 216.

4510. ———.]—Where a sole trustee dies insolvent & indebted to his trust estate, his legal personal representative, who has not done anything which amount to an acceptance of the trust, cannot be compelled at the instance of the *cestuis que trust* to exercise for their benefit his right of retainer as personal representative over the assets of deceased trustee in respect of the moneys owing by him to the trust estate. *Qu.*: whether the right of retainer would continue to be exercisable by the personal representative after he had appointed new trustees of the trust instrument.—*Re* BENETT, WARD v. BENETT, [1906] 1 Ch. 216; 75 L. J. Ch. 122; 94 L. T. 72; 54 W. R. 237; 50 Sol. Jo. 125, O. A.

Annotation:—**Refd.** *Re* Harris, Davis v. Harris, [1911] 2 Ch. 395.

4511. Effect of representative being party to breach of trust—Right of executor & co-trustee to retain.—(1) An exor. who as co-trustee of a settlement with his testator was party to a breach of trust which he has not made good cannot exercise on behalf of his *cestuis que trust* a right of retainer out of testator's estate in respect of that breach of trust; but another exor. being also a trustee of the settlement but no party to the breach of trust, can do so, even though he was not appointed a trustee until after the death of testator.

(2) Notwithstanding the earlier decisions in *cts.* of first instance to the contrary, the result of the Administration of Estates Act (Hinde Palmer's Act), 1869 (c. 40), is to enlarge an exor.'s right of retainer in respect of a simple contract debt so as to enable him to exercise it as against specialty creditors as well as against simple contract creditors.—*Re* HARRIS, DAVIS v. HARRIS, [1914] 2 Ch. 395; 83 L. J. Ch. 811; 111 L. T. 606; 58 Sol. Jo. 653.

H. Debts due to Third Party as Trustee for Representative.

4512. General rule.—An exor. or administrator may retain out of the assets, as well for a debt due in trust for himself as for a debt due to himself.—*COCKROFT v. BLACK* (1725), 2 P. Wms. 298; 2 Eq. Cas. Abr. 451, pl. 5; 21 B. R. 738, L. C.

Annotations:—**Consd.** *Re* Dunning, Hatherley v. Dunning (1885), 54 L. J. Ch. 900; *Re* Hayward, Tweedie v. Hayward, [1901] 1 Ch. 221. **Expld.** *Re* Sutherland, Michell v. Bubna, [1914] 2 Ch. 720.

4513. ———.]—*LOOMES v. STOTHERD*, No. 4401, *ante*.

4514. ———.]—The trustees of a marriage settlement, in exercise of a power contained in the deed, advanced to the husband a portion of the trust fund on the security of his bond made payable to themselves. The husband who never repaid this advance, died intestate, & without assets; the trustees never proved the debt, & there were no other creditors. The trust fund became after the husband's death, the absolute property of the widow, who was appointed intestate's administratrix. A sum of money became many years afterwards payable to intestate's estate, & the widow's right to retain it in part payment of the husband's bond debt to the trustees, was disputed by the husband's next of kin:—**Held**: the money lent to the husband remained trust money, & the debt was, therefore, not barred by Stat. Limitations.

The widow had a right to retain moneys in her hands as administratrix to satisfy the bond, though the debt was directly payable to the trustees, & not to herself as *cestui que trust*.—*COXWELL v. FRANKLINSKI* (1864), 11 L. T. 153; 12 W. R. 1072.

4515. What trusts will justify retainer—Necessity for absolute trust.—A covenant made with trustees in a deed of settlement before marriage, that the intended husband, in case the marriage should take effect, would pay or cause to be paid to his intended wife an annuity of £20; or, that his heirs, exors., or administrators, or some or one of them, should & would pay or cause to be paid unto the trustees, or the survivor of them, or the heirs, etc., of such survivor, within ——— months after his decease, the sum of £400 to remain vested in them, is not such a covenant as will enable the widow to retain the £400, as administratrix of her husband, & set up the retainer under plea of *plene administravit*, because the corpus is to be paid to the trustees.—*THOMPSON v. THOMPSON* (1821), 9 Price, 464; 147 E. R. 152.

Annotations:—**Refd.** *Re* Hayward, Tweedie v. Hayward, [1901] 1 Ch. 221. **Mond.** *Clough v. French* (1815), 2 Coll. 277; *Talbot v. Shrewsbury* (Earl) (1873), 42 L. J. Ch. 877.

4516. ———.]—*FERGUSON v. GIBSON*, No. 4416, *ante*.

4517. ———.]—**Effect of trustees of settlement being persons to sue for fund.**—Testator appointed his wife sole extrix, of his will. By a settlement executed on the marriage of testator & his wife certain funds were settled upon trust for the wife for life, with remainder to the children of the marriage. Testator, who acted as solr. for this trust, appropriated certain of the trust funds. He also appropriated to his own use the residuary estate to which his children were entitled under the will of a testatrix & of which he was one of the trustees. Testator died, & an action was brought by a creditor for the administration of his estate, which was insolvent. The extrix, on behalf of her own life interest, & also on behalf of her children, claimed the right to retain out of the estate of testator the amounts appropriated by him as above stated:—**Held**: the trustees of the settlement & will being the persons to sue for & recover the funds appropriated, & not the extrix, she had no right of retainer.—*Re* DUNNING, HATHERLEY v. DUNNING (1885), 54 L. J. Ch. 900; 53 L. T. 413; 33 W. R. 760, C. A.

Annotations:—**Fold.** *Re* Hayward, Tweedie v. Hayward, [1901] 1 Ch. 221. **Refd.** *Wilson v. Wilson*, [1911] 1 K. B. 327; *Re* Sutherland, Michell v. Bubna, [1914] 2 Ch. 720.

4518. ———.]—Testator, by the settlement made on his marriage with deft., his wife, covenanted with the trustees for the payment of a sum of £5,000 six months after his death, to be held upon trust for deft. for life, & for the children of the marriage, & in default of children for testator absolutely; testator's residuary real & personal estate was devised & bequeathed to deft. absolutely, & letters of administration with the will annexed had been granted to her: there were no children, & the estate was insolvent. Deft., as the widow & personal representative & devisee of the real estate, claimed the right to retain this £5,000 out of testator's real & personal estate on behalf of herself & the trustees of the settlement in priority to all other creditors:—**Held**: the trustees of the settlement being the persons to sue for & recover this £5,000 debt, & not the legal personal representative, she had no

PART IV. SECT. 4, SUB-SECT. 6.—H.

4512.1. General rule.—Where the holder of a fund, due to a third party,

possesses a right of retention as against that party, such right is equally available against the arresting creditor of

that party.—*BRODIE v. WILSON* (1837), 15 Sh. (Ct. of Sess.) 1195; 12 Fac. Coll. 1093.—**SCOT.**

Sect. 4.—Right of retainer: Sub-sect. 6, H. & I.; sub-sect. 7, A., B. & C.]

right of retainer.—*Re HAYWARD, TWEEDIE v. HAYWARD*, [1901] 1 Ch. 221; 70 L. J. Ch. 155; 84 L. T. 256; 49 W. R. 296.

Annotation:—Reid. Wilson v. Wilson, [1911] 1 K. B. 327.

4519. ———.—*By his marriage settlement a husband covenanted to pay a sum of £3,000 to the trustees to be held upon the trusts of the funds thereby settled. There was only one child of the marriage, a daughter, who under the trusts of the settlement became absolutely entitled on her mother's death to the settled funds. By his will the husband appointed his wife his sole extrix. & residuary legatee & directed payment of the £3,000 to the trustees. He died in 1883 & his widow proved his will, but the £3,000 was never paid. By her will the widow appointed her daughter & three other persons her exors. & bequeathed to her daughter a legacy of £50,000 & a life interest in her residuary estate. The widow died in 1912, & the daughter as one of her legal personal representatives & as being beneficially entitled to the £3,000, claimed a right to retain same out of her mother's assets. It was admitted that so far as the trustees of the settlement were concerned the debt under the covenant was barred:—*Held*: the inability of an exor. to sue himself which was the foundation of the right of retainer, did not exist in the present case inasmuch as the debt was due, if at all, to the marriage settlement trustees & not to the daughter, whose only right, if any, was to sue the trustees, & the daughter was not entitled to retain the £3,000.—*Re SUTHERLAND (DOWAGER DUCHESS), MICHELL v. BUBNA (COUNTESS)*, [1914] 2 Ch. 720; 84 L. J. Ch. 126; 112 L. T. 72.*

1. Other Debts.

Debts of deceased paid by representative personally.—Right of indemnity.—*See Part V., Sect. 7, post.*

4520. Balance of purchase-money.—Under contract with testator.—*A. sells an estate to B., who pays part of the purchase money; he dies making A. exor., who is his heir-at-law; A. may retain out of the personal estate for the purchase money, though thereby creditors suffer.*—*COPPIN v. COPPIN* (1725), *Cas. temp. King*, 28; 2 P. Wms. 291; 25 E. R. 204, L. C.

Annotations:—Consd. Mackreth v. Symmons (1808), 15 Ves. 329; *Sproule v. Prior* (1836), 8 Sim. 189. *Reid. Selby v. Selby* (1828), 4 Russ. 336. *Mentid. Courtenay v. Williams* (1844), 3 Hare, 539; *Phillips v. Phillips* (1844), 3 Hare, 281; *Turner v. Martin* (1857), 7 De G. M. & G. 429.

4521. Interest.—*Debtor leaves a creditor by note on demand, his exor., this ct. will not allow him interest for it, because he may turn money to his own advantage, which is coming in by testator's assets.*—*ADAMS v. GALE* (1740), 2 Atk. 106; 20 E. R. 466, L. C.

Annotation:—Reid. Tobbs v. Carpenter (1816), 1 Madd. 290.

4522. Joint debt.—*Re STEWART, CROWDER v. STEWART*, No. 4396, *ante*.

4523. Joint & several debt.—*CROSSE v. CORKE* (1672), 3 Keb. 116; 84 E. R. 626; *sub nom. ANON.*, *Freem. K. B.* 49; *sub nom. COCK v. CROSS*, 2 Lev. 73.

Debt of deceased for which representative is surety.—*See Sub-sect. 6, A., ante.*

4524. Debt bequeathed by creditor.—To representative of debtor.—*A creditor proved his debt in an administration suit, & then died, having bequeathed the debt to the extrix. of testator in the cause:—Held: she had no right of retainer*

in respect of it.—*JONES v. EVANS* (1876), 2 Ch. D. 420; 45 L. J. Ch. 751; 24 W. R. 778.

Annotations:—Consd. Davies v. Parry, [1899] 1 Ch. 602; *Re Harris, Davis v. Harris*, [1914] 2 Ch. 395. *Reid. Re Barrett, Whitaker v. Barrett* (1889), 43 Ch. D. 70.

4525. Future instalments of annuity.—*An administratrix, an annuitant under covenant by her intestate, whose estate is insolvent, is entitled to retain all arrears falling due during administration, but only to prove for the value of her future annuity.*—*Re BEEMAN, FOWLER v. JAMES*, [1896] 1 Ch. 48; 65 L. J. Ch. 190; 73 L. T. 555; 44 W. R. 247; 40 Sol. Jo. 99.

SUB-SECT. 7.—LOSS OF RIGHT.

A. Administration Proceedings.

4526. Institution of proceedings.—On behalf of plaintiff & all other creditors.—*The right of an exor. who is a creditor to retain in full his own debt out of the assets of an estate being administered in ct. in preference to the debts of other creditors is not lost or affected by the circumstance that the exor. has himself instituted the action for administration on behalf of himself & all other the creditors of testator.*—*Ex p. CAMPBELL, CAMPBELL v. CAMPBELL* (1880), 16 Ch. D. 198; 43 L. T. 727; 20 W. R. 233.

Annotation:—Consd. Re Giles, Jones v. Pennefather, [1896] 1 Ch. 956.

4527. Decree for administration.—*The personal representative may retain for his own debt notwithstanding a decree has been made in a suit by the other creditors for the administration of the assets, & notwithstanding the assets out of which he seeks to retain his debt came to his hands after the decree.*—*NUNN v. BARLOW* (1824), 1 Sim. & St. 588; 57 E. R. 232; *sub nom. NUNN*, 2 L. J. O. S. Ch. 123.

Annotations:—Follid. Re Orme, Evans v. Maxwell (1883), 50 L. T. 51. *Appl. Davies v. Parry*, [1899] 1 Ch. 602; *Re Belham, Richards v. Yates*, [1901] 2 Ch. 52. *Reid. Re Richards, Lawson v. Harvey* (1901), 70 L. J. Ch. 699.

4528. ———.—*Under the common decree against an administrator, directing his intestate's assets to be applied in a due course of administration, the master is not entitled to go into the consideration of transactions between the administrator & the other creditors which might affect the administrator's right of retainer for a debt due to himself.*—*SPICER v. JAMES* (1835), 2 My. & K. 387; 39 E. R. 902, L. C.

Annotation:—Follid. Thompson v. Cooper (1844), 1 Coll. 81.

4529. ———.—*(1) A. died in Mar. 1839, intestate & indebted to B.; & C. took out administration to A. B. died in Sept. 1846, having made C. one of his exors. & C. proved the will:—Held: C. had a right to retain, out of A.'s assets, the debt due to him as exor. of B.*

(2) Under the common decree in a suit by creditors against an administrator:—Held: upon the authority of Spicer v. James, No. 4528, ante, the master had no jurisdiction to decide & report upon a question of retainer, the claim as to which had been set up by debt. in his answer, but was disputed by plff.—THOMPSON v. COOPER (1844), 1 Coll. 81; 13 L. J. Ch. 416; 2 L. T. O. S. 419; 8 Jur. 164; 63 E. R. 330.

4530. ———.—*Re ORME, EVANS v. MAXWELL*, No. 4472, *ante*.

4531. ———.—*Re GILES, JONES v. PENNEFATHER*, No. 4445, *ante*.

4532. ———.—*DAVIES v. PARRY*, No. 4351, *ante*.

4533. Administration of insolvent estate.—Judicature Act, 1875 (c. 77), s. 10.—*An exor.'s right to retain a debt due to himself does not make him*

a secured creditor within the meaning of above sect. & his right to retain is not affected by above sect.—*Re NEVILLE, LEE v. NUTTALL* (1879), 12 Ch. D. 61; 48 L. J. Ch. 616; 41 L. T. 363; 27 W. R. 805, C. A.

Annotations.—*Consd.* *Re Maggi, Winchouse v. Winchouse* (1882), 20 Ch. D. 545. *Follid.* *Re May, Crawford v. May* (1890), 45 Ch. D. 499. *Consd.* *Re Sutherland, Michell v. Bubna*, [1914] 2 Ch. 720. *Reid.* *Re Hopkins, Williams v. Hopkins* (1881), 18 Ch. D. 370; *Re Jones, Calver v. Laxton* (1885), 31 Ch. D. 440; *Re Baker, Nichols v. Baker* (1890), 44 Ch. D. 262; *Re Leng, Tarn v. Emmerson*, [1895] 1 Ch. D. 652; *Davies v. Parry*, [1899] 1 Ch. 602; *Re Rhoades, Ex p. Rhoades*, [1899] 2 Q. B. 347; *Re Whitaker, Whitaker v. Palmer*, [1900] 2 Ch. 676; *Re Ambler, Woodhead v. Ambler*, [1905] 1 Ch. 697. *Mentd.* *Re D'Epineuil, Tadman v. D'Epineuil* (1882), 30 W. R. 423.

4534. ———.]—*Re MAY, CRAWFORD v. MAY*, No. 4484, *ante*.

4535. ———.]—I cannot myself go so far as to say that the general rule in bkpcy. which requires debts, with some exceptions, to be paid *pari passu* is not applicable in administration actions where the estate being administered is insolvent. Construing above sect. by the decisions & by the express provision of sect. 1 (6) of the Act of 1888, the rules in bkpcy. as to debts & liabilities provable must now, I think, include all rules as to priorities expressly enacted by any statute & made applicable in the event of bkpcy. The priority conferred in the case of bkpcy., by Married Women's Property Act, 1882 (c. 75), s. 3, must, therefore, in my opinion be treated as imported by above sect. into the administration of estates of deceased insolvents (LINDLEY, L.J.).—*Re LENG, TARN v. EMMERSON*, [1895] 1 Ch. 652; 64 L. J. Ch. 408; 72 L. T. 407; 43 W. R. 406; 11 T. L. R. 280; 39 Sol. Jo. 329; 12 R. 202, C. A. *Annotations*.—*Apld.* *Re Heywood, Parkington v. Heywood*, [1897] 2 Ch. 593. *Follid.* *Re Whitaker, Whitaker v. Palmer*, [1901] 1 Ch. 9. *Apld.* *Re Ambler, Woodhead v. Ambler*, [1905] 1 Ch. 697. *Mentd.* *Re Webb* (Smithfield, London), [1922] 2 Ch. 369.

4536. Administration of estate in bankruptcy—Bankruptcy Act, 1883 (c. 52), s. 125.—The right of an exor. to retain a debt due to himself from testator is not affected by above sect. where such right has been exercised before the notice prescribed by above sect. has been given to the exor. of the presentation to the ct. of a petition for an order for the administration of the estate of deceased debtor according to the law of bkpcy.—*Re WILLIAMS, Ex p. LEWIS & EVANS* (1891), 8 Morr. 65.

Annotation.—*Consd.* *Re Rhoades, Ex p. Rhoades*, [1899] 2 Q. B. 347.

4537. ———.]—*Re RHOADES, Ex p. RHOADES*, No. 4429, *ante*.

4538. ———.]—*Re BROAD, Ex p. OFFICIAL RECEIVER*, No. 4438, *ante*.

—.]—*See, generally*, BANKRUPTCY, Vol. IV., p. 502.

Appointment of receiver in.]—See Sub-sect. 5, D., ante.

B. Waiver.

4539. Accounting for produce of real estate.]—Qu.: whether the heir of the obligor in a bond, being one of two surviving exors. of the obligee, is entitled to retain the amount of the bond out of the produce of the estate descended to him? If, in a suit instituted by creditors, he accounts

for the produce of the real estate in the master's office, & he & his co-exor. prove the bond debt under the decree, he is not entitled to retain.—*PLAYER v. FOXHALL* (1826), 1 Russ. 538; 38 E. R. 207.

Annotations.—*Consd.* *Ferguson v. Gibson* (1872), L. R. 14 Eq. 379; *Ex p. Campbell, Campbell v. Campbell* (1880), 16 Ch. D. 198; *Re Giles, Jones v. Pennecfather*, [1896] 1 Ch. 956.

4540. Consenting to order directing inquiry as to persons entitled to fund in court.]—By an order made on a petition in 1893, a sum of money representing the share of the estate of H., who died in 1842, was carried to a separate account, & an inquiry was directed as to the persons beneficially entitled, which inquiry was still pending. H. died insolvent & indebted, amongst others, to his son F., who died in 1867, his son G. being his exor. On July 3, 1890, letters of administration *de bonis non* to the estate of H. were granted to G. On his death E., his extrix., obtained letters of administration *de bonis non* to the estate of H., & now claimed to have the fund in ct. paid out to her as administratrix of H. in order that she might retain the debt due to the estate of F., which was larger than the amount of the fund in ct.:—*Held*: the order of 1893 having been made in the presence of the administratrix the ct. ought not to order the money to be paid out to her, & so enable her to exercise the right of retainer & to defeat the rights of the persons found beneficially entitled under the inquiries directed by it.—*TREVOR v. HUTCHINS*, [1896] 1 Ch. 844; 65 L. J. Ch. 738; 74 L. T. 470; 44 W. R. 417; 40 Sol. Jo. 403, C. A.

4541. Delay.]—Where money has been lent originally to a partner in an old firm, & he dies; what shall be sufficient evidence that the creditor adopted the new firm as his debtors. If the creditor, being also one of the exors. of his original debtor, makes no demand for many years upon the new firm, to pay the sum to the original debtor's estate, he will not be allowed, after the bkpcy. of the new firm, to claim it as a debt due to him from testator's assets.—*CAMPBELL v. CAMPBELL* (1825), 3 L. J. O. S. Ch. 129.

4542. ———.]—*Re GILES, JONES v. PENNEFATHER*, No. 4445, *ante*.

4543. Failure to plead plene administravit or retainer—In common law action by creditor de bonis testatoris.]—Where an action is brought by a creditor against an exor. in respect of a debt due to him from testator, & in the action the exor. does not either plead *plene administravit*, or set up his retainer, & the creditor recovers judgment, the exor. cannot in an action brought to administer testator's estate set up his right of retainer as against the judgment creditor.—*Re MARVIN, CRAWTER v. MARVIN*, [1905] 2 Ch. 490; 74 L. J. Ch. 699; 93 L. T. 599; 54 W. R. 74; 21 T. L. R. 765.

Res judicata generally, see ESTOPPEL, Vol. XXI., pp. 159 *et seq.*

C. Other Cases.

4544. Balance order obtained by liquidator for calls.]—Re HUBBACK, INTERNATIONAL MARINE HYDROPATHIC CO. v. HAWES, No. 4191, *ante*.

4545. Payment under order of court—"Without prejudice" to question of retainer.]—In an administration action an order was made directing the exors. to pay "out of moneys in

PART IV. SECT. 4, SUB-SECT. 7.—B.

a By his own acts.]—An exor. has no longer any right of retainer when by his own acts he has put the assets out of his own possession & control.—*Re STARR, STARR v.*

(1901), 21 C. L. T. 592; 2 O. L. R. 762.—CAN.

PART IV. SECT. 4, SUB-SECT. 7.—C.
t. Abrogated by statute.]—The exors. & administrator's former right of retainer has been abolished in New

South Wales by statute in all cases in which deceased dies since Dec. 15, 1890.—*SADDINGTON v. SADDINGTON* (1904), 21 N. S. W. W. N. 99; 4 S. L. N. S. W. 341.—AUS.

a. Where estate insolvent.]—An executor, who is also a creditor, is not

Sect. 4.—Right of retainer: Sub-sect. 7, C. Sect. 5: Sub-sect. 1, A., B. & C.]

their hands forming part of testatrix's outstanding personal estate" £250 to certain specialty creditors "without prejudice to any question of retainer" by the exors. One of the exors. was a simple contract creditor of the estate for a sum exceeding £250. The £250 was paid under the order, & a receiver of the estate was subsequently appointed:—*Held*: the right of retainer of the exor. as against the £250 remained unaffected by the payment.—*Re LANCE, SHARP v. REBBECK* (1900), 44 Sol. Jo. 243.

Appointment of receiver.]—See Sub-sect. 5, D., ante.

SECT. 5.—LEGACIES.

SUB-SECT. 1.—CLASSIFICATION.

A. In General.

See, generally, WILLS.

4548. Distinction between general, specific & demonstrative legacies.]—(1) Testator gave to his son all his furniture, plate, etc., & all other his goods & chattels whatsoever, not being money, or securities for money, whereof he might be possessed at the time of his decease, & in a subsequent part of his will he bequeathed to his trustees "all my property as well as real & personal or mixed, not hereinbefore disposed of":—*Held*: although the word "goods & chattels" might, if unrestrained by the subsequent part of the will, have constituted a residuary bequest, yet, that a residuary bequest being found in the subsequent part of the will, the gift to the son was specific & not residuary.

(2) Testator also gave a legacy of £500 per cent. Consols, or other stock into which the same might be converted, or in case he should not be possessed of such stock, then he gave a legacy of as much sterling money as that amount of stock would have been worth at his decease, & by a subsequent clause testator gave another legacy of like stock to the same person, "in addition to the legacy already given," to be raised out of the proceeds of his residuary estate:—*Held*: the first legacy, there being sufficient stock to answer it, was specific, but that the second legacy, though expressed to be a substitute for the first legacy, was general.

(3) Testator gives certain legacies of stock, & then says, that if he has no such stock at his decease, then he gives the value in money. That is tantamount to saying, that if he has stock of that denomination at his decease, then he gives so many sums of stock out of it; but that if he has no such stock, then he gives so many sums of money out of his general estate. As testator had stock to answer the bequest at his decease, those legacies were specific; but if he had no such stock at his decease, then the bequest of the money would have been, not specific, but general legacies (KINDERSLEY, V.-C.).

(4) These legacies of stock are specific legacies, in contradistinction to general & to demonstrative legacies. They are not money legacies payable out of a particular property, which would be demonstrative legacies; but they are legacies of specific portions of a particular property, which he contemplated his being in possession

of at his death, which are specific legacies (KINDERSLEY, V.-C.).

(5) A stock legacy payable out of stock of the same denomination is specific, but a money legacy payable out of stock is not specific, but demonstrative (KINDERSLEY, V.-C.).

(6) The points of difference between specific & demonstrative legacies are these: A specific legacy is not liable to abatement for the payment of debts, but a demonstrative legacy is liable to abate when it becomes a general legacy by reason of the failure of the fund out of which it is payable. A specific legacy is liable to ademption, but a demonstrative legacy is not. A specific legacy, if of stock, carries with it the dividends which accrue from the death of testator; while a demonstrative legacy does not carry interest from testator's death (KINDERSLEY, V.-C.).—MULLINS v. SMITH (1860), 1 Drew. & Sm. 204; 8 W. R. 739; 62 E. R. 356.

Annotation:—As to (1) *Reid. Davies v. Fowler* (1873), L. R. 16 Eq. 308.

— **Ademption of legacies.]—See EQUITY, Vol. XX., pp. 492, 493.**

Abatement of legacies.]—See Sub-sect. 6, post.

4547. Same legacy may be specific or general.]—

(1) Where testator gave a sum of £10,000 stock, & framed the bequest in these words: "If I shall not have so much as £10,000 capital stock, in the three per cent. reduced, or consolidated Bank Annuities, or one or both of them, I will, that A. & B., his exors., shall make up the capital sum of £10,000 in the three per cent. reduced, or consolidated Bank Annuities, or one or both of them, & shall hold the same in trust," etc., for the legatees, & if the bequest failed by the death of the legatee, it was to be considered as part of his personal estate. He died leaving £70,000 three per cent. Consols, & £9,000 three per cent. reduced annuities:—*Held*: specific & not general or pecuniary, & therefore the legatees were entitled to the dividends, from the death of testator. (2) Such a legacy is specific, with the substitution of a general pecuniary legacy, in case of its failure, to be satisfied in a specific manner. The same legacy may be specific, where it can be specifically satisfied, & general where it cannot. *Semble*: the exor. has the right to elect out of which stock the bulk of the legacy shall be satisfied.—*FONTAINE v. TYLER* (1821), 9 Price, 94; 147 E. R. 32.

Annotations:—As to (1) *Apid. Queen's College, Oxford v. Sutton* (1842), 12 Sim. 521. *Reid. Stephenson v. Dowson* (1840), 3 Beav. 342; *Bothamley v. Sherson* (1875), L. R. 20 Eq. 301.

B. General Legacies.

4548. What are—Bequest of stock—Testator possessing no such stock at death.]—SLEECH v. THORINGTON, No. 4949, post.

4549. ————.]—MULLINS v. SMITH, No. 4546, ante.

4550. ———— Payment to be made out of specific security—Failure of security.]—Legacies to be paid out of a specific security, which failed:—*Held*: general, upon the circumstances.—*ROBERTS v. POCKOCK* (1798), 4 Ves. 150; 31 E. R. 77, L. C. *Annotations:—Expi. Raymond v. Brodbelt* (1800), 5 Ves. 200. *Reid. Chaworth v. Beech* (1799), 4 Ves. 555; *Livesay v. Redfern* (1836), 2 Y. & C. Ex. 90. *Mentd. Barker v. Rayner* (1820), 5 Madd. 208.

4551. ———— Bequest of money "like" specified stock.]—S. S., by her will, gave £15,000 £3 per cent. Reduced Bank Annuities, "part of a larger sum standing in my name in the books of

entitled to satisfy his debt out of the executry funds to the prejudice of the other creditors, if he knows that the estate is insolvent.—*SALAMAN v. SINCLAIR'S TRUSTEE*, [1916] S. C. 698. —*SCOT*.

the Bank of England," to trustees, for the benefit of S. A. J. & her children. Testatrix then bequeathed the sum of £3,500 like £3 per cent. Reduced Annuities, "being a further part of such Annuities standing in my name in the books of the Bank of England," to trustees, upon trust for J. L. & her children. By a codicil to her will, after reciting the gift of the £15,000 £3 per cent. Reduced Annuities she revoked the gift, so far as related to the sum of £6,000, part of the sum of £15,000, £3 per cent. Reduced Annuities, & gave the same to J. W. absolutely. She then said "whereas, by my will, I have bequeathed unto my trustees the sum of £3,500 like £3 per cent. Reduced Annuities, upon certain trusts for the benefit of my granddaughter J. L., & her children, & I am desirous of increasing such bequest. Now, I hereby revoke the last-mentioned gift, & in lieu thereof, I bequeath unto my trustees, their exors., & assigns, the sum of £4,500 like £3 per cent. Annuities" (not referring to them as standing in her name), "upon the same trusts, & for the same purposes, as are by my will declared in respect of sum of £3,500 £3 per cent. Reduced Annuities." By a subsequent codicil, she directed that the legacy of £6,000 £3 per cent. Reduced Annuities should not be subject to any reduction for legacy duty, or other charges, & that the same should be assigned or transferred to him before, & in preference to, any other legacies or bequests given by her out of, or as part of, her £3 per cent. Reduced Annuities. The funds proved insufficient for the payment of all the legacies in full:—*Held*: (1) the gift of "£4,500 like £3 per cent. Annuities" was a general, & not a specific, legacy; (2) the legacy of £6,000 £3 per cent. Reduced Annuities to J. W. was not liable to abate, but should be paid in full & in the first instance.—*JOHNSON v. JOHNSON* (1844), 14 Sim. 313; 8 Jur. 1038; 60 E. R. 379.

4552. — *Gift of legacy duty payable on specific legacy.*—*FARRER v. ST. CATHARINE'S COLLEGE, CAMBRIDGE*, No. 4908, *post*.

4553. — *Bequest of sum of money—Direction for set-off of debts due from legatee.*—*Re RICHARDSON, Ex p. THOMPSON v. HUTTON*, No. 4902, *post*.

C. Specific Legacies and Devises.

4554. What are—General rule.—(1) I do not know, if it were necessary to give a definition of a specific legacy, that any would come nearer to my idea than what has just been said by the Lord Chancellor in this case, "something which testator, identifying it by a sufficient description, & manifesting an intention that it should be enjoyed in the state & condition indicated by that description, separates in favour of a particular legatee, from the general mass of his personal estate" (*LORD BLACKBURN*).

(2) The principle of the exemption of personal estate specifically bequeathed is, that it is necessary to give effect to the intention apparent by the gift. If the bequest is of a particular chattel, such as a horse or a ship, it is manifest that testator intended the thing itself to pass unconditionally, & *in statu quo*, to the legatee, which could not be if it were subject to the payment of funeral & testamentary expenses, debts, & pecuniary legacies. As against creditors testator cannot wholly release it from liability for his debts, but as against all persons

taking benefits under his will he may. The same principle applies to everything which testator, identifying it by a sufficient description, & manifesting an intention that it should be enjoyed or taken in the state & condition indicated by that description, separates in favour of a particular legatee, from the general mass of his personal estate, the fund out of which pecuniary legacies are in the ordinary course payable (*LORD SELBORNE, C.*).—*ROBERTSON v. BROADBENT* (1883), 8 App. Cas. 812; 53 L. J. Ch. 206; 50 L. T. 243; 32 W. R. 205, H. L.; *affg.* S. C. *sub nom. Re OVEY*, *BROADBENT v. BARROW* (1882), 20 Ch. D. 676, C. A.

Annotations:—As to (2) *Consol. Re Bourne, Martin v. Martin*, [1893] 1 Ch. 188. *Reid, Re Kenyon's Estate, Mann v. Knapp* (1887), 56 L. T. 626; *Re Maddock, Llewellyn v. Washington*, [1902] 2 Ch. 220; *Berry v. Gunkroger*, [1903] 2 Ch. 116. *Generally, Mead, Trott v. Buchanan* (1885), 28 Ch. D. 446; *Re Huddleston, Bruno v. Eyston*, [1894] 3 Ch. 395; *Re Mason, Ogden v. Mason*, [1901] 1 Ch. 619.

4555. — *Bequest of sum of money—Out of money due to testator on security.*—*SMALLBONE v. BRACE* (1677), Cas. temp. Finch, 303; 23 E. R. 166.

4556. — — — — —.]—*CHAMBERS v. JEFFERY*, No. 4839, *post*.

4557. — *Bequest of all deceased's personal estate at specified place.*—A devise of all a man's personal estate at such a place is a specific devise thereof, is not to be brought in to make up other pecuniary legacies.—*SAYER v. SAYER* (1714), Prec. Ch. 392; Gilb. Ch. 87; 2 Vern. 688; 24 E. R. 170.

4558. — *Bequest of stock—To larger amount than testator possessed.*—*ASHTON v. ASHTON*, No. 4912, *post*.

4559. — — — — —.]—*SLEECH v. THORINGTON*, No. 4949, *post*.

4560. — — — — —.]—A bequest was made of £1,000, £3 per cent. Consolidated Bank Annuities "part of the stock standing in my name in the books of the Bank of England," in trust for A. for life, & then over, & other bequests in the same words, for different legatees. Testatrix had no stock standing in her own name, but she was absolutely entitled to a sum of Consols insufficient to pay the legacies, & to a sum of £3 5s. per cents. standing in her deceased husband's name:—*Held*: the legacies were specific bequests out of both these funds, & carried interest from the death of testatrix.—*SAWREY v. RUMNEY* (1852), 16 Jur. 1110; 1 W. R. 18.

4561. — — — — —.]—Testatrix, by her will, gave to a legatee "the sum of £2,000, Long Annuities, standing in my name in the books of the Bank of England." At the date of her will, & at her death, she was possessed of £300 Long Annuities & no more, but of considerable other personal estate:—*Held*: the legacy was specific & not demonstrative, & the legatee was not entitled to have the deficiency made up out of testatrix's general assets.—*GORDON v. DUFF, Re WARD* (1861), 3 De G. F. & J. 662; 4 L. T. 598; 7 Jur. N. S. 746; 9 W. R. 643; 45 E. R. 1035, L. C.

Annotation:—*Reid, Re Pratt, Pratt v. Pratt*, [1891] 1 Ch. 491.

4562. — — — — —.]—*Direction to make up deficiency out of residue.*—Testator bequeathed, amongst other stock legacies, £30,000 consols to the Provost & Fellows of Queen's College, to be

PART IV. SECT. 5, SUB-SECT. 1.—C.

b. What are—Bequest of farm stock.—Testator bequeathed to A. all his stock, cattle, etc., upon certain lands:—*Held*: the bequest of the stock, cattle, etc., to A. was a specific

legacy.—*RODD v. HARPER* (1888), 16 O. R. 422.—*CAN.*

c. — — — — —.]—Testator bequeathed to A. "the full control of all my real & personal estate, stock & implements, during her lifetime":—

Held: the bequest to A. of the stock & farm implements was specific.—*ARGENTIUS v. SCHRIER* (1889), 18 O. R. 192.—*CAN.*

d. — — — — —.]—A bequest of "all my interest in that part of the

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by them expended, within three years after his death, in the purchase of such books for the use of, & to be added to the library of the College, as the Provost & Fellows for the time being should, in their discretion, think fit; & in a subsequent paragraph, he directed that if, at his decease, he should not have a sufficiency of stock standing in his name to answer the several stock legacies aforesaid, his exor. should purchase & make up the deficiency out of his residuary estate. The stock standing in testator's name at his death, was sufficient to answer the bequest to the College:—*Held*: that bequest was specific.—*QUEEN'S COLLEGE, OXFORD v. SUTTON* (1842), 12 Sim. 521; 11 L. J. Ch. 198; 6 Jur. 906; 59 E. R. 1233.

4563. ———.]—Legacy of "my £1,000 East India stock" is specific, & is adeemed by testator's having sold the stock.—*ASHBURNER v. MACQUIRE* (1786), 2 Bro. C. C. 108; 29 E. R. 62, L. C.

Annotations:—*Consd.* *Stanley v. Potter* (1789), 2 Cox, Eq. Cas. 180. *Apld.* *Chaworth v. Beech* (1799), 4 Ves. 555. *Consd.* *Innes v. Johnson* (1799), 4 Ves. 568; *Gardner v. Hatton* (1833), 6 Sim. 93; *Re Bridle* (1879), 4 C. P. D. 336. *Reid.* *Simmons v. Vallance* (1793), 4 Bro. C. C. 345; *Barker v. Dayner* (1820), 5 Mudd. 208; *Re Tobie, Slade v. Walpole* (1889), 61 L. T. 497; *Re Tyler, Tyler v. Tyler* (1891), 65 L. T. 367.

4564. ———.]—All stock not already bequeathed.]—Testator reciting that he has £1,500 5 per cents., gives it to A., & then gives to B. all other his stocks that he might be possessed of at his death. The latter bequest is not specific, but is liable to debts in preference to the former.—*PAIKROTT v. WORSFORD* (1820), 1 Jac. & W. 594; 37 E. R. 494.

Annotations:—*Consd.* *Stephenson v. Dowson* (1840), 4 Jur. 1152; *Bothamley v. Sherson* (1875), L. R. 20 Eq. 304. *Reid.* *Mytton v. Mytton* (1874), L. R. 19 Eq. 30.

4565. ———.]—Testator bequeathed the dividends, etc., of all stocks he should be entitled to at the time of his decease, in the public funds. He had £10,000 Consols at his death:—*Held*: this was a specific bequest of that sum.—*STEPHENSON v. DOWSON* (1840), 3 Beav. 342; 10 L. J. Ch. 93; 4 Jur. 1152; 49 E. R. 135.

Annotations:—*Mentd.* *Sorenson v. R., The Ariel* (1857), 11 Moo. P. C. C. 119; *Petty v. Wilson* (1869), 4 Ch. App. 571.

4566. ———.]—Testator possessing such stock at death.]—*MULLINS v. SMITH*, No. 4546, *ante*.

4567. ———.]—Part of larger fund.—Or sum equal thereto.]—Testator, reciting that he was entitled, after the death of his sister, to £5,002 consols, bequeathed to his son the sum of £2,000 consols, part thereof, or a sum equal thereto, to be transferred or paid to him when the same should be received by his exors. After the date of his will testator's sister died, & he received the £5,002 consols, which he sold out & mixed with his other moneys. He afterwards confirmed his will by a codicil, but died without having any sum of consols:—*Held*: the legacy was specific; & the particular fund, part of which was given to the son, being no longer in existence, the legacy failed.—*OLIVER v. OLIVER* (1871), L. R. 11 Eq. 506; 40 L. J. Ch. 189; 24 L. T. 350; 19 W. R. 432.

4568. ———.]—(1) Legacies which before

lands of K. now in my possession, together with all my sheep, cattle, horses, pigs, farming implements, & everything appertaining thereto," is a specific bequest.—*KAVANAUGH v. KELLY* (1903), 37 L. L. T. 71.—*IR.*

a. ———.]—Request of "my property at

A."—A gift of "my property at A." is specific.—*Re NEWCOMBE* (1918), 42 O. L. R. 590; 14 O. W. N. 103.—*CAN.*
f. ———.]—Sum of money "lent on bond to E. & I."—*PAGAN v. PAGAN* (1838), 16 Sh. (Ct. of Sess.) 383; 13 Fac. Coll. 330.—*SCOT.*

the passing of Wills Act, 1837 (c. 26), would have been specific, remain specific.

(2) A gift of "all my stock in the Midland Railway Co." is specific.

(3) A specific legatee if entitled to have his legacy redeemed from charges created by testator, as distinguished from charges incidental to the property, at the expense of testator's general estate, or, if the property is not redeemed, to have compensation out of the general estate to the amount of the legacy.

(4) Testator by his will dated in 1869, made a bequest of "all my shares or stock in the Midland Railway Co." to trustees upon certain trusts. He was at the date of his will entitled to £1,000 stock in that co. In Feb. 1871, he transferred the stock into the names of certain bankers to secure an advance made to them by A., who gave testator an undertaking that the stock should be retransferred within three months. Testator died in 1872, & after his death the bankers sold the stock which had never been re-transferred, & applied the proceeds in reduction of the debt due from A. Under orders made in a suit to administer testator's estate, A. transferred £500 Midland Railway stock into ct., but was unable to make any further transfer:—*Held*: the trustees of the bequest were entitled to the stock so transferred into ct., & not the residuary legatee.

(5) Definition of specific legacy observed upon —*BOTHAMLEY v. SHERSON* (1875), L. R. 20 Eq. 304; 44 L. J. Ch. 589; 33 L. T. 150; 23 W. R. 848.

Annotations:—*As to* (2) *Reid.* *Re Tyler, Tyler v. Tyler* (1891) 65 L. T. 367. *As to* (3) *Reid.* *Re Groen, Baldock v. Groe* (1888), 40 Ch. D. 610; *Re Bourne, Martin v. Martin* (1893) 1 Ch. 188; *Berry v. Gaukriger*, [1903] 2 Ch. 111. *As to* (5) *Expld.* *Re Ovey, Broadbent v. Barrow* (1882) 20 Ch. D. 676. *Generally.* *Mentd.* *Everett v. Everett* (1877), 26 W. R. 333; *Re Betty, Betty v. A.-G.*, [1891] 1 Ch. 821.

4569. ———.]—*Re PRATT, PRATT v. PRATT* No. 4952, *post*.

4570. ———.]—*Re COMPTON, VAUGHAN & SMITH*, No. 4945, *post*.

4571. ———.]—Bequest of money in bag.]—

(1) Testator having £500 upon mtge. & no other sum out upon security gave by will to deft. £500 to remain & continue at interest on such security as he should die possessed of, or to be put out on govt. securities, at the election of his exors.:—*Held*: a pecuniary legacy.

(2) But a devise of money in a bag, or of money on a particular security, is specific, & shall not abate with pecuniary legatees.—*LAWSON v. STITCH* (1738), West temp. Hard. 325; 1 Atk. 507; 25 E. R. 963, L. C.

Annotations:—*Reid.* *Ashburner v. Macquire* (1786), Bro. C. C. 108; *Simmons v. Vallance* (1793), 4 Bro. C. 315.

4572. ———.]—Bequest of money on specific security.]—*LAWSON v. STITCH*, No. 4571, *ante*.

4573. ———.]—(1) Legacy of the money due upon a note held specific, upon the intention but the inclination of the ct. is against specific legacies, & to hold it a general legacy, with reference only to the security, as the fund first be applied to it.

(2) Specific legacy retained by the exor. of assets; but was not wanted: in case of depreciation the legatee is entitled to the original value.

g. ———.]—Request of "£100 due to me from H."—Testator by his will bequeathed to A. "£100 due to me from H." *Held*: the legacy to A. was a specific legacy of the debt due by H.—*CORRELL v. CORRELL*, [1915] 8. 82.—*SCOT.*

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afterwards incurred fresh debts to the amount of about £1,300 which were due at the date of the codicil & at the death of testator:—*Held*: the legacy was specific: it was adeemed by payment of the debt & the confirmation of the will by the codicil did not give the son any benefit in respect of the debts then due.—*SIDNEY v. SIDNEY* (1873), 1 L. R. 17 Eq. 65; 43 L. J. Ch. 15; 29 L. T. 569; 22 W. R. 101.

Annotations:—Reid. Re Slater, Slater v. Slater, [1906] 2 Ch. 480. Mentd. Re Rowe, Pike v. Hamlyn (1897), 77 L. T. 475.

4584. ——— Forgiveness of debt due to testator.]

—Testator gave to the trustees of his daughters' marriage settlement £3,000 in satisfaction of his covenant to pay them £1,000. He also forgave his children respectively all debts & sums of money which might be due from them to him at his death & secured by bond, bill, note or other security. At the date of his death two of his sons owed him sums not secured as above mentioned. The estate proved to be insufficient for the payment of all the legacies in full. The question having arisen whether the legacy of £3,000 which the legatee had elected to take & the unsecured debts forgiven to the sons were liable to abate with the other general legacies:—*Held*: the principle by which a legacy given in satisfaction of an ascertained debt & therefore the legacy of £3,000 being a mere bounty was liable to abatement; (2) the forgiveness of their debts to the sons amounted to specific legacies which were not liable to abatement.—*Re WEDMORE, WEDMORE v. WEDMORE, [1907] 2 Ch. 277; 76 L. J. Ch. 486; 97 L. T. 26; 23 T. L. R. 547.*

Annotation:—As to (1) Consd. Re Whitehead, Whitehead v. Street, [1913] 2 Ch. 56.

D. Demonstrative Legacies.

4585. What are—Bequest of pecuniary legacy payable out of specific fund—Proceeds of sale of estate.]—A pecuniary legacy directed to be paid by the sale of an estate, which testator had contracted to purchase, is payable out of testator's general assets if contract cannot be completed.

This is neither a *legatum nominis* nor a *legatum debite*, but a pecuniary legacy with a particular security which in the civil law was termed a demonstrative legacy (*LEACH, V.-C.*).—*FOWLER v. WILLOUGHBY* (1825), 2 Sim. & St. 354; 4 L. J. O. S. Ch. 72; 57 E. R. 381.

Annotations:—Reid. Creed v. Creed (1844), 11 Cl. & Fin. 491; Williams v. Hughes (1857), 21 Beav. 471; Paget v. Hulsh (1863), 1 Hem. & M. 663. Mentd. Newbold v. Roadknight (1830), 1 Russ. & M. 677; Fream v. Dowling (1855), 20 Beav. 624.

4586. ——— Stock.] MULLINS v. SMITH, No. 4540, ante.

4587. ——— Capital employed in business.]—Where testator, having claims against his firm, directed his proportion of capital invested in the business to be converted into cash, such cash to be

paid over as realised, with the exception of certain bequests thereafter mentioned, to a charity, & requested his exors. as soon as convenient after his decease, out of the capital employed in the business to pay the persons mentioned below the following sums, etc.:—*Held*: (1) the legacies were demonstrative, & not specific, & if the particular fund failed the deficiency was payable out of the general personal estate not specially given; (2) the proportion of capital included not only testator's share in the assets, but also the debt due from the partner.

(3) The case is one in which pecuniary legacies or legacies of quantity are directed to be paid out of a certain specific fund. If that be so, that is exactly the definition of a demonstrative legacy (*STUART, V.-C.*).—*BEVAN v. A.-G.* (1863), 4 Giff. 361; 2 New Rep. 52; 9 L. T. 221; 9 Jur. N. S. 1099; 66 E. R. 746.

4588. ——— Estate & effects inherited by testator from parent.]

—Testator bequeathed to his sister "the sum of £10,000 as her sole & absolute property to be paid out of the estate, & effects inherited by me from my mother in terms of her last will & testament, & as regards the residue of the estate & effects of my mother so to be inherited by me in terms of her will, & of all my estate & effects at present in my possession & enjoyment I do hereby appoint as my sole heir or heirs" certain specified persons. Testator died in 1903. All the property to which he was entitled under the will of his mother was in reversion expectant on the life interest of his father, who died in 1910:—*Held*: (1) the legacy of £10,000 was a demonstrative legacy; (2) there was nothing in the will expressly directing payment to be made only when the reversion fell in; (3) the mere fact that the fund out of which the legacy was directed to be primarily paid was reversionary made no difference; (4) interest on the legacy ran from the expiration of a year from testator's death.—*WALFORD v. WALFORD, [1912] A. C. 658; 81 L. J. Ch. 828; 107 L. T. 657; 50 Sol. Jo. 631, H. L.; affg. S. C. sub nom. Re Walford, KENYON v. WALFORD, [1912] 1 Ch. 219, C. A.*

4589. ——— Particular Investment.]—Re JEFFERY, NUSSEY v. JEFFERY, No. 4707, post.

4590. ——— Testator's insurance funds.]—Testator by a holograph letter, which by the law of Scotland is a testamentary writing, instructed his solr. to pay to applt. A., a single lady, on the first of each month after his death, the sum of £12 10s., being at the rate of £150 a year. "But in lieu of this I would prefer that as soon as you conveniently can, that the sum of £3,000 should be taken from my life insurance funds & paid over to her." Testator's trust disposition contained a general direction for payment of debts, & the insurance funds, after paying off the charges upon them, amount to £1,900:—*Held*: (1) the trustees were bound to pay over the capital sum of £3,000 to A., & had no option to decide whether she was to receive the monthly allowance or the capital sum; (2) the direction that £3,000 should be taken from testator's insurance funds & paid to A. in

PART IV. SECT. 5, SUB-SECT. 1.—D.

4591. What are—Bequest of pecuniary legacy payable out of specific fund—Stock.]—Testator bequeathed to S. the interest on £1,000, "out of the moneys invested by" him in the M. Bank of C., to be annually paid to S. by his exors., & for S.'s sole use & benefit during life:—*Held*: the bequest was demonstrative.—*Re LOXAN'S TRUSTS* (1885), 4 Man. L. R. 19.—*CAN.*

4592. ——— Capital employed in business.]—Testator directed that "£5,000 of the money to which I may be entitled as my share of the partnership business now carried on at" etc., under the name of E. & Co., should be invested by his exors. at interest, & that the income derived therefrom should by them be paid over, as received, to M. Subsequently to the making of the will the partnership of E. & Co. was dissolved, & testator until his death carried on the business

alone, but under the name of E. & Co., his interest in the partnership having been realised by him & carried into his new business:—*Held*: the legacy of £5,000 was demonstrative.—*DAY v. HARRIS* (1882), 1 O. R. 147.—*CAN.*

h. ———.]—The gift of a definite sum of money to be paid from amounts of testator in a definitely named bank is a demonstrative legacy.—*Re ATKINS* (1912), 21 O. W. R. 238; 3 O. W. N. 665; 3 D. L. R. 180.—*CAN.*

the circumstances marked the legacy as demonstrative & not specific.—*DAWSON v. REID* (1915), 113 L. T. 52, H. L.

SUB-SECT. 2.—NOTICE TO LEGATEE.

4591. Duty of executor to give notice.—Of rights under will.—Testatrix bequeathed a sum of money to her sister, subject to this condition, that "if she should be dead at the time of testatrix's decease, or should not be heard of to be then living, or should not claim her legacy within twelve calendar months after testator's decease," then it should go over:—*Held*: it was not the duty of the exor. to inform the legatee.—*HAWKES v. BALDWIN* (1838), 9 Sim. 355; 7 L. J. Ch. 297; 2 Jur. 608; 59 E. R. 304.

4592. —Of conditions attached to will—Executor benefiting by breach of condition.—Where a legacy is given upon a condition, an exor. who takes a beneficial interest in the legacy on the breach of the condition owes no duty to the legatee to give notice of the terms of the legacy:—*Re LEWIS, LEWIS v. LEWIS*, [1904] 2 Ch. 656; 73 L. J. Ch. 718; 91 L. T. 212; 53 W. R. 393, C. A.

Annotation: *Consd. Re Mackay, Mackay v. Gould*, [1906] 1 Ch. 25.

4593. ——A, who died in 1856, left all his estate to his wife, the mother of plff. M., & children, & appointed his wife exrix. M. attained twenty-one years of age in 1876: *Held*: (1) plff.'s mother was under no duty to disclose her rights to or obtain for plff. legal advice on them; (2) the mother never held the estate otherwise than in her character of exrix., & no act on her part had been shown which converted her liabilities into the duties attaching to an express trustee. *Re MACKAY, MACKAY v. GOULD*, [1906] 1 Ch. 25; 75 L. J. Ch. 17; 93 L. T. 694; 54 W. R. 88; 50 Sol. Jo. 13.

SUB-SECT. 3. ASSENT.

See Land Transfer Act, 1897 (c. 65), s. 3 (1); Administration of Estates Act, 1925 (c. 23), s. 36.

A. Necessity for Assent.

4594. General rule—Specific bequest.—At law a legacy does not vest in the legatee till the exor.'s assent, but in equity he will be decreed to deliver the specific legacies, being considered here as a bare trustee. —*NORTHEY v. NORTHEY* (1740), 2 Atk. 77; 9 Mod. Rep. 270; 26 E. R. 447, L. C. *Annotation*: —*Mentd. Tasker v. Tasker*, [1895] P. 1.

4595. ——*ANON.* (undated). Keil. 128; 72 E. R. 297.

— Gift to executor.—*See* Sub-sect. 3, F., *post*.

4596. Absence of assent—Effect—As between incumbrancers of legatee.—A sum of stock was standing in the names of D. & L. in trust for K. for life, with remainder to A. absolutely. A. by her will bequeathed the stock to B., & appointed D., one of the trustees, her sole exor. After A.'s death B. assigned all his estate & effects to L. & another upon trusts for the benefit of his creditors, but no notice of this assignment was given to D. Afterwards B. assigned the particular stock to C. by way of mtg., & notice of the last assignment was forthwith given to D. Upon bill by C.:

Held: the legacy not having been assented to, notice to the exor. was necessary, & notice to the trustees alone was not sufficient, & consequently C. was entitled to priority. —*HOLT v. DEWELL* (1845), 1 Hare, 446; 15 L. J. Ch. 14; 9 Jur. 1005; 67 E. R. 723.

Annotation: —*Apprvd. Stephens v. Green, Green v. Knight*, [1893] 2 Ch. 148.

4597. — On title of mortgagee—Mortgage by legatee.—Devise of a term to E. the wife of B. for life, & to the survivor, with remainder to S., E. being appointed exrix. E. concealed the will, saying that testator had died intestate, & that she was entitled to the whole as next of kin. E. & her husband then took out administration to the estate, entered, & sold part. The husband survived, & appointed deft. his exrix., who proved his will, & administered to the will which had been suppressed, & then the letters of administration to E. & husband were cancelled. The husband of the granddaughter after her death took out letters of administration to her, & mortgaged the premises unsold to plff.: *Held*: as there had been no assent to the legacy to the granddaughter by the legal representative of testator under the above facts, mtgce. had no legal title. —*WEBSTER v. JOHNSON* (1854), 21 L. T. O. S. 92; 3 W. R. 60.

Annotation: —*Refd. Johnson v. Warwick* (1856), 17 C. B. 316.

4598. Power to assent to part Of residue.—Testator bequeathed the residue of his estate, including the lease of a colliery, to trustees, who were also exors. of his will, on trust for his son on attaining twenty-one years of age. On the son attaining that age, the trustees let him into possession, but made no formal assignment of the lease, & there were still debts due from testator's estate: *Held*: the assent of the exors. was sufficient to pass the property in the colliery, & it was competent for them to assent to the bequest of part of the residue of the estate without assenting to the rest. —*AUSTIN v. REDDIE* (1803), 41 W. R. 619; 37 Sol. Jo. 156; 3 R. 580.

4599. — Of devise.—Where an exor. assents to part of a devise, contending that only that part was intended to pass under it, he cannot at law set up his want of assent to the devise, where it shall appear that the devise carried more. His assenting to part, & denying title as to the remainder, is an assent to the whole. *Doe d. SIMS v. SIMS* (1827), 5 L. J. O. S. K. B. 140.

4600. — Of gift of articles specifically bequeathed.—*ELLIOTT v. ELLIOTT*, No. 4009, *post*.

B. By Whom given.

4601. Where several co-executors—Power of one co-executor to assent to bequest to himself.—One co-exor. may release a debt & do other acts without his companion, & he may therefore assent to a bequest to himself (*per C.R.*). —*TOWNSON v. TICKELL* (1819), 3 B. & Ald. 31; 100 E. R. 575. *Annotations*: —*Mentd. Doe d. Palmer v. Andrews* (1827), 4 Bing. 318; *Begbie v. Crook* (1835), 2 Scott, 128; *Doe d. Winder v. Lawes* (1837), 7 Ad. & El. 195; *Browell v. Reed* (1842), 1 Hare, 431; *Doe d. Childrey v. Harris* (1847), 16 M. & W. 517; *Siggers v. Evans* (1855), 5 E. & B. 367; *Xenow v. Wickham* (1862), 13 C. B. N. S. 301; *Peacock v. Eastland* (1870), L. R. 10 Eq. 17.

4602. Bequest of leaseholds.—By an assignment, by one of several exors., of a leasehold estate, the property of testatrix, which had been bequeathed to that exor. absolutely for his benefit, reciting that assignor & another exor. had proved

PART IV. SECT. 5, SUB-SECT. 3.—A.

K. General rule.—Until the exor. has given his assent to the legacy, the legatee has only an inchoate right to it. —*LAKSHMANNA v. RATNAMMA* (1913), 1 L. L. 38 Mad. 174.—*IND.*

Sect. 5.—Legacies: Sub-sect. 3, B., C. & D.]

the will, but not stating the fact that a third exor. had also subsequently proved, & reciting that the exors. had assented to the bequest to assignor, it was witnessed that assignor, in his several capacities of exor. & assignee of testatrix, in consideration of the sum therein mentioned, sold & assigned the premises to the purchaser. Assignor, in his character of exor. was, at the time of the assignment, indebted to the estate of testatrix in a sum greater than the value of the property assigned. On a bill by the co-exors., on behalf of the estate of the testatrix, to set aside the assignment & recover the title-deeds:—*Held*: the assignment by the exor. to the purchaser was effectual, & whether there had or had not been an assent to the bequest by the other exors., the ct. would not disturb the sale.

Qu.: whether, without any express assent by exors. to a bequest of a leasehold estate, the entering of the legatee into possession & receipt of the rents & profits, with the knowledge of & without any objection from the exors., does not amount to an assent by them.—*COLE v. MILES* (1852), 10 Harc. 179; 68 E. R. 889.

Annotations:—*Reid*. *Spencey v. Thorne* (1855), 3 Eq. Rep. 602; *Re Whistler* (1887), 35 Ch. D. 561; *Re Chaplin & Staffordshire Potteries Waterworks Co.'s Contract*, [1922] 2 Ch. 824.

4603. Infant — Executor.]—An infant exor. under seventeen cannot assent to a legacy.—*PRINCE'S CASE* (1599), 5 Co. Rep. 29 b; 77 E. R. 90; *sub nom.* *PRICE v. SIMPSON*, Cro. Eliz. 718.

Annotations:—*Reid*. *Finch's Case* (1607), 6 Co. Rep. 63 a. *Mentd.* *Nedham's Case* (1610), 8 Co. Rep. 135 a; *Grange v. Denny* (1616), 3 Bulst. 174; *Roskelly v. Godolphin* (1682), 1 Haym. 483; *Okell v. Sudlow* (1697), 5 Mod. Rep. 423; *Lysons v. Barrow* (1836), 2 Bing. N. C. 486; *Hewson v. Shelley*, [1914] 2 Ch. 13.

4604. — — —.] *COOKES v. BELLAMY* (1661), 1 Sid. 187; 82 E. R. 1048.

Annotation:—*Mentd.* *Pemberton v. Chapman* (1858), E. B. & E. 1056.

4605. — — Administration.]—*COOKES v. BELLAMY* (1661), 1 Sid. 187; 82 E. R. 1048.

Annotation:—*Mentd.* *Pemberton v. Chapman* (1858), E. B. & E. 1056.

4606. Married woman.]—*COOKES v. BELLAMY* (1661), 1 Sid. 187; 82 E. R. 1048.

Annotation:—*Mentd.* *Pemberton v. Chapman* (1858), E. B. & E. 1056.

C. Time for Assent.

See Part I., Sect. 13, sub-sect. 5, *ante*.

D. Mode of Assent.

4607. General rule.]—Testator by his will, after appointing two persons exors. & trustees & giving pecuniary legacies, gave his residuary estate to his trustees upon trust for sale & distribution as therein mentioned. Fourteen years after testator's death one of the exors., without the knowledge of his co-exor., pledged certain plate forming part of testator's residuary estate with a firm of pawnbrokers, who had no notice that he was not the absolute owner thereof, & misapplied the money so raised. All the debts & legacies, so far as was known, were paid, & the residuary account was passed, within one year of testator's death, but the residuary estate had not been completely distributed. On the death of the pledgor, the transaction was discovered. An action was brought by the co-exor. & a new

trustee against the pawnbrokers to recover the plate:—*Held*: the proper inference to be drawn from the facts was that at the date of the pledge the exors. had assented to the trust dispositions taking effect & held the plate not as exors. but as trustees. Therefore deceased exor. had no power to pledge the plate & the existing trustees were entitled to recover it.

[An exor. may assent] informally & the assent may be inferred from his conduct (*LORD HALDANE, J.*).—*ATTENBOROUGH v. SOLOMON*, [1913] A. C. 76; 82 L. J. Ch. 178; 107 L. T. 833; 29 T. L. R. 79; 57 Sol. Jo. 76; *affg.* S. C. *sub nom.* *SOLOMON v. ATTENBOROUGH*, [1912] 1 Ch. 451.

Annotations:—*Apld.* *Wise v. Whitburn*, [1924] 1 Ch. 460. *Mentd.* *Hewson v. Shelley* (1913), 82 L. J. Ch. 551; *Re De Leeuw, Jakens v. Central Advance & Discount Corp.*, [1922] 2 Ch. 540.

4608. —.]—In 1922 defts., as exors., contracted to sell to plffs. a London leasehold house with stabling held by testator for the unexpired residue of a term of eighty years. By his will testator bequeathed these premises to defts. as his exors. & trustees upon trust to permit his wife to occupy the same during her life, she paying the rent, rates, & taxes & performing the covenants of the lease, & after her death to hold the same upon the same trusts for the benefit of his son, deft., who was one of the exors., & his children & other issue as were therein declared of his son's share in the residuary estate. The exors. permitted the widow of testator to continue residing in the house for ten years until her death in Dec. 1921, she paying the rent & performing the covenants of the lease. The purchasers made a requisition on title to the effect that they knew that the house & premises had been occupied since testator's death by his widow, according to the trusts of the specific bequest, "which had been assented to," & the exors. could not sell until the death of the tenant for life; but the purchasers were willing to accept the title from the tenant for life under Settled Land Act, 1882 (c. 38). To this the reply was made that the tenant for life had died. Both parties acted on the assumption that the leasehold had fallen into the residue, & completed the purchase in 1922. Plffs. subsequently agreed to sell the stabling to a sub-purchaser, who took the objection that the exors. had no power to sell in 1922. No written or verbal consent to the specific bequest had been in fact given by the exors.

In an action by plffs. for damages for breach of an implied covenant for title by defts.:—*Held*: upon the acts & conduct of the parties this legacy had been assented to soon after testator's death, & the effect was to strip the exors. of their title as such, & to clothe them with a title as trustees, so that they had no power to sell as exors.

The question of assent is one, no doubt, mainly of fact. It is not suggested that in order to prove assent it is necessary to show affirmatively that the exors., either verbally or in writing, formally expressed assent; it is conceded that assent may be implied from conduct on their part, & plffs. rely upon conduct which they say is unequivocal & unambiguous as establishing the assent (*EVE, J.*).—*Wise v. Whitburn*, [1924] 1 Ch. 460; 93 L. J. Ch. 235; 130 L. T. 655; 68 Sol. Jo. 302.

4609. What amounts to assent—Whether question of fact for jury.]—Testator bequeathed to his two sons his two carriage manufactories, with all

PART IV. SECT. 5, SUB-SECT. 3.—D.

1. Assent by implication.—As well as by express words.]—The assent of an exor. to a legacy may be by

implication as well as by express words.—*HONSEBARGER v. HONSEBARGER* (1837), 5 O. S. 479.—*CAN.*

m. Assent by conduct.]—The as-

sent of an exor. to a legacy may be shown by his conduct.—*HONSEBARGER v. HONSEBARGER* (1837), 5 O. S. 479.—*CAN.*

fixtures, implements, tools, stock, job-carriages, harness, & everything appertaining to his trade in the manufactories. At the time of his death, a carriage was in one of the manufactories, unfinished, which was being built to the order of a purchaser. A question arose between the exors. & the sons, whether this carriage fell within the bequest, & the exors. paid the legacy duty on the whole, but annexed the following memorandum to the legacy receipt: "A disagreement arising between the sons S. & T. & the exors., as to whether the whole of this item belongs to the sons, or part to the residue, the exors. desire to pay the duty on the whole, leaving it for them to settle with the legatees the proportion of duty, when the matter in dispute shall be determined." The sons retained possession of & finished the carriage, delivered it to the purchaser, & received the price. In an action by the exors. against them for money had & received, commenced two years afterwards:—*Held*: there was no evidence to go to the jury of assent by the exors. to the legacy of the carriage to debts.—*ELLIOTT v. ELLIOTT* (1841), 9 M. & W. 23; 11 L. J. Ex. 3; 152 E. R. 11.
Annotation:—*Consd.* *Austin v. Beddoe* (1893), 11 W. R. 619.

4610. ————*Assent of an exor. to a bequest is not a matter of law, but a question of fact for the jury.*—*MASON v. FARNELL* (1841), 12 M. & W. 674; 1 Dow. & L. 576; 13 L. J. Ex. 142; 2 L. T. O. S. 424; 152 E. R. 1369.

Annotations:—*Mentd.* *Barnewall v. Williams* (1841), 7 Man. & G. 403; *Whitehead v. Harrison* (1841), 6 Q. B. 423; *Clements v. Flight* (1846), 16 M. & W. 42; *Clossman v. White* (1849), 7 C. B. 43; *Morgan v. Marquis* (1853), 9 Exch. 145.

4611. ————*Ambiguous expressions.*—At the reading of testator's will, soon after his death, the devisee in trust said "he ought to have had £5 for being trust":—*Held*: these words were equivocal & ambiguous, & should not have been left to the jury as proving his assent, as a trustee to the devise.

Qu.: whether an unambiguous assent to a devise, expressed by words or matter in pais, without deed, is sufficient.

Qu.: whether a devisee in trust can disclaim by deed after previous assent to the devise in words.—*DOE d. CHIDGLEY v. HARRIS* (1847), 16 M. & W. 517; 16 L. J. Ex. 190; 8 L. T. O. S. 414; 153 E. R. 1294.

Annotations:—*Mentd.* *Young v. Grove* (1847), 4 C. B. 668; *Venables v. East India Co.* (1848), 18 L. J. Ex. 266; *Wright v. Wilkin* (1860), 2 B. & S. 232; *Re Lacy*, Royal General Theatrical Fund Assocn. v. Kydd, [1899] 2 Ch. 149.

— *Pecuniary legacy—Payment.*—*See* Sub-sect. 4, *post*.

— *Gift to executor.*—*See* Sub-sect. 3, *F.*, *post*.

4612. Assent in writing—Contents—Description of bequest—Sufficiency.—*Re PIX, PLOMLEY v. STILEMAN*, [1901] W. N. 165.

4613. ————*To devise of land—In preference to executing conveyance—Land Transfer Act, 1897 (c. 65), s. 3 (1) (2).*—*Re PIX, PLOMLEY v. STILEMAN*, [1901] W. N. 165.

4614. ————*Liability to stamp duty.*—By Land Transfer Act, 1897 (c. 65), s. 3 (1), "at any time after the death of the owner of any land his personal representatives may assent to any devise obtained in his will . . .".—*Held*: an assent in writing, made in pursuance of the above sect. under the hand but not under the seal of the exor. was not "an instrument . . . whereby any property on any occasion, except a sale of mtge., is transferred to or vested in any person" within Stamp Act, 1891 (c. 39), s. 62, & was, therefore, not

liable to stamp duty as a conveyance or transfer.—*KEMP v. INLAND REVENUE COMRS.*, [1905] 1 K. B. 581; 74 L. J. K. B. 112; 92 L. T. 92; 53 W. R. 479; 21 T. L. R. 168; 49 Sol. Jo. 147.

4615. Assent by implication—General rule.—

(1) Decree for payment of legacies was made against an exor. without reference to the state of the assets, upon the ground of his having, by his acts & admissions, rendered himself personally liable for the payment.

(2) The ct. will relieve an exor. from an admission of his liability to pay legacies if made incautiously & by mistake if he recall the same within a reasonable time after discovery of the mistake.

Semble: (3) payment of interest upon a legacy, or a declaration that a legacy is ready for a legatee at twenty one is sufficient admission of assets.

Semble: (4) widow, exrix. of husband having refused to pay legacies given by her husband's will & having stated as a reason for such refusal that the personal estate was not on mtge. the same was a sufficient admission of assets. *BARNARD v. PUMFRET* (1811), 5 My. & Cr. 63; 10 L. J. Ch. 124; 41 E. R. 295, L. C.

Annotation:—*As to* (1) *Consd.* *Postlethwaite v. Mounsey* (1812), 6 Harv. 32, n.

4616. ————*Slight evidence sufficient.*

Where assent would be rightful.—The doctrine that slight evidence is sufficient of the assent of exors. to a bequest, or that it may be implied, only applies in ordinary cases, where the assent would be rightful, & not where it must be implied against their own acts. Where the bequest to debt. was by a husband, of household property devised to his deceased wife for her separate use, & which she had bequeathed to pttf., & the husband's exors. joined with the devisee of the wife in suing:—*Held*: even supposing that the husband's assent was necessary to the validity of the wife's will, the assent of the exors. to the bequest by him to debt. required to be proved by express evidence, & was not to be presumed or implied opposed to their own act in suing.—*TUDOR v. GURST* (1858), 27 L. J. Ex. 395; 31 L. T. O. S. 206.

4617. ————*Universal legatee taking out administration with will annexed.*—*GUNDY v. BROWN* (1878), Cas. temp. Finch, 370; 23 E. R. 203.

4618. ————*Application of profits of lease in maintenance of infants.*—Lessee for years devises his term to his son, & further says, that his will is, that his wife shall have the occupation & profits of the lease during the minority of his son, to the intent that with the profits she may educate his children, & see his hus. will performed, & he makes her his executrix, & dies. Afterwards she proves the will, & sells the term to a creditor of her husband's before all the debts are paid, having other goods in her hands sufficient to pay the debts & funeral expenses. She educates the issues after her husband's death until her own death. The son comes to his full age, & enters into the premises & his entry is adjudged lawful.—*PARAMOUR v. YARDLEY* (1579), 2 Plowd. 539; 75 E. R. 791.

Annotations:—*Consd.* *Doe d. Saye & Sele v. Guy* (1802), 3 East, 120; *Doe d. Hayes v. Sturges* (1816), 7 Taunt. 217. *Reid*, *Cheney v. Smith* (1599), 1 Leon. 215; *Manning's Case* (1609), 8 Co. Rep. 94, b; *Young v. Holmes* (1717), 1 Stra. 70; *Newlands v. Palmer* (1849), 13 L. T. O. S. 116. *Mentd.* *Bredon's Case*, *Gardiner v. Bredon* (1597), 1 Co. Rep. 76, a; *Roberts v. Roberts* (1613), 2 Bulst. 123; *Blamford v. Blamford* (1615), 3 Bulst. 98; *Thurman v. Cooper* (1618), Poph. 138; *Howard v. Norfolk* (1681), 3 Cas. in Ch. 14; *Hitchem v. Bassett* (1688), 1 Flow. 537; *Fisher v. Wigg* (1699), 1 Ld. Raym. 622; *Ide v. Cooke* (1705), 2 Ld. Raym. 1444; *Darblow v. Beaumont* (1713), Fortes. Rep. 18; *Ulrich v. Litchfield* (1742), 2 Atk. 372; *Sherratt v. Bentley* (1831), 2 My. & K. 149.

Sect. 5.—Legacies: Sub-sect. 3, D. & E.]

4619. — **Entry of devisee of leaseholds—Without permission of executor—Subsequent grant of devisee's interest to executor.]—**CARTER v. LOVE (1593), Moore, K. B. 358; 72 E. R. 627.

4620. — **With permission of executors.]—**AUSTIN v. BEDDOE, No. 4598, *ante*.

4621. — **Entry of life-tenant of leaseholds—Rent paid & covenants performed.]—**WISE v. WHITBURN, No. 4608, *ante*.

4622. — **Lease of premises with clause that rent in trust for devisee.]—**NOELL v. ROBINSON (1086), 2 Rep. Ch. 248; 2 Vent. 358; 1 Vern. 90; 21 E. R. 670, L. C.

*Annotations:—***Reid.** Elliott v. Elliott (1841), 9 M. & W. 23. **Mentd.** Anon. (1738), 1 Atk. 491; March v. Russell (1837), 3 My. & Cr. 31; *Re* Fitzgerald, Surman v. Fitzgerald, [1903] 1 Ch. 933.

4623. — **Payment—Of debts of deceased.]—**CHENEY v. SMITH (1590), 1 Leon. 215; 74 E. R. 108.

*Annotation:—***Apld.** Hawkins v. Williams (1862), 10 W. R. 692.

4624. — **Of debts & legacies of deceased—Residuary account passed—Executors also trustees.]—**ATTENBOROUGH v. SOLOMON, No. 4607, *ante*.

4625. — **To legatee of rents of leaseholds—Payment charged to legatee.]—**A. devised the residue of a term determinable on lives to B. After the decease of testator, the administrator with the will annexed paid the rent reserved on the term for six years, & charged it to B.:—**Held:** this was sufficient evidence of his assent to the bequest to enable B. to maintain ejectment.—**Doe d. MABBERLEY v. MABBERLEY** (1833), 6 C. & P. 126.

4626. — **General payments to or for benefit of legatee of leaseholds.]—**The mere fact that an exor. has made general payments to or for the benefit of a legatee of leaseholds & other property, not specially out of or on account of the rents, is not in the absence of representations on the subject by the exor. to the legatee sufficient to enable the ct. to infer that the legacy has been assented to.—**THORNE v. THORNE**, [1893] 3 Ch. 190; 63 L. J. Ch. 38; 69 L. T. 378; 42 W. R. 282; 8 R. 282.

4627. — **Lapse of time.]—**Leasehold property was bequeathed to three persons, who were also appointed exors. of the will, upon certain trusts. One only of the exors. proved the will. Six years afterwards he conveyed the whole property, professing to do so as exor.:—**Held:** lapse of time from the probate of the will was no evidence of assent to the legacy, & therefore the whole property passed. **HAWKINS v. WILLIAMS** (1862), 10 W. R. 692.

4628. **Presumption of assent.]—**Testator bequeathed the residue of his personal estate to three trustees, R., L., & I., who were also his exors., upon trust to invest the same, & to pay the income to his widow for her life, & after her death "to lay out & invest or retain invested" £350, & to pay the income of £500, part thereof, to his daughter M. for her life, with remainder to her children, & upon trust to pay the income of the remaining £350 to his daughter B. for her life, with remainder to his children. In the event of the death of his daughter M. without issue, her share was to be divided among L., I., & B. Testator died in Dec. 1851, & his widow died in June, 1856. The daughter M. died in Jan. 1859, without issue. After the death of the widow, R. began to pay interest to B. on £350, & after the death of M., on £516 13s. 4d. (i.e., on the £350

& one-third of the £500), & continued the payment half-yearly until his death, which took place in Sept. 1863. Part of the estate of the original testator consisted of a sum of £1,200 lent upon mtge. Before the death of R. £700, part of this sum, had been paid off by mtgor. in instalments. For some of these instalments R. alone gave receipts, & he joined in the receipts for others. After R.'s death, J., one of his exors., continued to pay interest to B. on £516 13s. 4d. until June, 1874, when the payment ceased. He made these payments with the knowledge of his co-exors. & of the persons beneficially interested in R.'s estate, & the payments were admitted as proper deductions upon a half-yearly settlement of the accounts of the income of R.'s estate made between the exors. & the beneficiaries. The £500 remaining due on the mtge. was paid off by instalments after the death of R., the receipts for the instalments being signed by his exor. J., as "for the exors." or "for the trustees" of the original testator. J. paid one-third of the £500 to L., & another third to I., & retained the remaining one-third. In 1877 B. commenced an action against the exors. of R. alone, claiming to have the sum of £516 13s. 4d. & the arrears of income made good out of the estate of R.:—**Held:** as R.'s exors. could not properly have paid interest to B. after his death, unless the exors. of the original testator had assented to the legacy & had set apart in the hands of R. a fund to meet it, it must be assumed that such an appropriation had been in fact made.—**WILSON v. RHODES** (1878), 8

E. Effect of Assent.

4629. **Title to thing bequeathed vests absolutely in legatee.]—**BASTARD v. STUKELY (1677), 2 Lev. 209; T. Jo. 130; 3 Keb. 440; 83 E. R. 522.

*Annotations:—***Reid.** Cray Willis (1729), 2 P. Wms. 529; **Doe d. Saye & Sele v. Guy** (1802), 3 East, 120. **Mentd.** Gould v. Gapper (1801), 5 East, 345.

4630. — **Whether executors become trustees—Specific bequest in trust.]—**Upon assenting to a specific bequest given to them in trust, exors. forthwith become trustees.

Testator bequeathed a mtge. secured by a conditional surrender, & which had become absolute, to his two exors. upon trust to continue & hold it on certain trusts. The exors. assented to the legacy, but did not procure themselves to be admitted, & by reason thereof, one of them was enabled to receive the money & release the estate. The money being misapplied:—**Held:** the co-exor. had become a trustee & was liable for his default.—**DIX v. BURFORD** (1854), 19 Beav. 409; 52 E. R. 408.

*Annotations:—***Reid.** *Re* Smith, Henderson—Roe v. Hitchins (1889), 42 Ch. D. 302. **Mentd.** Macnamara v. Carey (1867), 15 W. R. 374.

4631. — **Bequest of residue.]—**An exor. by assenting to a bequest of residue does not thereby constitute himself a trustee of the fund so as to prevent the operation of Stat. Limitations.

Executrix in 1870 signed a declaration at the foot of her residuary account, whereby she declared that the residue of the estate which she was administering was £807 7s. 9d., being the residue & moneys which she intended to retain to her own use & the use of J., being a sister & a descendant of a brother of deceased. J. was in fact the residuary legatee. In 1887 the representative of the residuary legatee instituted an action against the representative of the executrix to recover the fund:—**Held:** Stat. Limitations a defence to the action.—**Re ROWE, JACOBS v.**

entered, & was possessed, & alone demised the premises for forty-two years, reserving rent to himself, his exors., etc.:—*Held*: neither his entry on the land, nor his sole lease reserving rent to himself & his exors., which was alike inconsistent with his interest as tenant for life, & his duty as exor., should be deemed an assent to the legacy, & the lease should therefore take effect for the whole forty-two years, out of the lessor's legal interest as exor.—*DOE d. HAYES v. STURGES* (1816), 7 Taunt. 217; 2 Marsh 505; 129 E. R. 87.

Annotations:—*Appld.* Doe d. Sturges v. Tatchell (1832), 3 B. & Ad. 675. *Reid.* Hawkins v. Williams (1862), 10 W. R. 692.

4659. ————.]—Testator bequeathed a term in premises to S. his exors., etc., in trust to sell & dispose of the same as might seem most advantageous & apply the proceeds to the maintenance of testator's son during his life. He bequeathed the remainder after the son's decease to such uses as the son should by will appoint & he appointed S. his exor. When testator died his journeyman was managing his business on the premises as he had done for some years & testator's son also resided there. At the funeral S. said in presence of the journeyman & other persons:—"The house is young B.'s" (meaning the son's), "T." (the journeyman) "must stay in the house & go on with the business, but young B. must have a biding place." T. accordingly continued on the premises carrying on the business, paying no rent but maintaining testator's son, who was weak in intellect & unable to provide for himself. S. lived twenty years afterwards & did not interfere further with the property:—*Held*: this was sufficient evidence of a disposal of the property by S. according to the trusts in the will & that he had assented to take under the will as legatee in trust & not as exor.—*DOE d. STURGES v. TATCHELL* (1832), 3 B. & Ad. 675; 1 L. J. K. B. 239; 110 E. R. 246.

4660. ————.]—Where an extrix. has a life estate in a chattel under a bequest, her taking possession of the chattel is no assent to a further bequest thereof in remainder.—*RICHARDS v. BROWNE* (1837), 3 Bing. N. C. 493; 3 Hodg. 27; 4 Scott, 262; 6 L. J. C. P. 95; 132 E. R. 500. *Annotations*:—*Mentd.* Jewsbury v. Mummery (1872), L. R. 8 C. P. 56; *Re Birch*, Roe v. Birch (1884), 27 Ch. D. 622.

4661. ————.]—Testator bequeathed a leasehold & his residuary estate to A., B. & C., his exors., on trust to permit A. to receive the rents & profits for life, & afterwards to pay certain legacies, & the residue to such of three persons, D., E., & F., as should be living at A.'s death. The exors. permitted A. to retain possession of the leasehold during her life, & D., E., & F. executed a deed, which was also executed by B., the husband of D., & whereby they agreed to take as tenants, in common, A. died:—*Held*: the exors. had not assented to the legacies, either by permitting A. to retain possession of the leasehold, or by the execution of the deed by B. & the exors. could make a good title to the leasehold.—*A.-G. v. POTTER* (1844), 5 Beav. 164; 14 L. J. Ch. 16; 9 Jur. 241; 49 E. R. 539, L. C.

Annotation:—*Reid.* Trull v. Bull (1844), 1 Coll. 322.

4662. ————.]—The widow of testator, who was his extrix. & also legatee for life of certain leaseholds, with a limitation over on her death to testator's children, entered into possession of the leaseholds, & received & applied the rents to her own use. From the master's report, it appeared that the widow, during the whole of her life, had been in advance to testator's estate:—*Held*: under the circumstances such

receipt & application of the rents did not constitute an implied assent to the legacy.—*TRAIL v. BULL* (1853), 1 Eq. Rep. 9; 22 L. J. Ch. 1082; 21 L. T. O. S. 146, L. C.

4663. ————.]—*WEBSTER v. JOHNSON* No. 4597, *ante*.

4664. ————]—Where gift absolute—Acts showing ownership evidence of assent.]—Testator bequeathed his leasehold cottages to his son, on trust to sell the same, & out of the proceeds to reimburse himself a sum borrowed by testator, funeral expenses, & other payments, & if any surplus, that to be divided between testator's three children & his grandchild, & testator appointed his son sole exor. The son never proved the will, but, on the death of testator in Aug. 1833, he took possession of the cottages, & continued to receive the rents up to the time of his death in Mar. 1839, & he disposed of the cottages by his will. In June, 1853, the grandchild of testator obtained administration of his estate & effects with the will annexed, & brought ejectment to recover possession of the cottages:—*Held*: there was sufficient evidence of an assent by the son to the bequest to himself, & consequently, he was entitled as legatee.—*FENTON v. CLEGG* (1854), 9 Exch. 680; 2 C. L. R. 1014; 23 L. J. Ex. 197.

Annotation:—*Reid.* Johnson v. Warwick (1856), 17 C. B. 516.

SUB-SECT. 4. —PAYMENT.

A. By Whom made.

4665. Executor de son tort.] Legacies are payable by an exor. *de son tort*. *NICHOLSON v. SHERMAN* (1665), Freeman. Ch. 181; 1 Cas. in Ch. 57; 22 E. R. 1116, L. C.

Annotation:—*Consd.* Holland v. Pitor (1834), 1 My & K. 237.

Liabilities of executor *de son tort* generally, see Part I., Sect. 15, sub-sect. 1, *ante*.

B. To Whom made.

Legacy to infant.] See Sub-sect. 11, *post*.

4666. Legacy to married woman Domiciled abroad.] Testator who died, & whose will was proved in England, bequeathed a legacy to a married woman, whose domicile, as well as that of her husband, was in Scotland. The husband died a few months after testator without having received the legacy. After his decease the exors. of testator, with knowledge of the before-mentioned circumstances of domicile, paid the legacy to the widow. It was proved that according to the Scotch law the payment should have been made to the husband's personal representatives: *Held*: in the absence of proof that the exors. knew the Scotch law on the subject, the payment to the widow was a good payment.—*LESLIE v. BAILLIE* (1843), 2 Y. & C. Ch. Cas. 91; 12 L. J. Ch. 153; 7 Jur. 77; 63 E. R. 40.

4667. —Foreigner.]—Where testatrix bequeathed legacies of £250 each to two French ladies, the wives of French subjects, the ct. ordered payment of the ladies' legacies to them.—*SUTHERLAND v. YOUNG* (1862), 5 L. T. 738.

—.]—See, generally, HUSBAND & WIFE.

4668. Legacy to lunatic.]—On account of the imbecility of an adult legatee the exors., in proper time & *bona fide*, set apart the amount of her legacy, & after payment of the legacy duty & incidental expenses, invested the balance in consols, in their own names, & accumulated the dividends, & did not transfer the amount into ct. A bill was filed in 1846 for payment of the legacy

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in cash, with interest. But the ct. refused to disturb the investment, & directed it & its accumulations to be brought into ct. It appearing, however, that the legatee was of imbecile mind at the date of testator's will, the ct., on that ground, gave the costs out of testator's general estate.—*POTHECARY v. POTHECARY* (1848), 2 De G. & Sm. 738; 18 L. J. Ch. 48; 12 L. T. O. S. 240; 12 Jur. 1016; 64 E. R. 330.

— — —.] *See, generally, LUNATICS.*

C. Time for Payment.

4669. General rule—Legacies not payable until year after testator's death.]—*GRIFFITH v. MORRISON* (1816), 1 Jac. & W. 311, n.; 37 E. R. 395.

Annotation:—Reid. Taylor v. Hibbert (1820), 1 Jac. & W. 308.

4670. — — —.]—Where testator directs his exors., as soon as they should think proper after his decease, to sell as much stock as would produce a legacy of £12,000, the legacy is not payable until the end of the year after testator's death.—*BENSON v. MAUDE* (1821), 6 Madd. 15; 56 E. R. 994.

4671. — — —.]—(1) Testatrix, having a general power of appointment over property which was the subject of pending litigation, appointed it by her will to L., upon trust, "so soon as proceedings in law & equity should be terminated, & the same should come into his possession," to pay certain legacies, & as to the residue upon other trusts:—*Held*: the trust to pay the legacies did not arise, & consequently the legacies did not carry interest until the litigation ended, & the property came into the hands of L., which was not until more than eighteen years after the death of testatrix.

(2) The rule of law is clear & there can be no controversy with regard to it, that a legacy payable at a future day carries interest only from the time fixed for its payment. On the other hand, where no time for payment is fixed, the legacy is payable at, and therefore bears interest from, the end of a year after testator's death, even though it be expressly made payable out of a particular fund which is not got in until after a longer interval (*LORD CAHENS, L.J.*).—*Re LORD'S ESTATE, LORD v. LORD* (1867), 2 Ch. App. 782; 36 L. J. Ch. 533; 17 L. T. 105; 15 W. R. 1118, 1 L. J. J.

Annotations:—As to (1) Distd. Re Yates, Throckmorton v. Pike (1907), 96 L. T. 758. *As to (2) Consd. Re Whiteley, Whiteley v. London (Bp.)* (1909), 100 L. T. 920. *Apprvd. Walford v. Walford*, [1912] A. C. 658.

4672. — — —.] **Application of rule to demonstrative legacy—Payment out of reversonary fund.]**—*WALFORD v. WALFORD*, No. 4588, *ante*.

4673. Power to pay legacies within year.] One by his will devises, that all his debts & legacies shall be paid by his exor. out of his personal estate if that shall be sufficient, but if not, then that his exor., within twelve months after his death, shall

sell or mtge. so much of his real estate, as shall be sufficient for that purpose, & gives a legacy of £1,000 to J. S. who dies within a year, & the personal estate is not sufficient. This is a vested legacy, & shall be paid to the exor. of the legatee, though charged upon land, for the words, within twelve months, denote the ultimate time, but the exors. may pay the legacy sooner.—*WILSON v. SPENCER* (1732), 3 P. Wms. 172; 24 E. R. 1017.

Annotations:—Fold. Whaley v. Cox (1737), 2 Eq. Cas. Abr. 549. *Reid. Hall v. Terry* (1738), West. temp. Hard. 500; *Hodgson v. Rawson* (1717), 1 Vos. Sen. 14; *Seal v. Tichener* (1771), 2 Dick. 445.

4674. — — —.]—Exors. may pay legacies, or hand over the residue, within the year after the death of testator.—*ANGERSTEIN v. MARTIN* (1823), Turn. & R. 232; 2 L. J. O. S. Ch. 88; 37 E. R. 1087, L. C.

Annotations:—Consd. Hewitt v. Morris (1824), Turn. & R. 241; *Stair v. Macgill* (1827), 1 Bl. N. S. 662; *Taylor v. Clark* (1841), 1 Hare, 161; *Macpherson v. Macpherson* (1852), 19 L. T. O. S. 221; *Morley v. Mendham* (1856), 2 Jur. N. S. 998. *Reid. Douglas v. Congreve* (1836), 1 Keen, 410; *Caldecott v. Caldecott* (1842), 1 Y. & C. Ch. Cas. 312; *Morgan v. Morgan* (1851), 14 Beav. 72; *Bulkeley v. Stephens* (1863), 3 New Rep. 105; *Allbusen v. Whittell* (1867), L. R. 4 Eq. 295.

4675. Effect of executor's year—Does not prevent vesting.]—The year allowed to exors. & administrators is only for convenience & does not prevent vesting.—*GARTHSHORE v. CHALIE* (1804), 10 Ves. 1; 32 E. R. 743, L. C.

Annotations:—Mentd. Goldsmid v. Goldsmid (1818), 1 Swan. 211; *Wathen v. Smith* (1819), 4 Madd. 325; *Adams v. Lavender* (1824), McCle. & Yo. 41; *Glongal v. Barnard* (1836), 1 Keen, 769; *Lang v. Lang* (1837), 1 Jur. 472; *Salisbury v. Salisbury* (1848), 6 Hare, 526; *Lett v. Randall, Lett v. Dormer* (1855), 3 Sm. & G. 83; *Patch v. Shore* (1862), 2 Drew. & Sm. 589; *Willis v. Willis* (1865), 34 Beav. 340; *James v. Castle* (1875), 33 L. T. 665; *Re Hall, Hope v. Hall*, [1918] 1 Ch. 562.

4676. Effect of postponing time for payment—Does not prevent vesting.]—The length of time before the legacy is to be paid is not material, but the certainty or uncertainty with respect to the payment of it will determine whether it is a vested interest or not. When the day of payment is certain, the legacy is due at the time of the death of testator, though it is not to be paid before the day comes, & if the legatee dies before the day of payment, it will go to his exors. or administrators (*JEKY, H., M.R.*).—*WHALEY v. COX* (1736), 2 Eq. Cas. Abr. 519; cited West temp. Hard. 700; 22 E. R. 462.

Annotations:—Consd. Hall v. Terry (1738), West temp. Hard. 500; *Van v. Clarke* (1739), West temp. Hard. 699.

4677. Legatee taking by limitation over on death of infant—Death of infant under age.]—*CRICKETT v. DOLBY*, No. 4819, *post*.

D. Mode of Payment.

4678. Conditional payment—Validity.]—A legacy is bequeathed to J. S. & the exor. delivers it upon condition. The question is, if it be good. It seems not.—*ANON.* (circa 1570), Plowd. 61; 75 E. R. 918.

4679. What amounts to payment.]—*JONES v.*

PART IV. SECT. 5, SUB-SECT. 4.—C.

4669 I. General rule—Legacies not payable until year after testator's death.] An application for payment of a legacy is premature when a year has not elapsed from the death of testator. *Re LIVINGSTON ESTATE* (1921), 66 D. L. R. 776; [1922] 2 W. W. R. 408.—**CAN.**

n. Power to pay legacies within year.] The rule that exors. are not bound to pay pecuniary legacies before the expiration of a year from testator's

death does not prevent them, where no time is fixed for payment, & there is sufficient to pay debts, etc., from paying a legacy forthwith.—*Re HOLLAND* (1902), 22 C. L. T. 161; 3 O. L. R. 106; 1 O. W. R. 73.—**CAN.**

o. When legacy becomes vested.] Every person of full age to whom a legacy is given is entitled to payment the moment it becomes vested. *LEWIS v. MOORE* (1896), 24 A. R. 393.—**CAN.**

p. Inevitable delay.] The exor. is not entitled to delay payment of

legacies for eighteen months from the decease of testator, where he had ample funds in his hands to enable him to have paid the same, in the absence of evidence to show the existence of debts, claims, or difficulties calling for eighteen months to dispose of them.—*CULLEN v. McNEIL* (1908), 42 N. S. R. 346.—**CAN.**

PART IV. SECT. 5, SUB-SECT. 4.—D.
q. Legatee requiring payment—In foreign country—Cost of remittance.]—In the absence of any contrary intention of testator to be inferred

BRADSHAW (1661), 2 Eq. Cas. Abr. 464; Freem. Ch. 153; Nels. 74; 2 E. R. 396.

Annotation:—Mentd. Morrice v. Bank of England (1736), Cas. temp. Talb. 217.

4680. — Acceptance of bill—Bill never presented.]—If a legatee accept of the exor. a bill upon a goldsmith, & the legatee does not demand the same of the goldsmith, & after the goldsmith breaketh, in this case the loss shall be to the legatee. But if the legatee demandeth it in convenient time, & the goldsmith doth not pay it, but breaketh then it shall not go for payment, but the legatee may resort back to the exor. for his legacy.—*PHILLIPS v. PHILLIPS* (1700), Freem. Ch. 247; 22 E. R. 1189.
Annotation:—Consd. Crawley v. Crowther (1702), Freem. Ch. 257.

4681. — Purchase of assets to amount of legacy.]—Where an exor. before a sale of the goods of deceased testator, tells a legatee that she may purchase to a certain amount, the amount of her legacy, & that such purchase shall be an off-set to her legacy, such declaration amounts to a special contract as to the mode of payment, & may be given in evidence in an action for the value of the goods sold, brought by the exor., though the sale was by auction, subject to written particulars of sale.—*BARTLETT v. PURNELL* (1830), 1 Ad. & El. 792; 2 Har. & W. 16; 6 Nev. & M. K. B. 299; 5 L. J. K. B. 169; 111 E. R. 981.

Annotations:—Mentd. Hopkins v. Tanqueray (1854), 15 C. B. 130; Dale v. Humphrey (1858), E. B. & E. 1004; Manley v. Berkett, [1912] 2 K. B. 329.

Currency in which payable.]—See CONFLICT OF LAWS, Vol. XI., pp. 376, 377, Nos. 519, 551.

4682. Stock in which payable.]—Where testator directed his exors to pay certain legacies of different sums in three per cent. Annuities, & at his death possessed stock in Consols, New Three per cent. Annuities, & Reduced Three per cent Annuities:—*Held*: the exors. were bound to pay the legatees in consols.—*Re WATSON'S TRUST, WARREN v. PILGRIM* (1865), 12 L. T. 631.

4683. Out of what funds payable—Legacies payable out of purchase-money—Rights of legatees.]—*LANGLEY v. OXFORD (EARL)* (1748), Amb. 795; 2 Hov. Supp. 98; 27 E. R. 505, L. C.

4684. — No particular fund indicated.]—General pecuniary legacies are bequests of personal property, described in a general manner where no particular fund is indicated for payment, & are therefore payable out of personal estate, which testatrix had power to appoint in any manner she might think proper, there being no assets of which testatrix was possessed as her own personal estate sufficient to pay the legacies.—*HAWTHORN v. SHEDDEN* (1856), 3 Sm. & G. 293; 25 L. J. Ch. 833; 27 L. T. O. S. 364; 2 Jur. N. S. 749; 65 E. R. 665.

Annotations:—Consd. *Re* Seabrook, Gray v. Baddeley, [1911] 1 Ch. 151. *Held.* Shelford v. Acland (1856), 23 Beav. 10; Hurlstone v. Ashton (1865), 11 Jur. N. S. 725; *Re* Wilkinson (1869), 4 Ch. App. 587.

4685. — Legacies given by donee of general power to appoint fund—Personal estate insufficient without fund.]—Where the donee of a general power to appoint a fund by will gives pecuniary legacies & appoints exors., & his personal estate, without the aid of the fund, is insufficient for the payment of his debts & the legacies, he will be taken to have exercised the power to the extent necessary for payment not only of the legacies, but also of the debts.—*Re SEABROOK, GRAY v. BADDELEY*, [1911] 1 Ch. 151; 80 L. J. Ch. 61; 103 L. T. 587.
—*See, generally, Sect. 7, post.*

4686. What deductions allowed—Judgment debt against legatee.]—A *cestui que trust*, under a will, being indebted to a debtor of testator's estate, is not bound to pay off his debt before claiming under the will. Under Judgments Act, 1838 (c. 110), s. 13, a judgment debt against a legatee is a charge upon property mortgaged to the testator to the extent of the legatee's interest therein.—*AVISON v. HOLMES, PENNY v. AVISON* (1861), 1 John. & H. 530; 30 L. J. Ch. 561; 4 L. T. 617; 7 Jur. N. S. 722; 9 W. R. 550; 70 E. R. 855.

4687. — Sums wrongly treated by testator as advances.]—A father gave a legacy to trustees for the benefit of his daughter & her husband & their children, & he directed that any money he should advance, lend, or pay to her or her husband beyond what was secured by their marriage settlement should be deducted from the legacy, & he ordered the sums advanced to be ascertained from his books of account, which were not to be questioned. Testator, upon the marriage of his daughter, had agreed with the husband's father, in addition to provisions made by settlement, to allow his daughter £150 a year. Testator for thirteen years treated the £150 a year in his books of account as a liability he was bound to discharge, but he afterwards altered his accounts by debiting the former payments thereof as advances, & thenceforth until his death he treated the payments in respect of the allowance as advances:—*Held*: as testator was in equity bound to pay the £150 a year, the payments in respect thereof were not advances. The ct. was not bound to treat the entries in the books, founded as they were upon an obvious mistake, as conclusive, & consequently, the payments of the £150 ought not to be deducted from the legacy.

Testator bequeathed a legacy to trustees for his son for life, with remainder to his children. Subsequently, by a codicil, reciting that he had given a legacy for the benefit of his son & his family, he revoked the legacy, & in lieu thereof made his son one of his residuary legatees:—*Held*: the son was entitled to the share of the residue absolutely.—*HARGREAVES v. PENNINGTON* (1861), 34 L. J. Ch. 180; 10 L. T. 857; 10 Jur. N. S. 831; 12 W. R. 1017.

4688. — Interest on advances.]—The period of distribution is, for the purposes of calculation, the date from which interest is to be charged upon advances made by testator in his lifetime to one of his residuary legatees, & such period of distribution is not the less the death of testator because he has given to his widow an annuity which had prevented a large part of the residue from being divided during her lifetime.

In calculating the interest to be charged upon advances from time to time made residuary legatees between testator's death & the time of division of the fund, simple interest is to be charged upon the advances from the dates of payment, & it is not proper to distinguish between the capital & income of the sums advanced & to charge interest upon the capital only with annual rests. The rate of interest to be charged upon advances should now be three, & not four per cent. *per annum*.—*Re WHITEFORD, INGLIS v. WHITEFORD*, [1903] 1 Ch. 889; 72 L. J. Ch. 540; 51 W. R. 491; 47 Sol. Jo. 336.

Annotation:—Held. *Re* Davy, Hollingsworth v. Davy, [1908] 1 Ch. 61.

from the context or circumstances, if a legatee under a will requires payment to be made to him at a place elsewhere

than the country in which testator was domiciled & resident & in which his assets are being administered, he

must pay the cost of remittance.—*Re* TITCHEWORTH v. PURNELL, [1919] V. L. R. 375.—*AUG.*

Sect. 5.—Legacies: Sub-sect. 4, D. & E. (a).]

4689. — **Set-off of debt—Due to representative.]**—Cross demands existing in different rights cannot in equity be set off the one against the other, except under special circumstances, or where the right to such set-off is conferred by an agreement expressed or implied between the parties. Thus, where an exor. & residuary legatee claimed to retain the unpaid portion of a specific legacy on account of monies paid by him as surety for the legatee, since become bkpt., the ct. being of opinion that there was not any express or implied agreement to that effect between the exor. & the legatee. On bill filed by bkpt.'s assignees:—*Held*: the right to such set-off did not exist, & payment of the legacy was decreed accordingly.—*FREEMAN v. LOMAS* (1851), 9 Hare, 109; 20 L. J. Ch. 564; 17 L. T. O. S. 252; 15 Jur. 648; 68 E. R. 435.

Annotations:—*Consd.* *Stammers v. Elliott* (1868), 3 Ch. App. 195. *Reid.* *Wilson v. Leslie* (1857), 5 W. R. 815; *Cochrane v. Green* (1860), 9 C. B. N. S. 448; *Richardson v. Richardson* (1867), L. R. 3 Eq. 686; *Bailey v. Finch* (1871), 41 L. J. Q. B. 83; *Middleton v. Pollock*, *Ex p. Nugee* (1875), L. R. 20 Eq. 29.

4690. — — — — — **].**—A debt due to the administrator of an intestate in his own right from one of the next of kin may be set off in a suit by the next of kin for administration of the estate against a sum due from the administrator in respect of the next of kin's share of the intestate's estate.—*TAYLOR v. TAYLOR* (1875), L. R. 20 Eq. 155; 41 L. J. Ch. 718; 23 W. R. 719.

Annotations:—*Fold.* *Re Jones, Christmas v. Jones*, [1897] 2 Ch. 190. *Mentd.* *Re Blockley, Blockley v. Blockley* (1885), 20 Ch. D. 250. *Re Lacon, Lacon v. Lacon*, [1891] 2 Ch. 482; *Re Scott, Langton v. Scott*, [1893] 1 Ch. 1; *Re Crozier, Cooper v. Thorneycroft* (1906), 50 Sol. Jo. 206; *Re Watney, Watney v. Gold* (1911), 56 Sol. Jo. 109.

— — — — — **Due to testator.]**—*See* Sub-sect. 12,

ll., post.

4691. — — — — — **Due to stranger indebted to estate.]**—If a legatee in reversion has involved dealings with a stranger who is indebted to the estate of testator, from which the legacy proceeds, a promissory note given by the legatee to the exors. as a collateral security for the amount of the stranger's debt will not enable them to retain the legacy, if a creditor of the legatee having a *bond fide* charge upon the legacy requires it to be invested. *SMEE v. BAINES* (1861), 20 Beav. 601; 31 L. J. Ch. 63; 4 L. T. 573; 7 Jur. N. S. 902; 9 W. R. 802; 54 E. R. 784.

— — — **Costs of getting in & preserving articles specifically bequeathed.]**—*See* Sect. 7, sub-sect. 1, *post.*

— — — **Death duties.]**—*See* Sect. 7, sub-sect. 1, *post.*

E. Of What Legacies.

(a) Absolute Bequests with Directions as to Application.

4692. **Direction for application in particular mode—Right of legatee to legacy regardless of directions—Death of legatee before directions able to be carried out.]**—If a legacy be given to an infant to put him out apprentice, & he dies before he is of a competent age to be put out, it shall go to his exor. or administrator.—*BARLOW v. GRANT* (1884), 1 Vern. 255; 23 E. R. 451.

Annotations:—*Apld.* *Barton v. Cooke* (1800), 5 Ves. 461. *Consd.* *Hamley v. Gilbert* (1821), Jac. 354. *Reid.* *Cowper v. Mantell* (No. 2) (1856), 22 Beav. 231; *Lonsdale v. Hercholtz* (1857), 3 K. & J. 185; *Re Sanderson's Trust* (1857), 3 K. & J. 497; *Borton v. Dunbar* (1860), 3 De G. F. & J. 338; *Presant v. Goodwin* (1860), 1 Sw. & Tr. 544.

4693. — — — — — **].**—A legacy of £500 is given

to the eldest son of A. to be begotten to place him out apprentice. A. has a son born after testator's death, who brings a bill for the legacy, & it is decreed to be paid him, though not born in testator's lifetime, & though the £500 was given for a particular purpose.—*NEVILL v. NEVILL* (1701), 2 Vern. 431; 23 E. R. 876.

Annotations:—*Reid.* *Hamley v. Gilbert* (1821), Jac. 354; *Cowper v. Mantell* (No. 2) (1856), 22 Beav. 231.

4694. — — — — — **].**—The general personal estates not specifically bequeathed applied first in payment of all the costs except of inquiries as to a guardian & maintenance for a specific legatee, & then to the general legacies. Legacy for the board & education of an infant until he shall be fit to be put out apprentice & then a further sum with him as an apprentice fee; the infant having attained nineteen & not having been put out was held entitled to the legacies.—*BARTON v. COOKE* (1800), 5 Ves. 461; 31 E. R. 682.

Annotations:—*Consd.* *Hamley v. Gilbert* (1821), Jac. 354. *Reid.* *Cowper v. Mantell* (No. 2) (1856), 22 Beav. 231; *Presant v. Goodwin* (1860), 1 Sw. & Tr. 544. *Mentd.* *Eyre v. Marsden* (1839), 4 My. & Cr. 231.

4695. — — — — — **].**—Testator bequeathed manuscripts to trustees "for my grandson, that they may provide for the books being published to the best advantage for the interests of the child, so as to contribute towards raising a fund to assist him when he goes to college"; & bequeathed £1,000 towards the printing:—*Held*: the grandson was entitled to elect to take the £1,000, it appearing to be impossible to publish the book at a profit.—*Re SKINNER'S TRUSTS* (1860), 1 John. & H. 102; 3 L. T. 177; 8 W. R. 605; 70 E. R. 679.

Annotations:—*Apld.* *Re Johnston, Mills v. Johnston*, [1894] 3 Ch. 204; *Re Bowes, Strathmore v. Vane*, [1896] 1 Ch. 507.

4696. — — — — — **].**—Testator gave to trustees all his property upon certain trusts, & directed that certain specified sums of money should be invested for the benefit of his four sons on their attaining twenty-one, such sums to be supplied as the trustees in their discretion might think fit, & he further directed that the sums specified should be very judiciously invested, as they were intended specially for the advancement in life of the respective recipients:—*Held*: the sons were absolutely entitled to the legacies, freed from the exercise of any discretion on the part of the trustees.—*Re JOHNSTON, MILLS v. JOHNSTON*, [1894] 3 Ch. 204; 63 L. J. Ch. 753; 71 L. T. 392; 42 W. R. 616; 38 Sol. Jo. 564; 8 R. 563.

4697. — — — — — **].**—A bequest of money to be laid out in planting trees on an estate of which testator was tenant for life:—*Held*: primarily for the benefit of the owners for the time being, & to belong to persons entitled to the estate absolutely.—*Re BOWES, STRATHMORE (EARL) v. VANE*, [1896] 1 Ch. 507; 65 L. J. Ch. 298; 74 L. T. 16; 44 W. R. 441.

4698. — **Absolute bequest followed by powers given to executors—Failure of executors to exercise powers.]**—Legacy to A. but if the exors. after named, shall think it more for his advantage to have it placed out, & to pay him the interest, for life, as they in their discretion shall think fit, empowering them accordingly, & directing, that after his decease the sum should be divided among his children, & for default of children, over. One of the exors. being dead, & the others having renounced:—*Held*: the legacy was absolute in the legatee.—*KEATES v. BURTON* (1808), 14 Ves. 434; 33 E. R. 587.

Annotation:—*Reid.* *Crawford v. Forshaw*, [1891] 2 Ch. 361.

4699. Direction for postponement or accumulation—General rule.—When a legacy is directed to accumulate for a certain period, or where the payment is postponed, the legatee, if he has an absolute indefeasible interest, is not bound to wait until the expiration of that period, but may require payment the moment he is competent to give a valid discharge.—*SAUNDERS v. VAUTIER* (1841), Cr. & Ph. 240; 4 Beav. 115; 10 L. J. Ch. 354; 41 E. R. 482, L. C.

Annotations:—*Apld.* *Rammell v. Gillow* (1845), 15 L. J. Ch. 35; *Re Colson's Trusts* (1853), Kay, 133. *Consd.* *Chance v. Chance* (1853), 16 Beav. 572; *Joy v. Aspinwall* (1854), 23 L. T. O. S. 206. *Apld.* *Re Smith's Will* (1855), 20 Beav. 197; *Re Jacob's Will* (1861), 29 Beav. 402. *Consd.* *Pearson v. Dolman* (1866), L. R. 3 Eq. 315; *Weatherall v. Thornburgh* (1878), 8 Ch. D. 261; *Re Jobson, Jobson v. Richardson* (1889), 44 Ch. D. 154. *Apld.* *Re Johnston, Mills v. Johnston*, [1894] 3 Ch. 204. *Consd.* *Wharton v. Masterman*, [1895] A. C. 186. *Apld.* *Re Thompson, Griffith v. Thompson* (1896), 44 W. R. 582. *Reid.* *Lister v. Bradley* (1841), 1 Hare, 10; *Curtis v. Lukin* (1842), 5 Beav. 147; *Leeming v. Sharratt* (1842), 2 Hare, 14; *Festing v. Allen* (1844), 5 Hare, 573; *Packham v. Gregory* (1845), 4 Hare, 396; *Re Rouse's Estate* (1852), 9 Hare, 649; *Kling v. Isaacson* (1853), 1 Sm. & G. 371; *Petty v. Petty* (1853), 22 L. J. Ch. 1065; *Laxton v. Eedle* (1854), 19 Beav. 321; *Lonsdale v. Berchtold* (1854), Kay, 646; *Re Chulow's Trusts* (1859), 28 L. J. Ch. 696; *Ingram v. Suckling* (1859), 33 L. T. O. S. 89; *Oddie v. Brown* (1859), 4 De G. & J. 179; *Dundas v. Wolfe Murray* (1863), 1 Hem. & M. 425; *Re Baxter's Trusts* (1861), 4 New Rep. 131; *Hilton v. Hilton* (1872), L. R. 14 Eq. 468; *Re Judkin's Trusts* (1884), 50 L. T. 200; *Re Wrey, Stuart v. Wrey* (1885), 30 Ch. D. 507; *Re Bevan's Trusts* (1887), 34 Ch. D. 716; *Harbin v. Masterman*, [1896] 1 Ch. 351; *Re Travis, Frost v. Grentorrex*, [1900] 2 Ch. 541; *Re Nunburnholme, Wilson v. Nunburnholme*, [1912] 1 Ch. 489.

4703. ———.]—Bequest of residue to four sons equally, but the capital not to be divided until they should all become settled in life. The interest of their portions alone to be paid after they were all provided for, until they severally became thirty years old, when the capital to be placed at their disposal:—*Held*: the sons were entitled to payment of the capital on attaining twenty-one.—*Re JACOB'S WILL* (1861), 29 Beav. 402; 4 L. T. 104; 7 Jur. N. S. 302; 9 W. R. 471; 51 E. R. 683.

4701. ———.]—Testator gave all his property, real & personal, to trustees for division among his children, their shares to be paid when they respectively attained twenty-eight. The will further contained a clause cutting down the children's shares to £1,000 each in the case of sons, & to £500 in the case of daughters, if any of them should embrace a religious life:—*Held*: there was an absolute gift to the children vesting on testator's death, & the provision as to payment at twenty-eight was nugatory; & the clause as to embracing a religious life was a condition repugnant to the former gift, & must be disregarded.—*Re THOMPSON, GRIFFITH v. THOMPSON* (1896), 44 W. R. 582; 40 Sol. Jo. 544.

4702. ———.]—When legatee may require payment—*Will made in satisfaction of covenant.*—*DAVIES' CASE* (1587), Moore, K. B. 246; 72 E. R. 558.

4703. ———.]—Testator directed the property to be paid to the legatee upon the day she attained her twenty-fifth year:—*Held*: the legatee was entitled to payment immediately after completing her twenty-fourth year.—*GRANT v. GRANT* (1840), 4 Y. & C. Ex. 256; 10 L. J. Ex. Eq. 5; 100 E. R. 1001.

4704. ———.]—An absolute vested bequest was accompanied with a direction, that it should not be delivered till the legatee attained twenty-five:—*Held*: he was entitled to payment on attaining twenty-one.—*ROCKE v. ROCKE* (1845), 9 Beav. 66; 50 E. R. 267.

4705. ———.]—Unless there is in a will, or some codicil thereto, a clear indication of an intention on the part of testator, not only that his devisees are not to have the enjoyment of the property he had devised until they attain twenty-five, but that some other person is to have that enjoyment, or unless the property is so clearly taken away from the devisees, up to the time of their attaining twenty-five, as to induce the ct. to hold that, as to the previous rents & profits, there has been an intestacy, the ct. does not hesitate to strike out of the will any direction that the devisees shall not enjoy it in full until they attain the age of twenty-five years.

Expressions in a codicil of testator's desire that real and personal property given by his will should not be enjoyed by any of the successive devisees till twenty-five, & direction to accumulate in the meantime:—*Held*: inoperative, there being no gift over.—*GOSLING v. GOSLING* (1859), John. 265; 5 Jur. N. S. 910; 70 E. R. 423; *subsequent proceedings, sub nom.* *CHRISTIE v. GOSLING* (1860), L. R. 1 H. L. 279, H. L.

Annotations:—*Consd.* *Harrington v. Harrington* (1868), 19 L. T. 38; *Re Parry, Powell v. Parry* (1889), 60 L. T. 489. *Apld.* *Re Johnston, Mills v. Johnston*, [1891] 3 Ch. 204; *Re Couturier, Couturier v. Shea*, [1907] 1 Ch. 470; *Re Trevanion, Trevanion v. Lennox*, [1910] 2 Ch. 538; *Re Jeffery, Nussey v. Jeffery* (1913), 110 L. T. 11. *Reid.* *Wharton v. Masterman*, [1895] A. C. 186.

4706. ———.]—Testatrix desired & directed to set apart the sum of £200 for her grandson L. S., the sum of £150 for her grandson V. S., & the sum of £150 for her grandson D. S., the said sums to be free of duty & to be paid respectively as to £50, part thereof, on their attaining the age of twenty-one years, & as to £50, part thereof, on their attaining the age of twenty-five years, & also directed that the balance £100 for her grandson L. S. be paid him on his attaining the age of thirty years, & the balances £50 for V. S. & D. S. be paid them on their respectively attaining the age of thirty years. There was no disposition of the intermediate income, or gift over of the principal. L. S. survived testatrix, & on attaining twenty-one the first-mentioned sum of £50 was paid to him, but he died before attaining twenty-five:—*Held*: each bequest was equivalent to a gift of a legacy to the particular legatee, payable as to part at twenty-one, further part at twenty-five, & the balance at thirty; & that each legatee upon attaining twenty-one was entitled to the payment of his legacy & the intermediate interest or income, & that the legal personal representative of any legatee who survived testatrix & died before actual payment was entitled to the legacy or balance unpaid of both principle & income.—*Re COUTURIER, COUTURIER v. SHEA*, [1907] 1 Ch. 470; 76 L. J. Ch. 296; 96 L. T. 560; 51 Sol. Jo. 342.

4707. ———.]—Testator bequeathed to her niece M. "£1,000 but she is to receive no benefit from this until five years after my decease. This money is to be that invested in Board of Works debentures," which, she said, were in the keeping of a certain bank. She was then & died possessed of £1,100 of the debentures referred to, of the value at her death of £1,067:—*Held*: (1) there was an immediate gift of the debentures, & the proviso postponing the enjoyment must be rejected; (2) the legacy was demonstrative, & not specific.—*Re JEFFERY, NUSSEY v. JEFFERY* (1913), 110 L. T. 11.

Application of principle to charity legatees.]—*See CHARITIES*, Vol. VIII., p. 329, Nos. 1115, 1116.

*Sect. 5.—Legacies: Sub-sect. 4, E. (b).]**(b) Annuities.*

See, further, RENTCHARGES & ANNUITIES.

4708. Time for payment.]—(1) General residuary bequest, including a leasehold farm, with the stock, to be converted into money as soon as conveniently may be, upon trust to pay the interest, etc., for life, & as to the capital for the children. The stock being considerably increased between the death in Apr. & the sale at Michaelmas, it was decreed that the conversion was in a reasonable time.

(2) The distinction between an annuity & a legacy is that the former commences from the death, & the first payment is due at the end of the year. A legacy generally does not begin to carry interest till the end of the year.

(3) In all cases of legacy interest is only from the end of a year from the death, unless otherwise directed, the old rule, depending upon the fund, as productive or barren, being exploded.—*GIBSON v. BOTT* (1802), 7 Ves. 89; 32 E. R. 37, L. C.

Annotations:—As to (1) Reidd. Angerstein v. Martin (1823), *Turn. & R.* 232; *Mills v. Mills* (1835), 7 Sim. 501; *Douglas v. Congreve* (1836), 1 Keen, 419; *Taylor v. Clark* (1841), 1 Haro, 161; *Caldecott v. Caldecott* (1842), 1 Y. & C. Ch. Cas. 312; *Morgan v. Morgan* (1851), 14 Beav. 72; *Meyer v. Simonsen* (1852), 5 De G. & Sm. 723; *Thursby v. Thursby* (1875), L. R. 10 Eq. 395; *Re Woods, Gabelhnd v. Woods*, [1904] 2 Ch. 4. *As to (2) Reidd. Re Robbins, Robbins v. Legge*, [1906] 2 Ch. 648.

4709. — Annuity payable monthly.]—Where an annuity is given by will, with a direction that it shall be paid monthly, the first payment is to be made at the end of a month after testator's death.—*HOUGHTON v. FRANKLIN* (1823), 1 Sim. & St. 390; 1 L. J. O. S. Ch. 231; 57 E. R. 156.

Annotation:—Reidd. Re Robbins, Robbins v. Legge, [1906] 2 Ch. 648.

4710. — Annuity payable quarterly—First payment to be made within eighteen months after death.]—*IRVIN v. IRONMONGER*, No. 5157, *post*.

4711. — Annuity in lieu of dower.]—Testator charged his estates with payment of his debts & of an annuity to his wife in lieu of dower. The real estates having been sold to pay the debts & the income of the remaining proceeds being insufficient to pay the annuity:—*Held*: (1) the widow was entitled to have her annuity paid out of the capital as well as the income of the remaining fund; (2) the annuity being wholly in arrear, the arrears were to be computed from testator's death.—*STAMPER v. PICKERING* (1838), 9 Sim. 170; 59 E. R. 325.

Annotation:—As to (1) Reidd. Forbes v. Richardson (1853), 11 Haro, 354.

4712. Mode of payment—Out of what funds annuity payable—Annuity in lieu of dower.]—*STAMPER v. PICKERING*, No. 4711, *ante*.

4713. — —.]—When testator bequeaths legacies & annuities, & then gives the residue of his property, after payment of his debts, funeral

& testamentary expenses, legacies & annuities, the annuitants are not entitled as a matter of right to have the estate converted, & a sum sufficient to answer the annuity invested in such securities as the ct. would approve for the investment of funds under its control, but they are entitled to have the annuities sufficiently secured, for instance, by a mtge. of real estate of testator.—*Re PARRY, SCOTT v. LEAK* (1889), 42 Ch. D. 570; 61 L. T. 380; 38 W. R. 226.

Annotations:—Reidd. Re Leeds, Mowbray v. Caemarten (1895), 39 Sol. Jo. 381; *Harbin v. Masterman*, [1896] 1 Ch. 351; *Re Evans & Bettell's Contract*, [1910] 2 Ch. 438; *Re Earle, Tucker v. Donne* (1923), 131 L. T. 383.

4714. — Annuity payable out of clear residuary estate.]—Where an annuity is payable out of the clear residuary estate of testator, the ct. has jurisdiction to set apart a sufficient sum to answer the annuity, & to pay the remainder of the residue to the residuary legatees. This jurisdiction will be exercised in a proper case notwithstanding the opposition of the annuitant.

The annuitant has nevertheless the right to resort, if it becomes necessary, to the corpus of the fund set apart (*LINDLEY, L.J.*)—*HARBIN v. MASTERMAN*, [1896] 1 Ch. 351; 65 L. J. Ch. 195; 73 L. T. 591; 44 W. R. 421; 12 T. L. R. 105; 40 Sol. Jo. 129, C. A.

Annotations:—Apld. Re Earle, Tucker v. Donne (1923), 131 L. T. 383. *Reidd. Re Evans v. Bettell's Contract*, [1910] 2 Ch. 438.

4715. Bequest for purchase of annuity—Right of annuitant to sum bequeathed.]—(1) Bequest of a sum of money in trust to lay it out upon Govt. or other securities in the purchase of an annuity for life:—*Held*: a direction to lay it out in an annuity for life, the will making several dispositions of stock, both as to the dividends & the capital.

(2) From the different modes in which these bequests are made it is clear he meant an annuity to be purchased with the £500, which is the same in effect as giving a legacy of £500 to his son; for upon a bill filed he might have received the money, & the ct. would not have compelled the trustees to lay it out in an annuity (*GRANT, M.R.*)—*BAYLEY v. BISHOP* (1803), 9 Ves. 6; 32 E. R. 501.

Annotations:—As to (2) Follid. Palmer v. Craufurd (1819), 3 Swan. 482; *Day v. Day* (1853), 1 Eq. Rep. 195. *Distd. Power v. Hayne* (1869), L. R. 8 Eq. 262. *Consd. Re Robbins, Robbins v. Legge*, [1906] 2 Ch. 648. *Reidd. Dawson v. Hearn* (1831), 1 Russ. & M. 606; *Walters v. Corpe* (1851), 15 Jur. 764; *Hatton v. May* (1876), 3 Ch. D. 148; *Re Mabbett, Pittman v. Holbrow*, [1891] 1 Ch. 707.

4716. — —.]—Under a bequest to trustees for investment in govt. life annuities, to be paid to C. during his life, the annuitant is entitled absolutely to the sum bequeathed, & in consequence of the liability of C. to attend at the public office, no investment having been made during his life, & an annuity which testator paid

PART IV. SECT. 5, SUB-SECT. 4.—
E. (b).

4708 i. Time for payment.]—An annuity given out of residue is payable from the testator's death.—*CURTIS v. ALLIBAND* (1898), 19 N. S. W. L. R. 34; 14 N. S. W. L. 150.—*AUS.*

r. Annuity not purchased—Right of annuitant to sum of money—Equivalent to purchase-money of annuity.]—Where testator directed his exors. to purchase an irredeemable Govt. annuity for the benefit of his adult son, payable half-yearly, & declared that it was intended as a provision for his son during life, & that it should not be competent for his exors. to pay to him the value thereof:—*Held*:

annuitant was entitled to require payment to him of a sum equivalent to the purchase-money of the annuity, in lieu of its purchase.—*RE THOMAS* (1877), 3 V. L. R. 241.—*AUS.*

s. Apportionment—Not a judicial act—Discretion of executors.]—Testator devised his real estate to his exors. in trust for debts, during their respective lives, then to convey as directed. By a subsequent clause of his will testator charged the whole of the real estate with the payment of an annuity to his wife, to be paid in such proportions as his exors. should decide. The exors. fixed the proportions of the annuity to be borne by the several portions of the real estate & notified debts. of their decision. One of debts. regularly paid

the proportion of the annuity settled as her share but the other failed to pay anything. In an action by annuitant to enforce payment & to recover arrears:—*Held*: in settling the apportionment the exors. were not acting in a judicial capacity, but were merely carrying out the trust, & were not bound to notify debts. before arriving at a conclusion.—*ROCHE v. ROCHE* (1890), 22 N. S. R. (10 H. & G.) 211.—*CAN.*

t. What may be deducted—Payment of necessary expenses.]—Testator directed his exors. to invest \$50,000 & pay the income semi-annually to his wife during her lifetime. He then gave the residue equally amongst his children. The estate

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Secl. 5.—Legacies: Sub-sect. 4, E. (b), (c), (d), (e), (f), (g) & (h), & F.]

4724. ———.]—Legacy of stock to A. to be laid out in annuity for her life. A. died two days after testator, & before any alteration of the stock. Her administrator is entitled to a transfer.—*BARNES v. ROWLEY* (1797), 3 Ves. 305; 30 E. R. 1024.

*Annotations:—*Fold. *Palmer v. Craufurd* (1819), 3 Swan. 482. *Consd. Dawson v. Hearn* (1831), 1 Russ. & M. 606. *Reid. Bayley v. Bishop* (1803), 9 Ves. 6; *Walters v. Corpe* (1851), 15 Jur. 764; *Power v. Hayne* (1869), L. R. 8 Eq. 282; *Hatton v. May* (1876), 3 Ch. D. 148; *Re Mabbett*, *Pluman v. Holbrow*, [1891] 1 Ch. 707; *Re Robbins*, *Robbins v. Legge*, [1906] 2 Ch. 648.

4725. ———.]—Annuitant consenting to postponement of purchase.]—Where testator directs a govt. annuity of a certain amount to be purchased for his wife within a given time, & the wife, at the request of the exors., assents to postpone the time of purchase, & afterwards dies before it is purchased, her personal representative will be entitled to the sum which would have purchased the annuity.—*DAWSON v. HEARN* (1831), 1 Russ. & M. 606; 9 L. J. O. S. Ch. 249; 39 E. R. 232, L. C.

*Annotation:—*Consd. *Re Robbins*, *Robbins v. Legge*, [1907] 2 Ch. 8.

4726. ———.]—Testator by his will directed his trustees out of the proceeds of sale & conversion of his estate, after payment of his debts, & funeral & testamentary expenses, to purchase in the name of his wife a govt. annuity of £400 for her life. The wife survived testator but died sixteen days later, before the will was proved or any of the debts were paid:—*Held*: the annuity, & the right to take its value in cash instead of the annual payment, vested in the widow on testator's death, & therefore her legal personal representatives were entitled to such a sum as would, at the date of testator's death, have purchased the annuity.—*Re ROBBINS*, *Robbins v. Legge*, [1907] 2 Ch. 8; 76 L. J. Ch. 531; 96 L. T. 755; 51 Sol. Jo. 445, C. A.

*Annotation:—*Fold. *Re Brunning*, *Gammon v. Dale*, [1909] 1 Ch. 276.

4727. ———.]—Testator bequeathed an annuity to his sister for life to commence from his decease & to be paid by equal quarterly payments, & directed his exors. to provide for the annuity by purchasing a govt. annuity. Testator died on Sept. 21, 1907, & on Dec. 20, 1907, his exors. made the first quarterly payment of the annuity. The annuitant died on Mar. 16, 1908, before the govt. annuity had been purchased:—*Held*: her legal personal representative was entitled to such a sum as would have purchased the annuity on Dec. 20, 1907— that being the date up to which the annuity had been paid—with interest on that sum from that date at the rate of four per cent. *per annum*.—*Re BRUNNING*,

—Re Hooper (1885), 4 N. Z. L. R. 54 (S. C.).—N. Z.

d. ———.]—Testator appointed his trustees to pay to his widow an annuity of £1000 a year in lieu of her legal rights & of her claims under an antenuptial marriage contract, & disposed of the rest of his estate in legacies, some of which he directed to be postponed. The income of the trust estate was not sufficient to pay the annuity:—*Held*: the annuity was preferable to the legacies of which payment had been postponed, & the widow was entitled to have it paid in full, whether the revenue of the trust-estate yielded that amount or not.—*KINMOND'S TRUSTEES v. KINMOND* (1873), 11 Meaph. (Ct. of Sess.) 381; 45 Sc. Jur. 255.—SCOT.

GAMMON v. DALE, [1909] 1 Ch. 276; 78 L. J. Ch. 75; 99 L. T. 918.

(c) Contingent Legacies.

4728. Security for legacy.]—Although the ct. does sometimes compel exors. to give security for legacies, yet that must be when they are clear & without disputes & not when the right is disputable or at least depends upon a contingency.—*DINGLY v. DINGLY* (1678), 2 Eq. Cas. Abr. 318; *Freem. Ch. 40*; 22 E. R. 271, L. C.

4729. — Power to pay legacy into bank for investment—Right of executor to interest.]—A legacy was to be paid at the end of ten years. The exor. must give security to pay it at the end of ten years, or to pay it into the bank, to be placed out, & he is to have the interest till the end of the ten years.—*FERRAND v. PRENTICE* (1750), 2 Dick. 568; *Amb. 273*; 21 E. R. 391.

*Annotation:—*Reid. *Green v. Pigot* (1781), 1 Bro. C. C. 103.

4730. Appropriation to secure legacy—Right to distribute residue—On residuary legatees giving security for legacy.]—Where a legacy is given upon a contingency & a suit is instituted for the administration of testator's estate, the ct. does not direct a sum of stock belonging to the estate, to be appropriated to pay the legacy when the contingency happens, but directs the whole residue to be paid over to the residuary legatees on his giving security to pay the legacy when due.—*WEBBER v. WEBBER* (1823), 1 Sim. & St. 311; 1 L. J. O. S. Ch. 219; 57 E. R. 126.

*Annotations:—*Fold. *Re Parry*, *Scott v. Leak* (1889), 42 Ch. D. 570. *Reid. King v. Maccott* (1852), 9 Hare, 692; *Re Hall*, *Foster v. Metcalfe*, [1903] 2 Ch. 226.

4731. — After appropriation.]—When a cash legacy is given upon the happening of a contingency, e.g. the attainment of twenty-one by the legatee, but without interest in the meantime, the exor. is not entitled to set apart & invest the amount & appropriate the investment to satisfy the legacy, so that in case, on the happening of the contingency, the investment has become depreciated in value, the legatee must bear the loss.

An investment made in such circumstances remains part of testator's estate, & the legatee is entitled on the happening of the contingency to receive the amount of the legacy in full in cash.

But if an exor. sets aside & properly invests a reasonable amount to secure the legacy, he may then distribute the residue of the estate, & he will not be held personally responsible if, when the legacy becomes payable, the investment turns out to be not sufficient to answer it.—*Re HALL*, *FOSTER v. METCALFE*, [1903] 2 Ch. 226; 72 L. J. Ch. 554; 88 L. T. 619; 51 W. R. 529; 47 Sol. Jo. 514, C. A.

*Annotations:—*Apld. *Re Kirkley*, *Halligey v. Kirkley* (1918), 87 L. J. Ch. 247. *Reid. Re Salaman*, *De Pass v. Sonnen-thal*, [1907] 2 Ch. 46; *Re Salomons*, *Public Trustee v. Wortley*, [1920] 1 Ch. 290.

PART IV. SECT. 5, SUB-SECT. 4.—E. (c).

a. Failure of contingency—Whether legacy payable.]—Testator bequeathed the whole of his estate to his exor. upon trust to pay to his son a certain sum on his attaining the age of 25 years. The son died before attaining that age:—*Held*: the legacy did not vest in the son, but was contingent upon his attaining the age of 25 years.—*DURAND v. DURAND MANOR*, [1920] N. Z. L. R. 489.—N. Z.

1. — Legacy conditional on testator surviving his mother.]—Testator left a legacy contingent on testator surviving his mother, an event which did not occur:—*Held*: the direction did not import a condition into the

legacy, & the legatee was therefore entitled to payment.—*GRANT v. COWK* (1887), 15 R. (Ct. of Sess.) 81; 25 Sc. L. R. 80.—SCOT.

g. Renewal of marriage engagement—Right of trustees to declaration—That no engagement subsisting.]—Testator bequeathed to a legacy bequeathed by him to A., a condition that she should declare in writing that she would not renew her engagement of marriage with M. Testator's trustees refused to pay the legacy except upon the further statement being added that no engagement of marriage subsisted between legatee & M. at the date of the declaration. Legatee refused to make this additional statement, & raised an action against trustees for payment:—*Held*: trustees

4732. —[—(1) Testator gave a legacy of £250 to "each of my grandchildren who shall be born in my lifetime to be paid to them respectively if & when they shall respectively attain the age of twenty-one years with interest at the rate of four per cent. from my decease" :—*Held*: these legacies were not vested but contingent on the grandchildren attaining twenty-one.

(2) The gift of interest from the death of testator does not make these legacies vested, because it is a gift of interest contingent on the happening of the same event & not a gift of interest in the meantime :—*Held*: the exors. must be directed to set aside & invest such a sum as would represent the total amount of the legacies plus interest at four per cent. on each legacy from every year of the minorities of the legatees.—*Re KIRKLEY, HALLIGY v. KIRKLEY* (1918), 87 L. J. Ch. 247; 119 L. T. 304; 62 Sol. Jo. 364.

4733. Right of legatee at period of vesting to appropriated fund.—Legacy of £100 bequeathed to C. upon trust to invest & pay the interest & likewise any part of the principal if he should think fit, for the benefit of P., then an infant of eight years old, & the residue of the principal, if any should remain, unto P., on his attaining twenty-one. C. received the £100. P., the infant, who was living with C. at testator's death in 1818, continued to live with C. & was supported & maintained by him until C.'s death in the year 1829. C. by will gave to trustees £2,200 upon trust to invest the same & pay the proceeds, also £200 part of the capital, if they should see necessary, for the maintenance & advancement of P., then about nineteen, until he should attain twenty-five, then the interest to him for life, & after his death as he should by will appoint. The trustees of C.'s will, in 1829, set apart a sum of £100 to meet the possible claim under the former will. P. died in 1859, having appointed an exor., the present petitioner :—*Held*: (1) although lapse of time would ordinarily furnish a presumption that the legacy was paid, that presumption was rebutted by the appropriation in 1829; (2) although there was evidence of C. having expended more than the interest of £100 upon the maintenance of P., there was sufficient evidence to show he had actually invested that sum & exhausted the capital in P.'s maintenance & advancement. As the legacy consequently was not shown to have been satisfied, petitioner was entitled to the appropriated fund.—*Re CLARE'S TRUSTS* (1861), 4 L. T. 789; 7 Jur. N. S. 769.

(d) *Specific Legacies.*

4734. Duty of executor to preserve articles specifically bequeathed.—*CLARKE v. ORMONDE* (EARL), No. 5432, *post*.

4735. Specific legacy retained for assets—Not required—Depreciation while retained.—*CHAWORTH v. BEECH*, No. 4573, *ante*.

4736. Specific legatee also residuary legatee—Payments made on account of residuary estate—In excess of amount due to legatee.—A residuary legatee, who was also a specific legatee, filed a bill as residuary legatee, against the exors., for administration of testator's estate, & obtained a decree for an account of assets not specifically bequeathed. Pending this suit, plff. filed a claim against the

exors. for payment of the specific bequest, to which they had assented, but of which they resisted payment, on the ground that they had paid plff. various sums in respect of the residuary estate, & it would probably turn out, on the balance of accounts, which were being taken, that plff. had received more than was due to him. On this latter ground, without going into the question of assent by the exors., the claim was dismissed, with costs.—*LODGE v. PRICHARD* (1852), 19 L. T. O. S. 310.

Costs of getting in & preserving articles specifically bequeathed.—*See Sect. 7, sub-sect. 1, post.*

Liability to take legacy cum onere.—*See Sect. 7, sub-sect. 1, post.*

(c) *Legacies to Debtors.*

See Sub-sect. 12, post.

(f) *Legacies to Executors.*

See Sub-sect. 12, post.

(g) *Legacies to Infants.*

See Sub-sect. 14, post.

(h) *Legacies to Married Women.*

See Nos. 6220 6222, post; & generally, HUSBAND & WIFE.

F. Evidence of Payment.

4737. Presumption of payment After lapse of time.—[Great length of time raises a presumption that a legacy has been paid. *JONES v. TERNHILL* (1792), 1 Bro. C. C. 115; 2 Ves. 11; 20 E. R. 806.

Annotations: Rejd. Pickering v. Stamford (1793), 1 Bro. C. C. 211; *Chalmers v. Bradley* (1819), 1 Jac. & W. 51; *Campbell v. Graham* (1831), 1 Russ. & M. 453; *Re Richardson, Pole v. Pattenden*, [1920] 1 Ch. 423.

4738. —Where testator charges his general estate with legacies, & the exor. & residuary legatee sells a leasehold, & no demands in respect of the charges created by the will are made for twenty years, the ct. will presume that the legacies are satisfied. *MONTGOMERY v. WILLIAMS* (1823), 1 L. J. O. S. Ch. 151.

4739. Mode of payment contrary to duty of executor.—In 1780 the interest of a sum of money was bequeathed to A. for her life, & after her decease the principal to her daughter B. Between 1784 & 1795 proceedings in Chancery, in which A. & B. were parties, were instituted against the exor., & a decree for an account was obtained, which was not acted upon. From that time till 1828, no application was made by B. for her legacy, nor did it appear that A. had of late years received her interest. On the other hand, it was stated by the representatives of the exor., & from circumstances it appeared probable, that the legacy was paid by the exor. many years ago to A. & B. jointly, or to one of them with the consent of the other :—*Held*: payment of the legacy in the mode suggested could not be presumed, such mode of payment being contrary to the presumed duty of an exor. *PRIOR v. HOUNTBLOW* (1836), 2 Y. & C. Ex. 200; 160 E. R. 369.

Annotations: Rejd. Portlock v. Gardner (1842), 1 Hare, 591; *Adams v. Barry* (1845), 2 Coll. 285; *Binn v. Nichols* (1866), L. R. 2 Eq. 256; *Re Smith, Prada v. Vandroy*, [1916] 1 Ch. 523; *Re Richardson, Pole v. Pattenden*, [1920] 1 Ch. 423.

were entitled to have the declaration expressed in such terms as would best carry out testator's intention.—*FORBES v. FORBES' TRUSTEES* (1862), 9 H. (Ct. of Sess.) 675; 19 Sc. L. R. 452.—*SCOT.*

4732 i. Appropriation to secure legacy.—Testamentary trustees, who

were directed to pay a legacy of £5,000 at a postponed date, invested that sum in trust-investments & appropriated them to the legacy. The trust-deed contained no direction to appropriate investments to particular legacies, nor was such appropriation necessary to facilitate the administration of the

trust. The investments appropriated had materially depreciated in value, & the legatee refused to accept the depreciated investments & claimed payment of the legacy in full :—*Held*: the legatee was entitled to payment in full.—*COLVILLE'S TRUSTEES v. COLVILLE*, [1914] H. C. 255.—*SCOT.*

Sect. 5.—Legacies: Sub-sect. 4, F., G. & H.; sub-sect. 5, A.]

4740. ——— Rebuttal of presumption.]—A testator, by his will, bequeathed various pecuniary legacies, & charged all his real & personal estate with their payment; & subject thereto, devised his real and personal estate to the persons therein named. Testator died in 1789. From 1789 & 1816, the affairs of testator were in a state of great embarrassment, & mtgees. & incumbrancers were in possession of all his real estate. By a deed, dated in 1816, the devisees conveyed all their interests in the real estate to trustees, on trust to sell, & to apply the purchase-money in the payment of certain specific sums; & then, on the payment of all other the lawful charges & incumbrances upon the estates & property, to be sold according to their order & priority; & then to give the residue to the devisees. In 1830 the trustees had paid off all the debts of testator, & a surplus was left in their hands:—*Held*: the presumption of payment of the legacies between 1789 & 1816 was rebutted by the circumstances.—*RAVENSCROFT v. FRISBY* (1844), 1 Coll. 16; 13 L. J. Ch. 153; 63 E. R. 302.

Annotation: Refd. Carey v. Cuthbert (1873), 22 W. R. 240.

4741. ———]—*Re CLARE'S TRUSTS*, No. 4733, *ante*.

Lapse of time as bar to recovery of legacies, *see* Sub-sect. 8, *post*.

4742. ——— Same hand paying & receiving.]—A legacy, payable upon the death of a tenant for life of land on which it was charged, was assigned by the legatee, a married lady, & her husband, to R. A., the tenant in tail in remainder of the land, became exor. & sole residuary legatee of R., & paid debts to a larger amount than R.'s personal estate. Subsequently A. became tenant in tail in possession. Upon bill filed to have the legacy settled upon the legatee:—*Held*: she was not entitled, payment to the assignee of the legacy being presumed.

The presumption, *prima facie*, is, that where the same hand was to pay & to receive, payment has been made; & in this case the debts of the assignee being greater than his personal estate, the presumption was irresistible that A., as his representative, had received payment from himself as owner of the inheritance on which the legacy was charged.—*ALLDAY v. FLETCHER* (1857), 1 De G. & J. 82; 26 L. J. Ch. 519; 20 L. T. O. S. 190; 3 Jur. N. S. 422; 5 W. R. 584; 44 E. R. 653, L. C.

4743. Receipt for legacies—Necessity for stamping—Foreign stamp duty.]—*Re REINA, FROST v. LUCAS* (1898), 42 Sol. Jo. 408.

G. Releases to Executors.

4744. Right of executor to release.]—Exors. are not entitled to a release from legatees.—*Re ROBERTS' TRUSTS* (1869), 38 L. J. Ch. 708; 17 W. R. 639.

PART IV. SECT. 5, SUB-SECT. 4.—G.

4744a. Right of executor to release.]—Where a will creates a life estate in chattels the exor. is discharged when he hands over such chattels to the tenant for life.—*Re MESSIE* (1884), 10 J. R. 98.—*CAN.*

4744b. ———.]—A document signed by a residuary legatee authorising the exor. of the estate to keep out of the money coming to her an amount for the legal service to be rendered by a solr. in her interest, in connection with the estate, is illegal & the exor. will not be discharged in respect to payment made

thereunder. Such document is in no sense a "voucher" & the discharge of the exor. under it, in the absence of testimony, is unjustifiable.—*BOOKSON v. DISCOLL* (1916), 50 N. S. R. 1.—*CAN.*

k. What amounts to release — to guardian of infant.]—A payment *bona fide* made to a father as natural guardian discharges the exor. where no one else has been appointed to administer the minor's property.—*VAN ROOYEN v. WERNER* (1892), 9 S. C. 425.—*S. AF.*

l. Validity of release.]—B.'s exors.

4745. ——— Containing special recital—As to amount of residue.]—A legatee, who also claims to be entitled to a share of the residuary estate of testator, cannot, as a condition of being paid the legacy, be called upon by the exors. to execute to them a release containing a recital that the residue amounts to a given sum.—*MUNRO v. FITZGERALD* (1844), 3 L. T. O. S. 3.

4746. ———.]—A trustee who has a specific trust to execute, where the trust is apparent, & the fund clear, & paying the trust fund in direct accordance with the trust, is not entitled to a release under seal. On the contrary, if the trustee be asked to do what is not in strict accordance with the tenor of the trust, he is entitled to a general release. Where a trust fund in the hands of an exor. is about to be distributed, it is the practice to grant him a general release by the parties to whom the fund is paid.—*KING v. MALLINGS* (1852), 20 L. T. O. S. 178.

4747. What amounts to release—Refusal of legacy.]—Testatrix by her will directed her trustees to set apart out of her estate free of duty the sum of £1,000 & invest the same, & stand possessed of such investments upon trust to pay the income to A. for life for her separate use & after her death to B., A.'s son, for life, & after B.'s death the £1,000 was to fall into residue. Testatrix died on Mar. 20, 1904, & £1,000 was set apart & invested. A. declined in writing to receive any interest, & with her consent it was paid to B. B. died on Jan. 17, 1912, & A. now applied for a direction that the future income should be paid to her. The residuary legatees said that a legacy once refused must be treated as void:—*Held*: the refusal was a mere voluntary relinquishment of the income for the time being, & not a release of the life interest, & could be retracted.—*Re YOUNG, FRASER v. YOUNG*, [1913] 1 Ch. 272; 82 L. J. Ch. 171; 108 L. T. 292; 29 T. L. R. 224; 57 Sol. Jo. 265.

4748. Validity of release—From sister to brother—Legacy paid by mother.]—*THOMAS v. WILLIAMS* (1729), Mos. 177; 25 E. R. 335.

Annotation: Refd. St. George v. Wake (1833), Coop. temp. Brough. 129.

4749. ——— Given under mistake—As to amount of estate.]—Testator bequeathed two legacies of £2,000. The exor. rendered an account of the estate to A. one of the legatees, showing it to be about £1,750 in the whole. The legatee, on receipt of half, executed a general release. Afterwards, it appeared that there was a further asset of £2,000 belonging to the estate which had been omitted:—*Held*: the release was binding *pro tanto*, & the exor. was ordered to pay A. a moiety of the £2,000.—*ANON.* (1862), 31 Beav. 310; 54 E. R. 1158.

4750. ——— Limited to matters within knowledge of beneficiaries when release executed—Subsequent accession of property.]—In consideration of certain payments by an extrix. persons interested in the estate gave a release of

were cited to show cause why they should not proceed with the settlement of the estate. They appealed from an Order directing them to proceed, on the ground that petitioner was not "a person interested in the estate," he having given a release. Complete discharge of all claims he had under deceased's will:—*Held*: the release was not good as the exors. were, as trustees, debarred from purchasing petitioner's interest.—*Re BENT'S ESTATE* (1917), 50 N. S. R. 390; 34 D. L. R. 196.—*CAN.*

m. ———.]—An exor. contracted

all claims on the estate to the extrix. It was afterwards discovered that property in which testator was entitled to a share had during his life been sold at an undervalue. The extrix, instituted & succeeded in a suit to set the sale aside, & recovered a large sum of money as part of testator's estate:—*Held*: this money was not included in the release & the persons who gave the release were entitled to share in the money so recovered as part of his estate.—*TURNER v. TURNER, HALL v. TURNER* (1880), 14 Ch. D. 829; 42 L. T. 495; 44 J. P. 731; 28 W. R. 859.
Annotation:—*Mentd.* *Monk v. Arnold* (1902), 86 L. T. 580.

H. Other Cases.

4751. Bequest of conditional legacy—Legatee to convey share of real estate to third party—Whether legatee entitled to lien on real estate for unpaid legacy.—Testator gave a legacy to each of his daughters on condition that she should convey her share of certain real estate, to which the daughters were entitled, to the sons of testator, & in case of any daughter refusing or being unable to comply with the condition the legacy bequeathed to her was to be forfeited & to form part of testator's residuary personal estate. Testator gave his residuary personal estate to his sons; & he appointed one of them & two other persons exors. The daughters conveyed their shares of the real estate to their brothers, but did not obtain payment of the legacies: *Held*: they were not entitled to any lien in the nature of a vendor's lien on the real estate conveyed by them for their legacies.—*BARKER v. BARKER* (1870), L. R. 10 Eq. 438; 39 L. J. Ch. 825.

4752. Legatees entitled to require sale for payment of legacies—Acquiescence in no sale being made—Effect.—Persons holding freehold property in trust for sale for payment of legacies, & entitled to the proceeds subject to such payment, may, with the assent of the legatees, elect to take the property as realty.

Long acquiescence by legatees, entitled to require a sale for payment of their legacies, in no sale being made, may be construed as an assent to their legacies becoming simple charges.

A testator devised certain freehold houses to a son & two daughters upon trust for sale, the proceeds to be considered part of his personal estate; & after bequeathing legacies, gave the residue of his property to the same three persons absolutely & appointed them his exors. He died in 1825. One of the houses put up for sale was bought in & never sold. All the legacies were paid or satisfied, the three finding money to pay one legacy, except two legacies of £2,500 each to other daughters of testator. The four daughters lived with their brother, & appeared to have approved of the course taken, but no formal assent or release was shown. The house was let by the three devisees on lease for 21 years, & it was repaired at the son's expense. One of the three, a daughter,

died in 1844. In 1873 her administratrix filed her bill for administration of testator's estate, the principal object being to get a sale of the unsold house & a division of the proceeds as personality:—*Held*: with the assent of the pecuniary legatees, the three devisees & residuary legatees could elect to take the property as realty; such assent had been given, & the three had so elected.—*MUTLOW v. BIGG* (1875), 1 Ch. D. 385; 45 L. J. Ch. 282; 34 L. T. 273; 24 W. R. 409, C. A.

Annotations:—*Reid*, *Meek v. Devenish* (1877), 6 Ch. D. 566; *Re Douglas & Powell's Contract*, (1902) 2 Ch. 496; *Re Start, De Bunsen v. Hardinge*, [1922] 1 Ch. 416.

4753. Executor receiving notice of charge on legacy—Effect.—A trustee or exor., when he receives notice that a legatee has charged his legacy, is bound to withhold all further payments to that legatee. All right of set-off & adjustment of equities between the legatee & the exor. existing at the date of the notice have priority over the charge, but the trustees can create no new charges or rights of set-off after that time.

Exors. granted a lease of part of testator's property to a legatee, who afterwards incumbered his legacy. Notice of the charge having been given to the exors.:—*Held*: they had, as against the mortgagee, a right to set off the rent due from the legatee at the date of the notice, but not the subsequent rents.—*STEPHENS v. VENABLES* (No. 1) (1862), 30 Beav. 625; 54 E. R. 1032.

Annotation:—*Consd.* *Re Paine, Gustavson v. Haviland*, [1919] 1 Ch. 38.

SUB-SECT. 5. INTEREST AND ACCRETIONS.

A. In General.

4754. Right to interest. A legatee who has no notice of his legacy till the exor. publishes it in the *Gazette*, shall have no interest for it.—*KNAP v. POWELL* (1690), Prec. Ch. 11; 2 Eq. Cas. Abr. 561; 24 E. R. 6.

4755. After payment of legacy & receipt given in full. Interest recovered for a legacy, though after a receipt given in full for the legacy & the principal legacy paid.—*EAST v. THORNBURY* (1731), 3 P. Wms. 126; 2 Eq. Cas. Abr. 567; 24 E. R. 990.

4756. Action to recover legacy Administrator not guilty of delay.—*HUSSEY v. ANDREWS* (1755), 2 Lee, 113; 161 E. R. 292.

4757. Legacy of small account.—As to interest upon such small legacies as this, upon which no interest could be supposed to have been made, the ct. never allowed interest, especially to a stranger, *de minimis non curat lex* (SIR GEORGE LEE).—*BRADSHAW v. BRADSHAW* (1756), 2 Lee, 289; 161 E. R. 344.

4758. On arrears of annuity. The general rule of the ct. is that arrears of an annuity do not carry interest (LORD CRANWORTH, C.).—*TORRE v. BROWNE* (1855), 5 H. L. Cas. 555; 24 L. J. Ch. 757; 20 L. T. O. S. 129; 10 E. R. 1017, H. L.;

with legatees for the purchase of their legacies, which were accordingly assigned to a trustee for him, in consideration of sums of money less in amount than the legacies:—*Held*: the deed of assignment did not operate as a release of the estate.—*BARTON v. HAZARD* (1813), 3 Dr. & War. 461.—IR.

b. Whether corroboration of payment necessary.—*Held*: M., as executrix of E., was discharged of liability in respect of the amount of a cheque made payable to the E. estate & endorsed & cashed by her. She testified that she paid over the amount to S., & her statement did not require

corroboration in an accounting by her as extrix, for money received after E.'s death, she could not be asked to account for it against as part of S.'s estate.—*SPROULE v. MURRAY* (1919), 45 O. L. R. 326; 48 D. L. R. 568; 16 O. W. N. 811.—CAN.

c. Whether released to the extent of future assets.—*LAWK v. LAWK* (1873), 5 L. R. Eq. 327.—IR.

p. Mode of release—Deed poll.—The personal estate of deceased, to whom there is no legal personal representative, may be effectually released by deed-poll from a legacy.—*MCCKERT v. SEARIGHT* (1880), 5 L. R. Ir. 208.—IR.

PART IV. SECT. 5. SUB-SECT. 5. A. g. Direction in will to pay interest Payable out of residuary personal estate.—Testator bequeathed £5,000 to R.'s daughter & directed that she should be paid legal interest thereon from the time of his decease till the sum be paid in due course of law:—*Held*: interest from the testator's death was properly paid by the exors. out of his residuary personal estate.—*GREEN v. FLOOD* (1885), 15 L. R. Ir. 450.—IR.

r. Interest a tempore morae.—Interest, unless ordered by the testator in case of an inheritance or legacy does not accrue unless the person

96 L. T. 758. *Reid*. Whiteley, Whiteley v. London (Bp.) (1909), 101 L. T. 508. *Generally, Mentd.* Walford v. Walford, [1912] A. C. 638.

4771. ———.]—Legacy given to be paid within one year, without interest, &, in case of default or refusal, devise of life estate. The year expired; & on a bill filed, the ct. decreed a sale of the land to raise the legacy, interest from the end of the year, & costs of the suit.—*BELL v. SKELTON* (1831), 9 L. J. O. S. Ch. 214.

4772. ———.]—A. by will bequeathed to B. all the goods, plate, money at the bankers, linen, horses, carriages, etc., he might die possessed of, at M. or elsewhere in L., on condition that B. gave £3,000 sterling to the Casa d'Assicurazione, to make an annuity for the life of C. C. elected to take the £3,000 instead of the annuity. The master, on a reference to him, found that A., at his death, was possessed at M. & elsewhere in L., of divers goods, chattels, Polish & Austrian certificates, bonds, money at his bankers, carriages, horses, etc.; & the master also found that C. was entitled to interest on her legacy. It was afterwards determined that the Austrian & Polish certificates did not pass to B. by the will; by a consent order, made after the confirmation of the master's report, a sum of £3,000 was directed to be paid to C. in satisfaction of her legacy, & the question of interest thereon was thereby reserved:—*Held*: it was a pecuniary legacy, & C. was entitled to interest thereon at 4 per cent. *per annum*, from the expiration of one year from the death of testator, although the delay in payment arose from the bequest of the articles being disputed by the residuary legatee.

Semble: the subsequent reservation of interest did not, of itself, affect the master's report of prior date, finding the legatee entitled to interest on her legacy.—*HERTFORD (MARQUIS) v. LOWTHER (LORD)* (1846), 9 Beav. 266; 15 L. J. Ch. 126; 6 L. T. O. S. 410; 50 E. R. 315.

4773. ———.]—The rule that general legacies bear interest only from the end of a year from the death of testator applies to similar legacies under a *feme covert's* will made in exercise of a power of appointment.—*TATHAM v. DRUMMOND* (1864), 2 Hem. & M. 262; 5 New Rep. 184; 71 E. R. 464.

4774. ———.]—*Re LORD'S ESTATE, LORD v. LORD*, No. 4671, *ante*.

4775. ———.]—Under a gift by A. to his wife of £10,000 "afterwards to go to the understated residuary legatee E":—*Held*: the legacy of £10,000 was given to the wife absolutely, but that interest upon such legacy did not begin to run until after one year from testator's death.—*Re PERCY, PERCY v. PERCY* (1883), 24 Ch. D. 616; 53 L. J. Ch. 143; 49 L. T. 551.

4776. ———.]—Testatrix directed the trustees of her will to hold her residuary estate upon trust for investment thereof & to pay one moiety of the annual income to a niece during her life & the other moiety thereof to another niece during her life, with certain directions as to such income, her intention being that the income of each should not exceed £250 *per annum*; &, subject to the payment of the income as afore-

said, she directed the trustees to hold her residuary estate upon trust thereout to pay certain legacies; & she directed the trustees to hold the ultimate residue upon trust for certain named persons:—*Held*: no special period was fixed by the will for the payment of the legacies; & interest thereon was payable from the end of one year after testatrix's death.—*Re YATES, THROCKMORTON v. PIKE* (1907), 96 L. T. 758, C. A.

Annotation:—*Folld*, *Re Whiteley, Whiteley v. London* (Bp.) (1909), 100 L. T. 920.

4777. ———.]—Trust for sale with power to postpone & direction to appropriate sum out of net proceeds.]—By his will testator gave his residuary real & personal estate to his general trustees upon trust for sale & conversion, with power to postpone such sale & conversion for such a period as they might think proper, & in particular the disposal of certain specified shares; & he declared that his general trustees should as soon after his death as circumstances would permit, having regard to the amount of his residuary estate & the possibilities of sale & realisation thereof, & having regard also to the directions thereafter contained with respect to such sale & realisation, set apart & appropriate out of the residue of the moneys to arise from such sale & realisation a sum or sums amounting as nearly as may be in the whole but not exceeding the sum of £1,000,000 sterling, such sum or sums to be held upon the trusts thereafter declared concerning the same. Owing to circumstances connected with the realisation of testator's estate, no part of the sum of £1,000,000 had been paid:—*Held*: the directions contained in the will in no way interfered with the application of the ordinary rule that a legacy carries interest from the expiration of twelve months after testator's death. *Re WHITELEY, WHITELEY v. LONDON* (Bp.) (1909), 101 L. T. 508; 26 T. L. R. 16, C. A.

4778. ———.]—*WALFORD v. WALFORD*, No. 4588, *ante*.

4779. Legacy given generally. No time fixed for payment.—*ANON.* (1696), No. 4828, *post*.

4780. ———.]—*SMELL v. DEE*, No. 4781, *post*.

4781. Legatee an infant. (1) If a legacy be devised generally, & no time ascertained for the payment, & the legatee be an infant, he shall be paid interest from the expiration of the first year after the testator's death; but (2) if the legatee be of full age, he shall only have interest from the time of his demand after the year; for no time of payment being set, it is not payable, but upon demand, & he shall not have interest but from the time of his demand. (3) But where a certain legacy is left payable at a day certain, it must be paid with interest from that day (*LORD OWPPER, C.*).—*SMELL v. DEE* (1706), 2 Salk. 415; 91 E. R. 360.

Annotations:—*Generally, Mentd.* King v. Withers (1735), Cas. Temp. Talb. 117; Hutchins v. Foy & Gover (1749), 2 Com. 716.

4782. Legacy out of personal estate & on deficiency out of rents & profits of realty.—Devise of legacies to be paid out of the personal estate, & if that fall short, then out of the rents & profits

the bequest is by way of appointment under a settlement.—*DEEDEN v. GRAHAM* (1873), 20 Gr. 258.—*CAN.*

4785 III. ———.]—*TOOMEY v. TRACEY* (1883), 4 O. R. 708.—*CAN.*

4785 IV. ———.]—*CHINNAM RAJA-MANNAR v. TADIKONDA RAMACHENDRA RAO* (1905), 1 L. R. 29 Mad. 155.—*IND.*

4785 v. ———.]—*PEARSON v.*

PEARSON (1862), 1 Sch. & Lef. 10.—*IR.*

4785 VI. ———.]—*M'ALLISTER v. M'ALLISTER'S TRUSTEES* (1827), 5 Sh. (Cl. of Hom.) 882; *affd.*, 4 Will. & M. 142.—*SCOT.*

1. From death of testator.—*DUFF'S TRUSTEES v. SOCIETIE OF SCRIPTURE READERS* (1863), 24 Dunl. (Cl. of Hom.) 553; 24 Sc. Jur. 250.

—*SCOT.*

a. ———.]—*KIRKPATRICK v. BEDFORD* (1878), 4 App. Cas. 96; 6 R. (Cl. of Hom.) 1; 16 Sc. L. R. 315, H. L.

—*SCOT.*

b. ———.]—*MAY'S TRUSTEES v. PAUL* (1900), 2 F. (Cl. of Hom.) 657; 37 Sc. L. R. 479; 7 S. L. T. 402.—*SCOT.*

c. Legacy payable out of proceeds

Sect. 5.—Legacies: Sub-sect. 5, B. (a) & (b) i.]

of the real estate. The trustees were decreed to sell, & to pay interest from the time the legacies became due & payable.—*CAREW v. CAREW* (1674), *Cas. temp. Finch*, 165; 23 E. R. 91.

4783. ———.] — *MAXWELL v. WETTENHALL*, No. 4818, *post*.

4784. Bequest of residue — For life.] — The tenant for life of the residue under a will has no claim to interest until one year after testator's death.—*STOTT v. HOLLINGWORTH* (1818), 3 Madd. 161; 56 E. R. 470.

*Annotations:—***Expld.** *Angerstein v. Martin* (1823), *Turn.* & *L.* 232. **Overd.** *Macpherson v. Macpherson* (1852), 19 L. T. O. S. 221. **Refd.** *Douglas v. Congreve* (1836), 1 Keen, 410; *Taylor v. Clark* (1841), 1 Hare, 161.

4785. — Upon trust to invest in realty—Trusts declared by reference to deed of entail.]—A. by his will directed his exors. to set apart a portion of his personal estate to secure certain annuities, then to consolidate into one fund his whole fortune & movables, & lay out that fund in purchasing lands, to be limited as specified in a certain deed of entail, & that the principal of the above annuities, as they respectively fell, should be applied in the same way. At A.'s death, the bulk of his personal estate was standing in bank annuities, & a convenient investment in land was not made till five years' afterwards:—*Held*: the money so directed to be invested was impressed with the character of realty from the moment of testator's death, & the tenant for life was entitled to receive the interest of the same from the period of testator's death, though uninvested in the land as directed.

Where testator directs his estate to be converted & laid out in a particular investment, without any special direction, to accumulate or add interest to capital, the tenant for life is entitled to the interest actually accruing from the moment of testator's death, though the investment directed has not been made: but *semble*: after a year has expired, & the fund is still uninvested, in a question between the tenant for life & the person entitled in remainder, a ct. of equity will take into account the difference between the interest actually accruing & what would have accrued if the proposed investment had been actually made. *MACPHERSON v. MACPHERSON* (1852), 19 L. T. O. S. 221; 16 Jur. 817; 1 W. R. 8; 1 Macq. 213, 11 L. *Annotation:—***Mentd.** *Allhusen v. Whittell* (1867), L. R. 4 Eq. 205.

4786. Legacy of leasehold farm with stock.]—*GIBSON v. BOTT*, No. 4708, *ante*.

4787. Specific legacy of stock.]—*SAWREY v. RUMNEY*, No. 4560, *ante*.

4788. Legacy out of reversionary property.]—A legacy was bequeathed out of testator's reversionary interest in stock:—*Held*: the legacy carried interest only from the time when the reversion fell in.—*EARLE v. BELLINGHAM* (No. 2) (1857), 24 Beav. 448; 27 L. J. Ch. 545; 30 L. T. O. S. 162; 3 Jur. N. S. 1237; 6 W. R. 45; 53 E. R. 430.

*Annotations:—***Consd.** *Hornsey L. B. v. Monarch Investment Bldg. Soc.* (1889), 24 Q. B. D. 1. **Refd.** *Re Johnson, Sly v. Blake* (1885), 29 Ch. D. 964; *Walford v. Walford*, [1912] A. C. 658.

4789. Bequest of interest in partnership assets.]—Testator bequeathed his property upon trusts for conversion & investment, & then for his wife

for life, with remainder to his only child absolutely. Part of testator's property consisted of his interest in a co-partnership firm, of which he was a member. By the arts. it was provided that the partnership should continue until the completion of certain contracts, & should not be put an end to by the death of either partner, but should be carried on by the surviving partner & the exors. of deceased partner, & that there should be no division of profits till the completion of the aforesaid contract:—*Held*: the tenant for life was entitled to interest at the rate of 4 per cent. from testator's death on the value of his interest at that time in the partnership assets.—*JACKSON v. JACKSON* (1869), 20 L. T. 354; 17 W. R. 547.

4790. Legacy in satisfaction of debt.]—Where a legacy is decreed to be a satisfaction of a debt, the ct. gives interest always from the testator's death.—*CLARK v. SEWELL* (1744), 3 Atk. 96; 20 E. R. 858, L. C.

*Annotations:—***Refd.** *Adams v. Lavender* (1824), *M'Cle & Yo.* 41; *Re Horlock, Calham v. Smith*, [1895] 1 Ch. 516; *Re Rattenberry, Ray v. Grant*, [1906] 1 Ch. 667. **Mentd.** *Haynes v. Mico* (1781), *10m.* 41; *Warren v. Warren* (1783), 1 Bro. C. C. 305; *Garthshore v. Challe* (1804), 10 Ves. 1; *Durham v. Wharton* (1836), 10 Bll. N. S. 526.

4791. Legacy in lieu of dower.]—Where testator gives his wife a legacy, to be paid to her within three months after his death, in lieu of her jointure, & she elects to accept the legacy, she is not entitled to interest upon it during the interval between the death of testator & the time of payment.—*ELTON v. MONTAGUE* (1823), 1 L. J. O. S. Ch. 212.

*Annotation:—***Foldd.** *Re Bignold, Bignold v. Bignold* (1890), 45 Ch. D. 496.

4792. —.]—A legacy to testator's wife, in lieu of dower & freebench, carries interest only from the expiration of a year from testator's death.—*Re BIGNOLD, BIGNOLD v. BIGNOLD* (1890), 45 Ch. D. 496; 59 L. J. Ch. 737; 63 L. T. 512 39 W. R. 181.

4793. Defeasible legacy.]—Property was bequeathed to trustees in trust for an infant, with a gift over in case of his death under twenty-one.

The trustees accumulated the income of the property not required for his maintenance, in pursuance of the powers given by 23 & 24 Vict. c. 145, s. 26.

The infant died under twenty-one:—*Held*: the accumulations of income to the time of the death of the infant belonged to the infant, & were not to be held for the benefit of the remainderman who ultimately became entitled to the property from which the accumulations arose.—*Re BUCKLEY'S TRUSTS* (1883), 22 Ch. D. 583; 52 L. J. Ch. 439; 48 L. T. 109; 31 W. R. 376.

*Annotations:—***Mentd.** *Re Wells, Wells v. Wells* (1889), 43 Ch. D. 281; *Re Scott, Scott v. Scott*, [1902] 1 Ch. 918; *Re Boulter, Capital & Counties Bank v. Boulter*, [1918] 2 Ch. 40.

4794. Bequest of money for purchase of annuity.]

A sum of money bequeathed to exors. to be laid out by them in the purchase of an annuity carries interest only from a date twelve months after the death of testator.

Testator bequeathed to his exors. the sum of £1,000, free of duty, to be laid out by them in the purchase of an annuity for his daughter M. The will contained no clause for maintenance, nor was there any further provision made for M.:—

of sale of land—Limit of time fixed for sale.]—Testatrix directed that a legacy should be paid out of the proceeds of the sale of lands, & that the lands should be sold at any time within two years after her death:—*Held*: interest upon the legacy should be allowed from the day when the two years expired;

or, if the lands were sooner sold, from the date of sale.—*Re ROBINSON, McDONELL v. ROBINSON* (1892), 23 O. R. 438.—**CAN.**

d. —.]—Where land was directed to be sold within three years from testator's death & legacies paid out of the proceeds of sale:—*Held*:

the legacies bore interest from the date when the lands should have been sold.—*McMILLON v. LYNCH* (1894), 24 O. R. 632.—**CAN.**

e. — No time fixed for sale —Interest allowed after reasonable period.]—A party conveyed his land to trustees with discretionary powers

Held: interest only commenced to run twelve months after testator's death.—*Re FRIEND, FRIEND v. YOUNG* (No. 2) (1898), 78 L. T. 222.

4795. Legacy to executor—Infant executor—Infant unable to act until of age.]—G., by her will, appointed four exors., & gave them a legacy of £1,000 each as exors. One of the exors. was an infant at the date of testator's death:—**Held:** (1) the legacies were payable only upon the exors. accepting the office & duties of exor.; (2) the infant could not accept or act in the office until he attained twenty-one, & therefore his legacy did not carry interest from her death.—*Re GARDNER, LONG v. GARDNER* (1892), 67 L. T. 552; 41 W. R. 203; 37 Sol. Jo. 67; 3 R. 96.

4796. Legacy to wife.]—No exception in favour of a wife, as for a child, to the rule, that a legacy does not bear interest, before it is payable.—*STENT v. ROBINSON* (1800), 12 Ves. 461; 33 E. R. 174.

Annotation:—*Consd. Re Whittaker, Whittaker v. Whittaker* (1882), 21 Ch. D. 657.

4797. —.]—Under a bequest of £1,000 upon trust to invest the same upon mtge. of the B. borough fund & pay the interest as the same should arise to his widow during her life & widowhood & after her death or second marriage in favour of testator's children by a former marriage interest does not become payable to the widow except from the end of a year from testator's death.—*Re WHITTAKER, WHITTAKER v. WHITTAKER* (1882), 21 Ch. D. 657; 51 L. J. Ch. 737; 46 L. T. 802; 30 W. R. 787.

4798. Legacy to child—Child en ventre sa mère.]—Testator gave to each & every of his children born or thereafter to be born, & who should be living at the time of his death, £5,000 apiece, to be paid at their ages of twenty-one, etc., with interest from the day of his death. A child *en ventre sa mère* is entitled to a legacy of £5,000, but the interest is to be computed only from the birth.—*RAWLINS v. RAWLINS* (1796), 2 Cox, Eq. Cas. 425; 30 E. R. 196, L. C.

Annotation:—*Mentd. Villar v. Glibbey*, [1907] A. C. 139.

— Infant.]—*See, generally, Sect. 5, sub-sect. 14, post.*

— Effect of provision in will for maintenance.]—*See Sub-sect. 14, D. (b) ii., post.*

4799. — Adult.]—A testator made a settlement on his daughter, who was adult, & gave her a legacy by his will:—**Held:** the legacy did not bear interest from the death of testator, but only from the end of the first year after that event.—*WALL v. WALL* (1817), 15 Sim. 513; 16 L. J. Ch. 305; 11 Jur. 403; 60 E. R. 718.

Annotations:—*Mentd. Robinson v. Wheelwright* (1856), 6 De G. M. & G. 535; *Sadler v. Rickards* (1858), 4 K. & J. 302; *Festing v. Taylor* (1862), 3 B. & S. 217; *Williams v. Mayne* (1867), 16 W. R. 173; *Gleadow v. Leatham* (1882), 22 Ch. D. 269; *Re Vardon's Trusts* (1884), 51 L. T. 884; *Harle v. Jarman*, [1895] 2 Ch. 419; *Re Sallard, Pratt v. Gamble* (1917), 86 L. J. Ch. 749; *Re Shrewsbury Estate Acts, Shrewsbury v. Shrewsbury*, [1924] 1 Ch. 315.

4800. Legacy to illegitimate grandson on attaining majority—Testator placing himself in loco parentis.]—(1) An exor. denied assets, but his answer disclosed a personal liability for payment of pltf.'s legacies. The ct. made an order for immediate payment, without directing the accounts to be taken.

(2) Testator became bound to the parish for the support of an illegitimate child of his son, & he made weekly payments until his death:—**Held:** he had placed himself in *loco parentis*, &

interest was payable from testator's death, on a legacy given by him to the child, though made payable on attaining twenty-one.—*ROBERTS v. SOUTTEN* (1839), 2 Keen, 598; Coop. Pr. Cas. 96; 7 L. J. Ch. 118; 48 E. R. 758.

Annotations:—*As to (1) Consd. Savage v. Lane* (1847), 6 Hare, 32. *Generally, Mentd. Holland v. Clark* (1842), 1 Y. & C. Ch. Cas. 151.

4801. Direction to convert & reinvest—No direction to accumulate—Delay in reinvestment.]—*MACPHERSON v. MACPHERSON*, No. 4785, *ante*.

(b) Contingent Legacies.

i. In General.

See Law of Property Act, 1925 (c. 20), s. 175.

4802. Right to intermediate income.] Where a legacy depends on a contingency, the intermediate interest between the death of tenant for life & the contingency happening does not follow the principal, but falls into the residue.—*SHAW v. CUNLIFFE* (1792), 1 Bro. C. C. 141; 29 E. R. 822.

Annotations:—*Apld. Drew v. Killick* (1847), 1 De G. & Sm. 266. *Follid. Guthrie v. Walround* (1883), 22 Ch. D. 573. *Reid. Harris v. Lloyd* (1823), Turn. & R. 310; *Tucker v. Tucker* (1833), 2 L. J. K. R. 143; *Stone v. Harrison* (1846), 2 Coll. 715; *Cunningham v. Murray* (1847), 1 De G. & Sm. 366; *Fullerton v. Martin* (1860), 1 Drew. & Sm. 31. *Mentd. Pigott v. Wilder* (1858), 26 Beav. 90.

4803. Severance of legacy from rest of estate—Severance for benefit of legatee.] Where a fund is severed immediately from testator's death for the benefit of the objects of the gift, the interests are vested & carry the interim income, though the only gift is in a direction to pay at a future time. Therefore, where, under a power of appointment over a fund, testatrix directed the trustees, immediately after her death, to raise £5,000, & to pay the same equally between five nephews & nieces, the shares of sons to be payable on their respectively attaining twenty-one, & of daughters at twenty-one or marriage respectively, with benefit of survivorship, & upon trust to apply the residue for the benefit of certain other persons: **Held:** the interests vested immediately on the death of testatrix, & the nephews & nieces were entitled to the interim income arising from their respective shares.—*DUNDAS v. WOLFE MURRAY* (1863), 1 Hem. & M. 425; 1 New Rep. 429; 32 L. J. Ch. 151; 11 W. R. 359; 71 E. R. 185.

Annotations:—*Consd. Re Inman, Inman v. Rolls*, [1893] 3 Ch. 518. *Reid. Selby v. Whittaker* (1877), 6 Ch. D. 239; *Re Bevan's Trusts* (1887), 34 Ch. D. 716; *Re Smith, Smith v. Smith* (1894), 71 L. T. 318; *Re Marten, Shaw v. Marten* (1900), 70 L. J. Ch. 351; *Re Eyre, Johnson v. Williams* (1917), 86 L. J. Ch. 257.

4804. — (1) Testator bequeathed money in trust for A. for life, & after her decease for the children of A., when & as they should attain the age of twenty-one years, but if A. should die without lawful issue, then over:—Held: the gift to the children of A. was contingent upon their attaining the age of twenty-one years.

(2) Where a legacy is severed from the residue, for the benefit of a tenant for life & a remainderman, the residuary legatee cannot claim the income accruing after the death of the tenant for life, though the remainderman has not yet attained a vested interest in the legacy.—*KIDMAN v. KIDMAN* (1871), 40 L. J. Ch. 359.

Annotations:—*As to (1) Consd. Re Edwards, Jones v. Jones*, [1906] 1 Ch. 579. *Reid. Re Holford, Holford v. Holford*, [1894] 3 Ch. 39. *As to (2) Apld. Re Woodin, Woodin v. Glass*, [1895] 2 Ch. 309. *Reid. Re Holford, Holford v. Holford*, [1894] 3 Ch. 39.

4805. — (1) Testator by will

as to the times of sale, for payment of legacies which were declared not to be payable till after such sale:—**Held:**

interest should run on the legacies from the first term after the lapse of three years from testator's death, as a

reasonable period within which to have sold the lands.—*OSWIL v. HAMILTON* (1833), 12 Sh. (Cl. of Sess.) 189.—**SCOT.**

Secl. 5.—Legacies: Sub-secl. 5, B. (b) i. & ii.]

after giving his real & personal estate upon trust for sale & conversion & payment of debts & legacies directed the trustees to stand possessed of the residue of the trust moneys upon trust in the first place to pay thereout £1,500 to be equally divided between such of six legatees, whom he named, as should be alive at the death of A. B., such shares to be paid to them respectively on attaining twenty-one or marriage, "as to the rest of his residuary estate" upon trust for X. Y. A. B., & the six legatees all survived testator & were still living. The trustees having set apart & invested £1,500 to meet the legacy, X. Y., the six legatees & the next of kin of testator all claimed to be entitled to the income thereof during the life of A. B.:—*Held*: such income passed under the gift of the rest of testator's residuary estate & X. Y. was entitled thereto during the life of A. B.

(2) Where a contingent deferred legacy has been severed from the general estate of testator, such severance will not entitle the legatee to interim interest thereon unless the severance has been necessitated by something connected with the legacy itself.

(3) Trustees cannot under Conveyancing Act, 1881 (c. 41), s. 43, apply the income of an infant's contingent legacy for the benefit of the infant unless the income will go along with the capital of the legacy if & when such capital vests.—*Re JUDKIN'S TRUSTS* (1884), 25 Ch. D. 743; 53 L. J. Ch. 496; 50 L. T. 200; 32 W. R. 407.

Annotations:—*As to (2) Consd. Re Inman, Inman v. Rolls*, [1893] 3 Ch. 518. *Reid. Re Medlock, Ruffle v. Medlock* (1880), 55 L. J. Ch. 738. *As to (3) Reid. Re Holford, Holford v. Holford*, [1894] 3 Ch. 30; *Re Boulter, Capital & Counties Bank v. Boulter*, [1918] 2 Ch. 40.

4806. ———.—*Testator, by his will appointed certain persons "exors. & trustees" thereof, & bequeathed to his "trustees" the sum of £750 "upon trust to pay & divide the same" amongst a class composed of grandchildren & the issue of grandchildren of testator, contingently upon their surviving him & attaining twenty-one, or, in the case of females, marrying, & in default of any such person attaining a vested interest, then he directed that "the sum of £750, & the investments representing the same," should fall into his residuary estate. Testator then devised & bequeathed the residue of his real & personal estate, except what he otherwise disposed of by his will, to his trustees upon trust to sell & convert the same, & to pay the income thereof to his widow for life. The question was whether the income of the £750 was applicable to the maintenance of the contingent legatees who were infants, or whether testator's widow was entitled, as residuary legatee for life, to such income:—*Held*: the contingent legatees were entitled to the intermediate income of the £750 which was by the terms of the will directed to be set apart for their benefit, & such income might therefore be applied for their maintenance during infancy.—*Re MEDLOCK, RUFFLE v. MEDLOCK* (1880), 55 L. J. Ch. 738; 54 L. T. 828.*

Annotations:—*Consd. Re Inman, Inman v. Rolls*, [1893] 3 Ch. 518. *Appld. Re Clements, Clements v. Pearsall*, [1894] 1 Ch. 665; *Re Snaith, Snaith v. Snaith* (1894), 71 L. T. 318; *Re Woodin, Woodin v. Glass*, [1895] 2 Ch. 309. *Reid. Re Jeffery, Burt v. Arnold*, [1891] 1 Ch. 671; *Re Eyre, Johnson v. Williams*, [1917] 1 Ch. 351; *Re Boulter, Capital & Counties Bank v. Boulter*, [1918] 2 Ch. 40.

4807. ———.—*Testator bequeathed the sum of £4,000 Victoria stock, held by him at the dates of his will & death, to the trustees of his will, in trust for such of his granddaughters who*

should survive him & attain twenty-one:—Held: the legacy carried with it the gift of the intermediate income during the infancy of the legatees, & such income was applicable for their maintenance.—*Re CLEMENTS, CLEMENTS v. PEARSALL*, [1894] 1 Ch. 665; 63 L. J. Ch. 326; 70 L. T. 682; 42 W. R. 374; 38 Sol. Jo. 272.

Annotations:—*Appld. Re Woodin, Woodin v. Glass*, [1895] 2 Ch. 309. *Reid. Re Rowley, Rowley v. Rowley*, [1904] 2 Ch. 685; *Re Eyre, Johnson v. Williams*, [1917] 1 Ch. 351.

4808. ———.—*Testator, by his will, gave all his residuary real & personal estate to trustees upon trust to pay certain legacies & annuities, & proceeded, "& my trustees will hold the sum of £2,000 upon trust to invest the same in good security, & to pay the same to the five sons of my late brother J. S., that is to say, to Richard S., R. S., N. S., J. S., & Y. S. £400 each when they shall attain the age of twenty-one years respectively, & if one or more of them die before reaching the said age, their shares to be equally divided among their survivors, & as to all the rest of my estate, I give the same to T. S. H.:—Held*: the will directed the severance of the fund for the benefit of the five legatees, & they were entitled to interest on their legacies from the day of testator's death.—*Re SNAITH, SNAITH v. SNAITH* (1894), 71 L. T. 318; 42 W. R. 508; 38 Sol. Jo. 504; 8 R. 561.

4809. ———.—*Testator gave certain leasehold property to trustees upon trust to pay the income to his daughter during her life, & after her death upon trust to transfer the same to all her children in equal shares, the shares of sons to be vested in them at twenty-one, & of daughters at twenty-one or marriage. Testator made other specific bequests, & gave his residuary estate upon certain trusts for his children. The daughter died, leaving several children, all of whom were infants:—Held*: the effect of the bequest being to separate the leaseholds from the general estate of testator, the intermediate income until one of the children attained a vested interest was applicable to the maintenance of the infant children.—*Re WOODIN, WOODIN v. GLASS*, [1895] 2 Ch. 309; 64 L. J. Ch. 501; 72 L. T. 740; 43 W. R. 615; 39 Sol. Jo. 558; 12 It. 302, C. A.

4810. ———.—*Severance for convenience of administration.*—*Testator by his will gave all the rest & residue of his property to trustees upon trust to pay the income to his wife for life or until her second marriage, & from & after her decease or second marriage he directed his trustees to raise & pay to each of his sons J. & F who should be living at his death, & should live to attain the age of twenty-one years, the sum of £5,000 & to each of his two daughters the sum of £2,500, & subject to the payments, he directed his trustees after the death or second marriage of his wife to stand possessed of the trust fund in four equal shares, upon certain trusts in favour of his four children. Testator died in 1884. His widow did not marry again, & died in Oct. 1891. F. attained the age of twenty-one in May, 1893. On originating summons taken out by F.:—*Held*: (1) the legacy was contingent; (2) there must be a severance, but the severance was not for the benefit of the legatees, but of the residuary legatees, to facilitate the distribution of the estate, & the legacy did not carry interest, but the interest went into the residue.—*Re INMAN, INMAN v. ROLLS*, [1893] 3 Ch. 518; 62 L. J. Ch. 940; 69 L. T. 374; 42 W. R. 156; 8 R. 293.*

Annotations:—*As to (2) Reid. Re Holford, Holford v. Holford*, [1894] 3 Ch. 30; *Re Marten, Shaw v. Marten* (1900), 70 L. J. Ch. 354.

4811. ———.]—(1) Contingent bequest of leasehold, neither vested in trustees nor preceded by a vested limited interest, with gift over:—*Held*: not to carry intermediate rents & profits, which fell into residue.

Semble: (2) a contingent legacy is segregated, so as to carry interim income, by being subject to a prior vested limited interest.

(3) The rule that a contingent legacy by a parent to a child carries interest during suspense of vesting does not apply where the parent is the mother unless she is actually standing *in loco parentis* to the legatee.—*Re EYRE, JOHNSON v. WILLIAMS*, [1917] 1 Ch. 351; 86 L. J. Ch. 257; 116 L. T. 469; 61 Sol. Jo. 336.

Annotation:—As to (1) *Reid v. Boulter*, Capital & Counties Bank v. Boulter, [1918] 2 Ch. 40.

4812. ———.]—The interim income subject to the interim burden of a contingent specific legacy until the happening of the contingency falls into the residue of testator's estate, or goes to his next of kin, as the case may be.—*GUTHRIE v. WALROND* (1883), 22 Ch. D. 573; 52 L. J. Ch. 165; 47 L. T. 614; 31 W. R. 285.

Annotations:—*Reid*. *Re Clements*, *Clements v. Pearsall*, [1894] 1 Ch. 665; *Re Woodin*, *Woodin v. Glass*, [1895] 2 Ch. 309; *Re Eyre*, *Johnson v. Williams*, [1917] 1 Ch. 351. *Mentid*. *Re Hotchkys*, *Freke v. Culnady* (1886), 32 Ch. D. 408; *Re Prater*, *Dodginge v. Beare* (1888), 57 L. J. Ch. 342; *Re Lord & Fullerton* (1895), 65 L. J. Ch. 184; *Prewen v. Law Life Assoc. Soc.*, [1896] 2 Ch. 511; *Re Clark*, *McKeekie v. Clark*, [1904] 1 Ch. 294; *Re Lyons*, *Beck v. Lyons* (1912), 107 L. T. 146.

Contingent legacies to infants.—*See* Sub-sect. 14, D. (b), *post*.

ii. Residuary Gifts.

4813. Right to intermediate income—Residue consisting of personality.—Testator bequeathed his residuary personal estate to trustees, upon trust for A. for life, & after the death of A. the trust money & income in trust for all & every the children of A., share & share alike, to the son or sons when they should have attained the age of twenty-one, & for the daughter or daughters at that age or marriage; with a gift over, if A. should die without having a child, or, having any, such children should die, being sons before twenty-one & daughters before twenty-one or marriage. A. died leaving an only child B., who died under twenty-one:—*Held*: the trust property had vested in B., so that the income between the death of A. & the death of B. belonged to B.'s estate.—*RIDGWAY v. RIDGWAY* (1851), 4 De G. & Sm. 271; 20 L. J. Ch. 256; 17 L. T. O. S. 239; 15 Jur. 960; 64 E. R. 259.

4814. ———.]—A residuary devise of realty does not carry with it income not expressly disposed of, but it results to the heir-at-law as undisposed of.

Secus, as to personality, a residuary bequest of which or of a share of which carried with it *ex vi termini* all the income of such residue or share of residue, though not expressly disposed of, for the benefit of the legatees.

Where testator gave the residue of his real estate to uses commencing with an executory devise to an unborn person, & gave two-thirds of the residue of his personality to trustees upon trust to invest in real estates, to be settled to uses, which were the same as those declared of his residuary realty:—*Held*: the ordinary rule applied to the intermediate income of each class of property. As to the realty, there was an intestacy as to such income, & it resulted to the heir-at-law. As to the personality, there was no intestacy, & the income should be accumulated, & be added to the corpus to be laid out in land.—*BECTIVE v. HODGSON*

(1864), 10 H. L. Cas. 656; 3 New Rep. 654; 33 L. J. Ch. 601; 10 L. T. 202; 10 Jur. N. S. 373; 12 W. R. 625; 11 E. R. 1181, H. L.; *affg.* S. C. *sub nom.* *HODGSON v. BECTIVE* (EARL) (1863), 1 Hem. & M. 376.

Annotations:—*Apld.* *Wade-Gery v. Handley* (1876), 3 Ch. D. 374. *Expld.* *Re Dumble*, *Williams v. Murrell* (1883), 23 Ch. D. 360. *Consd.* *Re Townsend's Estate*, *Townsend v. Townsend* (1886), 34 Ch. D. 357; *Re Mellor Alvarez v. Dodgson*, [1922] 1 Ch. 312. *Reid*. *Holmes v. Prescott* (1864), 3 New Rep. 559; *Re Eddels's Trusts* (1871), L. R. 11 Eq. 559; *Chamberlayne v. Brickett* (1872), 8 Ch. App. 206; *A. G. v. Lomas* (1873), 29 L. T. 749; *Weatherall v. Thornburgh* (1878), 8 Ch. D. 261; *Re Holford*, *Holford v. Holford*, [1891] 3 Ch. 30; *Re Woodin*, *Woodin v. Glass*, [1895] 2 Ch. 309; *Re Robbins*, *Gill v. Worrall* (1898), 78 L. T. 218; *Re Taylor*, *Smart v. Taylor*, [1901] 2 Ch. 134; *Re Stevens*, *Stevens v. Stevens*, [1911] 1 Ch. 429; *Re Conyngham*, *Conyngham v. Conyngham*, [1920] 2 Ch. 495. *Mentid*. *Mathews v. Keble* (1867), L. R. 4 Eq. 467.

4815. ———.]—**Residue consisting of blended fund.**—Under an executory devise of a residue of real & personal estate, the intermediate rents & profits of the real estate pass, as well as the interest of the personality.—*GENERY v. FITZGERALD* (1822), Jac. 468; 37 E. R. 927, L. C.

Annotations:—*Consd.* *Ackers v. Phipps* (1835), 3 Cl. & Fin. 665; *Phipps v. Ackers* (1835), 3 Cl. & Fin. 702. *Apld.* *Lachlan v. Reynolds* (1852), 9 Hare 796. *Consd.* *Hodgson v. Bective* (1863), 1 Hem. & M. 376; *Furcell v. Elder* (1865), 13 L. T. 203. *Apld.* *Kidman v. Kidman* (1871), 40 L. J. Ch. 349. *Consd.* *Bellairs v. Bellairs* (1871), L. R. 18 Eq. 519. *Apld.* *Re Dumble*, *Williams v. Murrell* (1883), 23 Ch. D. 360. *Consd.* *Re Townsend's Estate*, *Townsend v. Townsend* (1886), 34 Ch. D. 357. *Apld.* *Re Burton's Will*, *Banks v. Heaven*, [1892] 2 Ch. 38. *Consd.* *Re Oliver*, *Wilson v. Oliver*, [1908] 2 Ch. 71. *Reid*. *Phipps v. Ackers* (1835), 3 Cl. & Fin. 583; *Thly v. Smith* (1844), 1 Coll. 434; *Tench v. Cheese* (1855), 6 De G. M. & G. 453; *Re Turtan*, *Lambrade v. Lambrade v. Brighthouse* (1866), G. F. & J. 406; *Re Holford*, *Holford v. Holford*, [1894] 3 Ch. 30; *Re Lowman*, *Dovenish v. Pester* (1895), 72 L. T. 818; *Re Robbins*, *Gill v. Worrall* (1898), 78 L. T. 218.

4816. ———.]—Testator devised his residuary real estate to trustees, on trust to pay the rents to his wife for her life, & upon her death to apply the rents for the maintenance of his daughter & to accumulate the surplus, & on the daughter attaining twenty-one to pay her the accumulations & the future income for her life, & upon her death on trust to convey the residuary real estate unto & equally between all & every her child & children who should live to attain twenty-one, as tenants in common *in fee*. But in case his daughter should die without leaving any child or children who should attain twenty-one, then on trust to convey the residuary real estate to such person or persons as the daughter should by deed or will appoint. By another clause testator bequeathed his residuary personal estate to the same persons as trustees, on the same trusts as those declared of the real estate except the clause as to maintenance & accumulation.

The will contained no disposition of the income of the realty or the personality during the suspense of vesting.

The daughter survived testator & his wife, & died leaving an only daughter, who was an infant. Testator's daughter had, by her will, exercised the power of appointment in favour of other persons, in the event of her leaving no child who should live to attain a vested interest under the trusts of her father's will: *Held*: testator had in effect mixed up the whole of his property in one mass, & the rule in *Genery v. Fitzgerald*, No. 4815, *ante*, applied, & consequently the interim rents of the real estate, until the happening of the contingency, as well as the interim income of the personality, must be accumulated, & follow the destination of the corpus.—*Re DUMBLE, WILLIAMS*

Sect. 5.—Legacies: Sub-sect. 5, B. (b) ii., (c) & (d).]

v. MURRELL (1883), 23 Ch. D. 300; 52 L. J. Ch. 631; 48 L. T. 661; 31 W. R. 605.

Annotations:—*Consd. Re Townsend's Estate, Townsend v. Townsend (1886),* 34 Ch. D. 357; *Re Burton's Will, Banks v. Heaven, (1892)* 2 Ch. 38. **Reid. Re Williams, Spencer v. Brighthouse (1886), 54 L. T. 831.**

4817. — Residue consisting of realty.]—**BECTIVE v. HODGSON, No. 4814, ante.**

Contingent legacies to infants.]—See Sub-sect. 14, 1. (b), post.

(c) Legacies charged on Land.

4818. General rule.]—(1) If a legacy be given out of land, it carries interest from the death of testator, because land yields profits.

(2) If out of personal estate, it yields interest from a year after testator's death.

(3) If a time of payment be mentioned, then interest from that time.—**MAXWELL v. WETTENHALL (1722),** 2 P. Wms. 26; 24 E. R. 628, L. C.

Annotations:—*As to (1) Reid. Lloyd v. Williams (1740),* 2 Atk. 108. *As to (2) Reid. Lloyd v. Williams (1740),* 2 Atk. 108. *Generally, Mentd. Bath v. Bradford (1754),* 2 Ves. Sen. 587; *Watkins v. Maule (1821),* Jac. 105; *Pearce v. Slocombe (1838),* 3 Y. & C. Ex. 84.

4819. — No time fixed for payment.]—BILSON v. SAUNDERS (1727), Bunb. 240; *Cas. temp. King,* 72; 145 E. R. 600.

4820. —Charge by will on real estate of simple contract debt of another person considered as a legacy, carrying interest from the death of testator at 4 per cent.—**SHIRT v. WESTBY (1808),** 16 Ves. 393; 33 E. R. 1033, L. C.

Annotations:—*Distd. Turner v. Buck (1874),* L. R. 18 Eq. 301. **Reid. Re Whitehead, Whitehead v. Street (1913),** 108 L. T. 368.

4821. ——**FREEMAN v. SIMPSON, No. 5726, post.**

4822. Legacy payable out of proceeds of real estate.]—Testator who died in 1823 directed the trustees of his will to raise a legacy by sale of his real estate:—**Held:** the legatee was not barred by Stat. Limitations, s. 42 from claiming interest on the legacy from the end of the first year after the testator's death.—**GOUGH v. BULT (1848),** 16 Sim. 323; 17 L. J. Ch. 480; 12 Jur. 859; 60 E. R. 898.

Annotations:—*Apld. Watson v. Saul (1859),* 33 L. T. O. S. 55. **Reid. Hughes v. Williams (1852), 3 Mac. & G. 683; *Oliver v. Bishop (1859),* 1 De G. F. & J. 137; *Mutlow v. Bigg (1874),* L. R. 18 Eq. 246. **Mentd. Petre v. Petre (1853), 1 Drew. 371; *Re Jordison, Raine v. Jordison, (1922)* 1 Ch. 440.****

4823. ——**Devise of real estate upon trust for sale & out of the proceeds of such sale to pay certain legacies:—Held:** interest on the legacies was payable from the period of a year after testator's death. **TURNER v. BUCK (1874),** L. R. 18 Eq. 301; 43 L. J. Ch. 583; 22 W. R. 748.

Annotation:—*Distd. Re Waters, Waters v. Boxer (1889),* 42 Ch. D. 517.

4824. — Power to postpone sale.]—Testator, after devising all his real estate to his wife for life, directed his trustees after the death of the tenant for life to sell the same, with power to postpone the sale, & to stand possessed of the proceeds upon trust to retain thereout two several sums of £1,000 sterling each & interest thereon respectively at 4 per cent., in trust for his daughters for life with remainder to their child or children respectively; & testator declared that the rents of his real estate unsold be applied as the annual income of the proceeds of sale would be applied if a sale had taken place. On summons:—**Held:** the two sums of £1,000 were a charge on the real

estate, & there was a distinct direction to pay the income out of the charge on the real estate; & interest was payable at 4 per cent. on the two sums of £1,000 from the death of the tenant for life.—**Re WATERS, WATERS v. BOXER (1889),** 42 Ch. D. 517; 58 L. J. Ch. 750; 61 L. T. 431; 38 W. R. 57. **Annotation:—***Fold. Re White, White v. Shenton (1909),* 101 L. T. 780.

4825. ——**The gift of this legacy is out of the proceeds of land, after payment of the charges thereon. The legatee had no right to receive, or title to receive, until realisation. Testator gave the trustees a discretionary power to postpone the sale so long as they deemed it expedient. In ordinary course the legacy would not be paid until the property was sold. The legatee could not have enforced payment, & it was not a legacy which was payable till then. The legacy was payable out of a particular fund not got in till now, & the legatee was entitled to receive it, with interest as from one year after the death of testator (KEKEWICH, J.).—Re HULL, MELHUISE v. FLETCHER (1890),** 40 Sol. Jo. 257.

4826. Legacy to be raised out of rents & profits of real estate—Payable within three months after death.]—(1) Testator, by his will, gave several pecuniary legacies, & directed them to be paid within three calendar months after his decease; & by a codicil, he directed that two of those legacies, consisting of £30,000 each, should not be paid out of his general personal estate, but should be raised out of the rents & profits of his real estates thereby devised & of those to be purchased with his residuary personal estate, & until they should be raised & paid, the first tenant for life was not to be entitled to the whole rents & profits but only to a fixed annual sum thereout:—**Held:** interest was payable on the two legacies from three months after the death of testator.

(2) Legacies given by will which directed them to be paid within three months after testator's decease will bear interest at 4 per cent. from the expiration of the time at which by the will they were so directed to be paid.—**LONDESBOROUGH (LORD) v. SOMERVILLE (1851),** 19 Beav. 295; 23 L. J. Ch. 616; 23 L. T. O. S. 291; 52 E. R. 363.

Annotations:—*Generally, Mentd. Scholefield v. Redfern (1863),* 2 Drew. & Sm. 173; *Freman v. Whitbread (1865),* L. R. 1 Eq. 266; *Bulkeley v. Stephens, (1896)* 2 Ch. 241.

(d) Legacies payable at Future Date.

4827. General rule—From future date.]—Where a legacy is to be paid at a certain day, it shall carry interest from that time, if not paid.—**PALMER v. TREVOR (1684),** 1 Vern. 261; 1 Eq. Cas. Abr. 286; 23 E. R. 456.

4828. ——**Where a legacy is given to be paid at marriage, or twenty-one years, or any other particular time, that it will carry interest from that time though a bill for it be not preferred till afterwards; but where a legacy is given generally & no time mentioned for the payment of it, there it will carry interest only from the time of the bill exhibited, or a demand made.—ANON. (1696),** Freem. Ch. 207; 22 E. R. 1162.

4829. — Necessity for demand for payment of legacy.]—A legacy payable at a certain time, shall notwithstanding carry interest only from the time it is demanded.—**JOLIFF v. CREW (1701),** Prec. Ch. 161; 2 Eq. Cas. Abr. 365; 24 E. R. 77.

PART IV. SECT. 5, SUB-SECT. 5.—B. (d).

4827 I. General rule—From future date.]—Re GYLES, GIBBON v. CHATTO, [1907] 1 I. R. 65.—IR.

4827 II. ——**LLOYD'S ESTATE v. DE JONG'S ESTATE (1902),** 25 S. C. 136; 18 C. T. R. 188.—S. AF.

4830. ———.]—*SMELL v. DEE*, No. 4781, *ante*.

4831. ———.]—A. by her will bequeathed a legacy of £100 to her nephew E. to be paid him "within six months after he shall have fully served out his apprenticeship to which he is bound." E. ran away from his apprenticeship, & afterwards died:—*Held*: his representative was entitled to this legacy, with interest from the end of six months after the apprenticeship expired; for the serving out the apprenticeship was not to be considered as a condition annexed to the legacy, for the non-performance whereof the legacy would be forfeited, but was only an appointment of the time when the legacy should be paid.—*SIDNEY v. VAUGHAN* (1721), 2 Bro. Parl. Cas. 254; 2 Eq. Cas. Abr. 211; 1 E. R. 926.

4832. ———.]—*MAXWELL v. WETTENHALL*, No. 4818, *ante*.

4833. ———.]—Devise to A. for life, with remainder to his first & other sons, remainder to his daughters; & in default of such issue, the premises to stand charged with two sums, to be paid after the death of A. without issue, & subject to such charge over, with a power to A. of jointuring the whole estate, which he executed, A. dying without issue:—*Held*: the sums only carried interest from the death of the jointress, who survived him.—*REYNOLDS v. MEYRICK* (1758), 1 Eden. 48; 28 E. R. 602.

4834. ———.]—Interest on legacies is given for delay of payment, & consequently, until the day of payment arrives, no interest is, in general, demandable.

Where a legacy is given by a father to a child payable at a future period, interest is payable thereon by way of maintenance; but if maintenance is provided by the will for the child from other sources, interest on the legacy is not allowed until the legacy becomes payable.—*DONOVAN v. NEEDHAM* (1816), 9 Beav. 161; 15 L. J. Ch. 193; 7 L. T. O. S. 107; 10 Jur. 150; 50 E. R. 306.

Annotations:—*Reid. v. George's Estate*, *George v. Turnell* (1876), 25 W. R. 182; *May v. Potter* (1877), 25 W. R. 507; *Re Moody, Woodroffe v. Moody*, [1895] 1 Ch. 101; *Re Bowlby*, *Bowlby v. Bowlby*, [1901] 2 Ch. 685.

4835. ———.]—Testator directed that no charitable bequest should be legally payable until the expiration of six calendar months from the time of his decease:—*Held*: the direction did not affect the general rule, & interest began to be payable on the legacies only at the expiration of six months from testator's decease.—*JACNCEY v. A.-G.* (1861), 3 Giff. 308; 5 L. T. 374; 8 Jur. N. S. 6; 10 W. R. 129; 66 E. R. 427.

Annotation:—*Mentid. v. Smith, Prada v. Vandroy*, [1916] 2 Ch. 368.

4836. ———.]—*Re LORD'S ESTATE*, *LORD v. LORD*, No. 4671, *ante*.

4837. ———.]—*Held*: a legacy payable under the will of a testatrix out of the reversionary interest in a fund, the life interest of which had been appointed by testatrix to another person, would bear interest from the death of the appointee for life, & not from a year from the death of testatrix.—*Re DAVIS'S TRUSTS*, *STOUGHTON v. TAGG* (1887), 3 T. L. R. 309.

4838. ———.]—R. by his will, dated June 11, 1906, directed his trustees to pay the income of his residuary estate to J. for life, &

after J.'s death he directed his trustees to convert such estate into money, & out of the proceeds to pay the sum of £1,000 to M., & to pay one moiety of the remainder of the proceeds to M. & the other moiety to S. Testator died on Jan. 29, 1908. J. died on Feb. 26, 1908:—*Held*: M. was entitled to interest on her legacy of £1,000 as from the death of J.—*Re WHITE*, *WHITE v. SHENTON* (1909), 101 L. T. 780.

4839. Vested legacy—Whether infant entitled to income during infancy.—A devise of £1,000 out of money on mtge. to be paid when the devisee came of age:—*Held*: (1) the legacy was vested, & carried interest only from the time when the devisee came of age; (2) it was a specific legacy, chargeable only on the mtge. & not on the residue of the personal estate. *CHAMBERS v. JEOFFERY* (1709), 2 Eq. Cas. Abr. 511; 22 E. R. 456, L. C.

4840. Legacy payable within specified period.—A. by will in 1699, created a trust term of twenty-one years for the payment of debts & legacies, to be paid within five years after his death, & by a codicil devised the same estates to trustees & their heirs to pay the wife during her life £300 *per annum* & with the surplus profits his debts & legacies. Testator's widow did not die till 1736; the question was, whether a legatee for £20 & a simple contract creditor for £70 *ds.* are entitled to interest upon the legacy, & debt, & from what time:—*Held*: interest on the legacy began at the expiration of the five years, & interest was allowed on the debt only from the time it was ascertained by the master's report, & confirmed in 1717. *LLOYD v. WILLIAMS* (1740), 2 Atk. 108; Barn Ch. 224; 26 E. R. 168, L. C.

Annotations:—*Consid. v. Yates*, *Throckmorton v. Pike* (1907), 96 L. T. 758. *Reid. v. Walford*, *Kenyon v. Walford*, [1912] 1 Ch. 219.

4841. ———.]—A legacy [to be paid within three months after decease] held to carry interest from three months after the death of testator.—*HARRISON v. RHODES* (1753), 1 Lee, 197; 161 E. R. 73.

4842. Discretion to postpone payment for convenience.—Testatrix gave several legacies, & directed her husband, whom she appointed her exor., to pay the legacies as soon after her death as might be convenient, or within three years, if it should suit his convenience:—*Held*: the legatees were not entitled to interest on their legacies before the expiration of the three years. *THOMAS v. A.-G.* (1837), 2 Y. & C. Ex. 525; 100 E. R. 501. *Annotation*:—*Distd. v. Westerman* (1884), 53 L. J. Ch. 525.

4843. ———.]—*LONDESBOROUGH (LORD) v. SOMERVILLE*, No. 4826, *ante*.

4844. ———.]—Where there was a bequest to testator's five daughters of £6,000 each, to be invested by the exors. within seven years from testator's death, "in trust for them or their children, but if any of my daughters should die leaving no issue, then the share or portion so invested shall be divided amongst those who have issue, share & share alike, as they arrive at the age of twenty-one years; & if only one, the whole to go to that one only." One daughter died without issue, in the lifetime of testator:—*Held*: as the estate was sufficient to pay them at testator's death, interest must be paid upon the legacies from a year after testator's death, the direction

4840. Legacy payable within specified period.—Testator gave legacies of \$1,000 each to two of his daughters, payable in seven years from the date of the will:—*Held*: they were not entitled to interest from the expiration of such seven years, but only interest

as in an ordinary case.—*MILLER v. MILLER* (1877), 25 Gr. 224.—*CAN.*

1. Legacy payable on happening of future event.—Where testator directed his real & personal estate to be converted into money, the proceeds to be invested, such investments to be

continued until the whole of his property should be realised; & out of the same, when so realised & invested, to pay certain legacies:—*Held*: until the whole was realised the legatees were not entitled to interest.—*SMITH v. SEATON* (1870), 17 Gr. 397. *CAN.*

Sect. 5.—Legacies: Sub-sect. 5, B. (d), C. & D.]

for investment being for the convenience of the estate, & not for the benefit of the residuary legatee.—*VARLEY v. WINN* (1856), 2 K. & J. 700; 25 L. J. Ch. 831; 28 L. T. O. S. 80; 2 Jur. N. S. 661; 4 W. R. 792; 69 E. R. 963.

Annotation:—Folld. Olive v. Westerman (1884), 53 L. J. Ch. 525.

4845. —.]—Testator directed that certain legacies given by his will should be paid within four years after his decease. The exors. paid some of the legacies within one year after testator's decease, but others of them remained unpaid by reason of the inability of the legatees, being infants, to give receipts. It was not necessary for the convenient administration of the estate that the payment of any of the legacies should be postponed:—*Held*: the unpaid legacies carried interest from the expiration of one year after testator's death.—*Re OLIVE, OLIVE v. WESTERMAN* (1884), 53 L. J. Ch. 525; 50 L. T. 355; 32 W. R. 608.

4846. Legacy payable on happening of future event—Event happening within testator's lifetime.]

—*PICKWICK v. GIBBES*, No. 5284, *post*.

4847. —.]—Testator bequeathed £18,000 to trustees, upon trust, for his three illegitimate children, the share of the sons to be paid at twenty-one, & the share of the daughter at twenty-one or marriage with consent of the trustees; & testator directed the trustees to apply £100 to the maintenance & education of each of the children during minority. The two sons attained twenty-one in the lifetime of testator; & the daughter married in the lifetime of testator, with his consent, but had not attained twenty-one at his death:—*Held*: this was an exception from the general rule as to legacies bearing interest, & the legatees were entitled to interest from the death of testator, the legacies being payable at that time.—*COVENTRY v. HIGGINS* (1841), 14 Sim. 30; 8 Jur. 182; 60 E. R. 267.

Annotation:—N.F. Re Palfreeman, Public Trustee v. Palfreeman, [1914] 1 Ch. 877.

4848. —.]—A testator gave his residuary estate upon trust subject to an annuity, to pay £2,000, to each of his three sons & £1,000 to each of his four daughters on their respectively attaining the age of twenty-three years, & directed the residue of the trust estate to be held upon certain trusts. Testator's eldest son & eldest daughter respectively attained twenty-three in his lifetime:—*Held*: the legacies to the eldest son & eldest daughter respectively became ordinary immediate legacies & carried interest not from the death of testator but at the expiration of one year from his death.—*Re PALFREEMAN, PUBLIC TRUSTEE v. PALFREEMAN*, [1914] 1 Ch. 877; 83 L. J. Ch. 702; 110 L. T. 972; 58 Sol. Jo. 456.

4849. Legacy to niece.]—(1) A legacy from an uncle to a niece, to be paid at twenty-one or marriage, does not carry interest before the time of payment.

(2) The ct. will not supply a surrender for a natural child; but if it has a legacy from the father payable at twenty-one, will allow maintenance.

(3) Legacy from a parent to a child bears interest before the time of payment, & from the death of testator; & is the only instance.

(4) Legacy payable at twenty-one; before which time the legatee dies: if interest is payable, his exor. shall have the legacy immediately: if not, he must wait, till the legatee would have been twenty-one, & cannot then have the interest.

(5) Legacy payable at twenty-one; before

which time the legatee dies: a person claiming by limitation over takes immediately, but the administrator of the infant must wait till the time at which the legacy is payable, unless the whole interest is given.

(6) A wife as well as a child is within the exception to the rule, that a legacy does not bear interest till it is payable.

(7) Legacy from parent to child payable *in futuro*; if maintenance is given generally, it shall carry interest; but if an annual sum, less than the interest, is given for maintenance, the exor. paying that shall have the rest.—*CRICKETT v. DOLBY* (1795), 3 Ves. 10; 30 E. R. 866.

Annotations:—As to (6) N.F. Lowndes v. Lowndes (1808), 15 Ves. 301; *Raven v. Waite* (1818), 1 Swan. 553. *Consd. Re Whittaker, Whittaker v. Whittaker* (1882), 21 Ch. D. 657. *As to (7) Apud. Tyrrell v. Tyrrell* (1798), 4 Ves. 1. *Re Bowly, Bowly v. Bowly*, [1904] 2 Ch. 685. *Generally, Mentd. Festing v. Allen* (1844), 5 Hare, 573.

4850. Legacy to child.]—*CRICKETT v. DOLBY*, No. 4849, *ante*.

4851. —.]—**Effect of direction for maintenance—Maintenance less than interest.]**—*CRICKETT v. DOLBY*, No. 4849, *ante*.

4852. Legacy to wife.]—*CRICKETT v. DOLBY*, No. 4849, *ante*.

Legacy to infants.]—*See, generally, Sect. 5, sub-sect. 14, post.*

C. Rate of Interest.

See R. S. C., Ord. 55, r. 64.

4853. Legacy charged on personal estate.]—It is the rule of this ct. to allow no more than 4 per cent. where the will does not mention interest on portions charged upon land, & has also been extended to the cases of legacies & portions charged upon personal estate.—*GUILLAM v. HOLLAND* (1741), 2 Atk. 343; 26 E. R. 608, L. C.

Annotation:—Reid. Lewis v. Freke (1794), 2 Ves. 507.

4854. —.]—(1) Where legacies are charged upon personal estate, & interest directed to be paid, the ct. in this case always allows the legal interest.

(2) Where legacies are charged on the real estate, the rule of the ct. is to give one per cent. less than the legal interest, as it is a good security for the principal.—*MOORE v. MOORE* (1746), 3 Atk. 402; 26 E. R. 1032, L. C.

4855. —.]—It was the rule to give interest at 5 per cent. on legacies out of personal estate, & 4 per cent. out of real. It has now long since been altered, & the general rule is, that they shall all carry interest at 4 per cent. from the end of a year after testator's death. The case of maintenance is an exception.—*BRYANT v. SPEKE* (1748), 1 Ves. Sen. 171; 27 E. R. 963, L. C.

4856. Legacy charged on real estate.]—*GUILLAM v. HOLLAND*, No. 4853, *ante*.

4857. —.]—*MOORE v. MOORE*, No. 4854, *ante*.

4858. —.]—*BRYANT v. SPEKE*, No. 4855, *ante*.

4859. When 4 per cent. allowed.]—Daughters' portions by will charged on personal, then on real estate with interest for maintenance; so far as the personal deficient, they carry but 4 per cent.—*TRIMLESTOWN (LORD) v. COLT* (1749), 1 Ves. Sen. 277; 27 E. R. 1030, L. C.

4860. —.]—Legacy payable at twenty-one with 5 per cent. till payable. *Extrix*. advanced a sum larger than the legacy by discharging disbursements, all paid *bond fide* for the infant, though some were improper. Legatee when of age assigned the legacy. Assignee entitled against *extrix*. to the legacy with 4 per cent. from the time it was

payable.—**DAVIES v. AUSTEN** (1790), 1 Ves. 247; 3 Bro. C. C. 178; 30 E. R. 325, L. C.

4861. — [No interest given by will.]—Legacies, where no interest is given by the will, shall carry interest at 4 per cent. only, & from the end of a year after death of testator; except where it is given by way of maintenance: though the fund produces more; & the interest shall not be increased by the effect of appropriation.—**SITWELL v. BERNARD** (1801), 6 Ves. 520; 31 E. R. 1174, L. C.

Annotations:—**Consd.** **Elwin v. Elwin** (1803), 8 Ves. 547; **Wood v. Penoyre** (1807), 13 Ves. 325. **Apld.** **Noel v. Henley** (1819), 7 Price, 241; **Taylor v. Hibbert** (1820), 1 Jac. & W. 308. **Expld.** **Angerstein v. Martin** (1823), Turn. & R. 232; **Howitt v. Morris** (1824), Turn. & R. 241. **Foll.** **Kilvington v. Gray** (1825), 2 Sim. & St. 396. **Consd.** **Stair v. MacGill** (1827), 1 Bl. N. S. 662. **Distd.** **Douglas v. Congreve** (1836), 1 Keen, 410. **Expld. & Apld.** **Taylor v. Clark** (1841), 1 Hare, 161. **Distd.** **Mackie v. Mackie** (1845), 5 Hare, 70. **Consd.** **Macpherson v. Macpherson** (1852), 19 L. T. O. S. 221; **Re Campbell, Campbell v. Campbell**, (1893) 3 Ch. 468. **Refd.** **Clifton v. Cockburn** (1834), 3 My. & K. 76; **Caldecott v. Caldecott** (1842), 1 Y. & C. Ch. Cas. 312; **Groisley v. Chesterfield** (1851), 13 Beav. 288; **Shore v. Shore** (1859), 28 L. J. Ch. 940. **Mentd.** **Gibson v. Bott** (1802), 7 Ves. 89; **Bernard v. Mountague** (1816), 1 Mer. 422; **Cassamajor v. Pearson** (1841), 8 Cl. & Fin. 69; **Ludlow v. Stevenson** (1854), 23 L. T. O. S. 294; **Yates v. Yates** (1860), 3 L. T. 9; **Bulkeley v. Stephens** (1863), 3 New Rep. 105; **Allhusen v. Whittell** (1867), L. R. 4 Eq. 295; **Re Whitehead, Peacock v. Lucas**, (1894) 1 Ch. 678; **Re Hall, Foster v. Metcalfe** (1903), 72 L. J. Ch. 554.

4862. — [—]**WOOD v. PENOYRE**, No. 4770, *ante*.

4863. — [—]**SHIRT v. WESTBY**, No. 4820, *ante*.

4864. — [—]**LONDESBOURGH (LORD) v. SOMERVILLE**, No. 4826, *ante*.

4865. — [—]—Testator, domiciled at Bombay, directed his trustees to invest two sums in Indian public loans or other securities therein mentioned, & to pay the interest to certain legatees. The bulk of the property was invested in Indian securities, producing 5 per cent. interest, but seven years after testator's death no interest had been paid on the legacies, nor any investment or appropriation made to answer them:—**Held**: until appropriation the legacies bore interest at 4 per cent. only.—**Re BOWYER'S ESTATE, BELLAMY v. BOWYER** (1868), 19 L. T. 482.

4866. — [—]**JACKSON v. JACKSON**, No. 4789, *ante*.

4867. — [—]—A gift of residue to testator's sister was confirmed in a codicil, but with a desire "that the same should be invested in any way my exors. think proper," in trust for her sole benefit during her lifetime, & at her death for her children:—**Held**: she was not entitled to the income of leaseholds & other parts of testator's estate, consisting of investments not usually authorised by the ct., which had remained for some time unconverted, but only to interest on their value at 4 per cent.—**GREEN v. BRITTON** (1872), 42 L. J. Ch. 187; 27 L. T. 811.

Annotation:—**Mentd.** **Guthrie v. Walrod** (1883), 22 Ch. D. 573.

—See, also, Nos. 4853–4855, *ante*.

4868. When more than 4 per cent. allowed—**Special circumstances.**—Interest at 5 per cent. was decreed on a legacy for mourning under special circumstances.—**SWINSEN v. SCAWEN** (1748), 1 Dick. 117; 21 E. R. 213; *sub nom.* **SWYNFEN v. SCAWEN**, 1 Ves. 99, L. C.

4869. — [—]—Where the exors. of testator who had left large legacies charged on his real estate had been advised to defer the sale of testator's real estate & accordingly to defer the payment of some of the legacies, the personal estate having been extended by them in payment of debts & some legacies:—**Held**: the residuary estate of

testator must pay for the indulgence granted in allowing the sale to be deferred by the payment of 5 per cent. on the said legacies instead of the usual rate of 4 per cent. as heretofore.—**Re BAILEY, TATHAM v. WELCH** (1917), 61 Sol. Jo. 398.

4870. — **Special direction in will.**—By his will S. B. gave legacies of £8,000 to each of his daughters, payable five years after his death, & interest in the meantime to be paid on each legacy at the rate of 3 per cent. half-yearly; & after giving & devising all his real & leasehold estates to his elder son, & bequeathing the residue of his personal estate between his two sons as therein mentioned, testator revoked, set aside, & avoided all other wills, settlements, & agreements for settlements which he had at any time theretofore made & executed: **Held**: the rate of interest to be paid on the daughters' legacies was 6 per cent. *per annum*.—**Re BOOKER, BOOKER v. BOOKER** (1886), 51 L. T. 239.

4871. Rate of interest declared by will—**Effect of payment of fund into court.**—Testator bequeathed to each of his six grandchildren £200, & in case any of them should not have attained twenty-one at the death of testator, he directed his trustees, who were also his exors. & residuary legatees, to pay interest for the legacies of such children, after the rate of 5 per cent., towards their maintenance & education. Upon differences arising between the father of the children & the trustees as to the investment of the money pending minority, the trustees filed their bill to obtain the direction of the ct., & for leave to pay the amount into ct.: **Held**: the trustees might pay the principal money into ct. **Seemle**: (1) the trustees will not be liable to make up the difference between the dividends on the money in ct. & the 5 per cent.; (2) if the direction in the will had been for the trustees to pay interest at 2 per cent., & the money was paid into ct., the legatees would be entitled to the full amount of the dividends. **ABRAHAM v. HOLDERNESSE** (1812), 6 Jur. 200.

4872. Whether simple or compound interest allowed—**Delay in receipt of legacy.**—An exor. having a gross sum in his hands, made advances to the parties entitled, by way of loan on security, & in one instance made an advance out of his own money, taking a deposit of deeds of the private property of the party to whom the advance was made at 5 per cent. The decree directed an account of those sums with 4 per cent. interest, but was silent as to interest on the security of the private estate, & did not contain any declaration as to priorities of the trust estate & the exor.'s own advance; & containing ample directions to deal with the whole estate, reserved further consideration. A petition of re-hearing was presented, setting out the decree, & also what had taken place, & sought to vary the decree: **Held**: although a party entitled to a share in an estate does not receive it till years afterwards, he can only have simple interest upon it. **LAMBE v. ORTON** (1863), 2 New Rep. 435; 33 L. J. Ch. 81; 11 W. R. 1043.

4873. Legacy bequeathed by testator domiciled abroad—**Administration in England.**—In the administration, in an English ct., of property bequeathed by a testator domiciled in France, the interest payable on legacies given by the will is governed by the law of the country in which the estate is being administered.—**HAMILTON v. DALLAS** (1878), 38 L. T. 215; 26 W. R. 326.

D. Arrears of Interest Recoverable.

See **LIMITATION OF ACTIONS**.

Sect. 5.—*Legacies: Sub-sect. 5, E.; sub-sect. 6, A.]**E. Accretions.***4874. Dividends accrued due from death.]—**

Bequest of a specific sum in the funds, to be paid within twelve months. The sum was not transferred within the twelve months, & the exors. received the dividends accruing during that period:—*Held*: they belonged to the legatee.—*BRISTOW v. BRISTOW* (1842), 5 Beav. 289; 49 E. R. 589.

Annotation:—*Reid*, *Lee v. Pain* (1845), 4 Hare, 201.

4875. —.]—Testator bequeathed as follows:

—"The pink coupons in the pigeon-hole are for £3,000; send those to I. & S." (brokers), "and he is to pay to T. £2,500, the rest for the Archdeacon (G. for B. & E.)." Testator died on Sept. 13, 1864. Certificates for £3,000 13s. 4d. Midland Ry. stock were found. On Nov. 2, 1864, an administrator was appointed, but the stock was not sold till Nov. 22, 1865. Meanwhile a dividend had accrued:—*Held*: the gift of £2,500 to T. was a specific legacy, & T. was entitled to a share of dividend, up to the time of sale, accruing on that portion of the stock which, at the death of testator, would have been requisite to realise £2,500.—*Re JEFFEY'S TRUSTS* (1866), 1 L. R. 2 Eq. 68; 35 L. J. Ch. 426.

4876. — Discretion to convert.]—Testator

specifically bequeathed to trustees certain railway & other shares, upon trust to convert the same at their absolute discretion, & to pay the income arising from the proceeds to his daughter for life, with remainders over. Testator's property had become the subject of an administration suit, in which a decree had been made about two years previously. Some of the shares had not been converted, & the dividends thereon had, since testator's death, been paid to the tenant for life:—*Held*: the tenant for life was only entitled to the income that would have been derived from so much Consols as the moneys arising from the sale of the shares one year after testator's death would have purchased at that date, & she must account for what moneys she had received in excess of that sum.—*ANDERSON v. READ* (1874), 22 W. R. 527.

4877. — Specific gift of stocks & securities.]—

Testatrix, having under her marriage settlement a general power of appointment over a sum of £5,000, & certain funds comprised in the 1st schedule thereto, appointed that the trustees should stand possessed of the sum of £5,000, & "of such portion of the stocks & securities comprised in the 1st schedule of the said indenture as shall, with the sum of £5,000 or the securities representing the same, make up the sum of £9,000," in favour of certain appointees:—*Held*: the appointment was a specific gift of a portion of the stocks & securities, & the appointees were entitled to the interest on the whole £9,000 from the death of testatrix.—*Re MARTEN, SHAW v. MARTEN*, [1901] 1 Ch. 370; 70 L. J. Ch. 354; 85 L. T. 704; *reversd.* on other grounds, [1902] 1 Ch. 314, C. A.

Intermediate income—Contingent legacy.]—See Sub-sect. 5, B. (b), *ante*.

PART IV. SECT. 5, SUB-SECT. 5.—E.

4874 I. Dividends accrued due from death.]—A testatrix entitled to receive £2,000, bearing interest at 6s. 5s. per cent., bequeathed the sum to a trustee in trust for certain legatees, & the residue to residuary legatees:—*Held*: the interest accruing subsequent to testatrix's death should be paid to the legatees of the £2,000, & not to the residuary legatees.—*Re JACOB, M'Coy v. JACOB*, [1919] 1 L. R. 134.—*IR.*

E. — Jus accrevendi.]—Testators bequeathed £200 to plff. & his brother by name. The brother predeceased testators:—*Held*: the *jus accrevendi* took effect & plaintiff was entitled to the whole amount of the legacy together with interest on the unpaid portion from the time he made a verbal demand therefor.—*LABUSCHAGNE v. SCHOEMAN* (1915), C. P. D. 19.—*S. AF.*

h. Income from investment of special bonus.]—Testator bequeathed a legacy for life, & directed that his exors.

4878. Apportionment—Application to specific devise.]—(1) Apportionment Act, 1870 (c. 35), applies to a specific as well as to a residuary devise.

(2) Where a testator charges an annuity on land with the ordinary power of distress & entry in the event of the annuity being in arrear, the annuitant must wait for payment of the annuity until the first rent day which occurs after the day fixed by testator for payment of an instalment of the annuity, & is not entitled to require that any prior rent should be kept in hand in order to answer the instalment.—*HAASLUCK v. PEDLEY* (1874), L. R. 19 Eq. 271; 44 L. J. Ch. 143; 23 W. R. 155.

Annotations:—*As to* (1) *Follid*, *Constable v. Constable* (1879), 11 Ch. D. 681. *Reid*, *Re March, Mander v. Harris* (1884), 27 Ch. D. 166; *Re Lucas, Parish v. Hudson* (1885), 55 L. J. Ch. 101; *Re Bridger, Brompton Hospital for Consumption v. Lewis*, [1894] 1 Ch. 297; *Re Ford, Myers v. Molesworth*, [1911] 1 Ch. 455. *Generally*, *Mentid. Re Davies, Davies v. Davies* (1892), 67 L. T. 548; *Re Meredith, Stone v. Meredith* (1898), 67 L. J. Ch. 409.

4879. —.]—Apportionment Act, 1870 (c. 35), applies to every will executed before, & confirmed by a codicil executed after, its passing; & *semble*: also to every will coming into operation after its passing.

Testator, by a will executed before the passing of the above Act, bequeathed his residuary personality to trustees upon certain trusts; & he devised his real estate to trustees on certain trusts, & subject thereto, to his son for life, with remainders over in strict settlement. But he provided that his son should not take any estate under the will unless he, within a year after testator's death, executed a settlement of certain other real estate, upon limitations corresponding to those created by the will of the devised real estate. Testator gave the clear & undisposed of rents of his real estate to trustees, upon trust for the son, if he should make the settlement required of him within the year, & if not, then upon trust for the persons who would thereupon become entitled to the devised real estate. By a codicil, executed after the passing of the Act, testator made some alterations in his will, & in all other respects confirmed it. The son executed the settlement required of him within a year after testator's death:—*Held*: the rents of the devised real estate accruing due at the time of testator's death must be apportioned between the son & the persons interested in the residuary personality.—*CONSTABLE v. CONSTABLE* (1879), 11 Ch. D. 681; 48 L. J. Ch. 621; 40 L. T. 516.

Annotations:—*Consd.* *Patching v. Barnett* (1880), 43 L. T. 50. *Reid*, *Re March, Mander v. Harris* (1884), 27 Ch. D. 166; *Re Lucas, Parish v. Hudson* (1885), 55 L. T. 30; *Re Bridger, Brompton Hospital for Consumption v. Lewis*, [1894] 1 Ch. 297.

—.]—*See, generally*, **REAL PROPERTY; RENT-CHARGES & ANNUITIES; SETTLEMENTS.**

SUB-SECT. 6.—ABATEMENT.*A. In General.*

4880. General rule—Legacies must abate if estate insufficient.]—Several legacies, the first is due, & the other not till afterward, the exor. may

should not sell certain stock held by him, but hold the same as part payment of legacy & pay the annual dividends on stock to legatee. Some time after testator's death bonuses were declared on the stock & taken in new shares, held for some time, then sold & the proceeds invested by exor.:—*Held*: the legatee was entitled to the annual profits derived from the investment of the amount realised from the special bonus.—*SHORTIS v. KENT* (1877), 6 Nfld. L. R. 138.—*NFLD.*

not pay the whole legacy to the first, if there be not assets to pay the rest.—*VINTNER v. PIX* (1630), 1 Rep. Ch. 133; 21 E. R. 529.

4881. ———.]—Legatee is to accept & abate in proportion with the other legatees where the estate of testator falls short to pay the whole.—*POWELL v. STAKES* (1679), Cas. temp. Finch, 422; 23 E. R. 230.

4882. ———.]—S. seized of lands & houses in fee, by his will in writing, devised to A. lands of £100 *per annum* in fee, to be set out by his exor., & £5,000 to one kinsman, & £3,000 to another, & died. The exor. set out to A. lands for £100 *per annum*, which were worth more, & thereby the lands & houses left were not sufficient to pay the £5,000 & £3,000. The legatees exhibited their bill to avoid the setting out of the lands. The defence made against it was that the devise of the lands was a specific legacy, & consequently not to come in average with the other legacies.

But the ct. decreed, that it was not a specific legacy, but *quantitas*, & therefore if there were not sufficient, each should bear his share in the loss. ———. *WILKINSON* (1680), 2 Cas. in Ch. 25; 22 E. R. 829, L. C.

4883. ———. In absence of contrary direction by testator.—What amounts to direction.]—In case of deficiency of assets a specific legatee shall not abate in proportion with pecuniary legatees. But one pecuniary legatee shall abate in proportion with the rest, though his legacy is directed to be paid in the first place. ———. *BROWN v. ALLEN* (1681), 1 Vern. 31; 23 E. R. 285, L. C.

Annotations:—*Consd.* *Lewin v. Lewin* (1752), 2 Ves. Sen. 415. *Reid.* *Blower v. Morret* (1752), 2 Ves. Sen. 420; *Miller v. Huddleston* (1851), 3 Mac. & G. 513.

4884. ———.]—One having two sons & a daughter, by will gives to each £2,000, payable at twenty-one, provided if assets fall short to pay the legacies, the abatement shall be borne out of the sons' legacies. Testator leaves assets to pay, which the extrix. wastes; the daughter's legacy shall have the preference.—*MAIRIE v. EVANS* (1720), 1 P. Wms. 608; 2 Eq. Cas. Abr. 556; 21 E. R. 561, L. C.

4885. ———.]—On a deficiency of assets:—*Held*: on the intention of testator, they should not abate in proportion with the general legacies.—*LEWIN v. LEWIN* (1752), 2 Ves. Sen. 415; 28 E. R. 265, L. C.

Annotations:—*Expld.* *Blower v. Morret* (1752), 2 Ves. Sen. 420. *Consd.* *Miller v. Huddleston* (1851), 3 Mac. & G. 513; *Re Hardy, Wells v. Borwick* (1881), 17 Ch. D. 798. *Reid.* *Creed v. Creed* (1844), 11 Cl. & Fin. 491; *Paget v. Hulsh* (1863), 1 Hem. & M. 663.

4886. ———.]—(1) Testator gave his wife a general legacy "to be paid to her immediately after my decease out of the first money belonging to me."

Pecuniary legacies abate in proportion, notwithstanding direction in the will that they are to be paid "in the first place," or a direction as to the time of payment.

(2) If, however, an intention that any legacies are to be paid in full is to be collected, or reasonably inferred, it will be otherwise, as where a legacy is meant as a purchase of dower to which the party

is entitled.—*BLOWER v. MORRET* (1752), 2 Ves. Sen. 420; 28 E. R. 268, L. C.

Annotations:—*As to* (1) *N.F.* *Re Hardy, Wells v. Borwick* (1881), 17 Ch. D. 798. *Fold.* *Cazonovo v. Cazonovo* (1889), 61 L. T. 113; *Re Schweder's Estate, Oppenheim v. Schweder*, (1891) 3 Ch. 44. *As to* (2) *Consd.* *Davenport v. Fletcher* (1754), Amb. 244; *Miller v. Huddleston* (1851), 3 Mac. & G. 513. *Reid.* *Heath v. Dundy* (1826), 1 Russ. 343; *Davies v. Bush* (1831), You. 341; *Henniker v. A.-G.* (1852), 8 Exch. 257; *Stahschmidt v. Lett* (1853), 1 Sm. & G. 421; *Stelfox v. Surden* (1859), John. 284; *Re Greenwood, Greenwood v. Greenwood*, (1892) 2 Ch. 295; *Re Wedmore, Wedmore v. Wedmore* (1907), 76 L. J. Ch. 486; *Re Whitehead, Whitehead v. Street*, (1913) 2 Ch. 56. *Generally.* *Mentd.* *Re Lawley, Zalace v. Lawley* (1902), 51 W. R. 150.

4887. ———.]—Unless a contrary intent appear upon the will, it must be presumed that a testator considers that he has property sufficient to answer all his legacies; & that he has an equal intention that all should be equally paid. This presumption of equality is not to be repelled by ambiguous expressions, but must prevail, unless there be clear intent to the contrary. The expressions, "In the first place, I give to A., then to B., then to C.," are not evidence of such intent, for they mark only the order in which it occurred to testator to name the objects of his bounty. A gift to A., payable at one month after my decease, to B. at six months, & to C. at twelve months, are not evidence of such intent; for, although to be paid at different time, the presumed intention remains that they are all equally to be paid at those times (*LEACH, V.-C.*). ———. *BREXTON v. BORTH* (1819), 1 Madd. 161; 56 E. R. 607.

Annotations:—*Consd.* *Thwaites v. Foreman* (1844), 1 Coll. 408; *Re Hardy, Wells v. Borwick* (1881), 17 Ch. D. 798. *Reid.* *Ashburnham v. Ashburnham* (1848), 12 Jur. 209; *Miller v. Huddleston* (1851), 3 Mac. & G. 513; *Coore v. Todd* (1857), 7 De G. M. & G. 320; *Re Wiltshire's Estate* (1859), 6 Jur. N. S. 190; *Whitcomb v. Insole* (1862), 7 L. T. 409; *Re Harris, Harris v. Harris*, (1912) 2 Ch. 241. *Mentd.* *Rawson v. McCausland* (1873), 22 W. R. 145.

4888. ———.]—*Primâ facie*, a testator must be presumed to intend that all his legacies should be equally paid, & the *onus* is upon those who contend for a priority, to show that testator meant to give a preference to a particular legatee.

Testator gave £1,000 to trustees, upon trust to pay the interest to his wife during her life, & after her decease he declared his will to be, that the £1,000 should become part of his personal estate, & applicable to the trusts or payment of the legacies given by his will; & he gave a legacy of £500 in trust for M. & his wife, in nearly the same words: *Held*: a priority was given to these two legacies.—*BROWN v. BROWN* (1836), 1 Keen, 275; 48 E. R. 312.

Annotations:—*Consd.* *Miller v. Huddleston* (1851), 3 Mac. & G. 513; *Re Hardy, Wells v. Borwick* (1881), 17 Ch. D. 798.

4889. ———.]—*JOHNSON v. JOHNSON*, No. 4551, ante.

4890. ———.]—Testator gave his residuary estate to trustees, upon trust, in the first place, to pay two debts due from him on his covenants, & his funeral & testamentary expenses; & then to set apart & invest a sufficient sum to meet some annuities given by his will; & then, after such investment, to pay certain legacies. Testator's estate being insufficient to pay all the

legacies.—*MILLER v. MILLER'S EX-ECUTORS* (1885), 4 S. C. 39.—S. AF.

4893 III. ———.]—The general rule is that all pecuniary legacies abate in proportion to their amount, & to rebut this presumption of testator's intention there must be clear indications in the will.—*MOORE'S EX-ECUTORS v. MOORE'S HEIRS & LEGATEES* (1892), 9 S. C. 230; 2 C. T. R. 175.—S. AF.

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PART IV. SECT. 5, SUB-SECT. 6. —A.

4893 I. (General rule.—*Legacies must abate if estate insufficient.—In absence of contrary direction by testator.*—Where there is a deficiency of assets of an estate to pay all the bequests in full, the *onus* is on the parties claiming priority to show conclusively from the

will an intention that in case of abatement of legacies a distinction should be made in their favour.—*Re WAIDELL'S ESTATE* (1896), 29 N. S. R. (17 E. & G.) 19.—CAN.

4893 II. ———.]—In the absence of any contrary intention, apparent on the face of the will, every legacy must abate in proportion, if the estate is insufficient to satisfy all the

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annuities & legacies in full:—*Held*: the annuitants were not entitled to priority, but the annuities & legacies must all abate ratably.—*THWAITES v. FOREMAN* (1846), 15 L. J. Ch. 397; 7 L. T. O. S. 297; 10 Jur. 483, L. C.

Annotations:—*Consd. Miller v. Huddleston* (1851), 3 Mac. & G. 513; *Gyett v. Williams* (1862), 2 John. & H. 429; *Re Hardy, Wells v. Borwick* (1881), 17 Ch. D. 798; *Re Harris, Harris v. Harris*, [1912] 2 Ch. 241. *Reid. Coore v. Todd* (1857), 7 De G. M. & G. 520; *Re Wiltshire's Estate* (1859), 6 Jur. N. S. 190.

4891. ————.]—Testator, by his will, bequeathed the residue of his real & personal estate to his widow & three other persons as trustees, on trust to sell & invest in Govt. securities, & out of the dividends to pay an annuity of £500 to his daughter for life, an annuity of £100 to C. for life, & on his death an annuity of £50 to the son of C. for life, & the remainder of the dividends to testator's widow for her life: testator directed that, after the death of the widow, if the daughter should be then living & should have no child then living, the trustees should pay her a further annuity of £500, that if testator's daughter should have a child living at the death of the widow the two annuities of £500 should cease, & the trustees raise & invest £20,000 & pay the dividends to the daughter for her life with remainder to her children, that the trustees should also pay £5,000 to such person or persons as the widow should by will appoint, & that the widow should also have power to dispose of £1,000, either by gift in her lifetime or by will, among her three co-trustees in such proportions as she should think fit; & testator named certain persons as residuary legatees. There being a deficiency of assets to pay the two annuities of £500, & also the legacies of £5,000 & £1,000:—*Held*: (1) the annuities were not entitled to priority over the legacies, the terms of the will affording no proof that testator intended there should be such priority; (2) the annuities were not payable out of the corpus of testator's estate.

(3) The rule is, that in cases of deficiency of assets all annuities & legacies abate ratably, & that the *onus* lies on the party seeking priority to make out clearly & conclusively that such priority was intended.—*MILLER v. HUDDLESTONE* (1851), 3 Mac. & G. 513; 21 L. J. Ch. 1; 18 L. T. O. S. 147; 15 Jur. 1043; 42 E. R. 358, L. C.

Annotations:—*As to* (1) *Consd. Street v. Street* (1863), 2 New Rep. 56. *Reid. Hyam v. Sutton* (1854), 19 Beav. 556. *As to* (2) *Reid. Birch v. Shorrott* (1867), 2 Ch. App. 644; *Carmichael v. Geo* (1880), 5 App. Cas. 588; *Re Taylor, Hilsley v. Randall* (1884), 50 L. T. 717. *Generally, Mendt. Rawson v. McCausland* (1873), 22 W. R. 145; *Stokes v. Bridgman* (1878), 47 L. J. Ch. 759.

4892. ————.]—Testatrix, by will, "out of the residue of her property," gave a legacy to A. By a codicil she directed her exors. "out of the residue of her estate in case there should be sufficient," to invest a legacy for B. The residue being deficient:—*Held*: these legacies must abate *pari passu*.—*EAKESTAFF v. AUSTIN* (1854), 10 Beav. 591; 52 E. R. 480.

Annotations:—*Mendt. Jull v. Jacobs* (1876), 3 Ch. D. 703; *Re Love, Green v. Tribe* (1878), 47 L. J. Ch. 783; *Re Johnson, Danily v. Johnson* (1893), 68 L. T. 20; *Aplin v. Stone* (1904), 90 L. T. 284; *Re Young, Fraser v. Young*, [1913] 1 Ch. 273.

4893. ————.]—Testator is presumed to consider that there will be a sufficiency of assets to provide for annuities & legacies; & *prima facie* to include that they should be paid equally. It is not sufficient to rebut this presumption that legacies are given to several persons successive, with references to successive residues interposed between the gifts, or that the legacies were to be "free from any deduction whatsoever."

Therefore the ordinary rule must apply, that on a deficiency of assets all annuities & legacies abate ratably.

When there is such a deficiency of assets, annuities will be valued from the time at which the deficiency began.—*STREET v. STREET* (1863), 2 New Rep. 56; 8 L. T. 306.

4894. ————.]—Testator gave to his wife all his furniture & effects together with the sum of £500 to be paid to her immediately after his decease. He also directed his trustees to raise out of his estate the sums of £12,000 & £5,000, & invest the same & pay the interest of the £12,000 to his wife during her life, & the interest of the £5,000 to his brother & sisters during their lives, & after the death of his wife, brother, & sisters, those sums were to fall into the residue of his estate. He then gave his brother & sisters legacies of £8,000 & £2,000, & gave other smaller legacies. His estate proved insufficient for the payment in full of all the legacies:—*Held*: (1) the legacy of £500 to the wife had priority over all the other pecuniary legacies; (2) the legacies of £12,000 & £5,000 had priority over the other legacies.—*Re HARDY, WELLS v. BORWICK* (1881), 17 Ch. D. 798; 50 L. J. Ch. 241; 44 L. T. 49; 29 W. R. 834.

Annotations:—*As to* (1) *N.F. Cazenove v. Cazenove* (1889), 61 L. T. 115; *Re Schweder's Estate, Oppenheim v. Schweder*, [1891] 3 Ch. 44. *As to* (2) *Consd. Re Olivieri, Hamill v. Rusconi* (No. 2) (1912), 56 Sol. Jo. 613.

4895. ————.]—Testator by his will, gave his real & personal estate to trustees upon trust for sale & conversion, & out of the proceeds "in the first place" to pay all expenses incident to the execution of the trusts & powers of his will & his debts & funeral & testamentary expenses; & "in the next place" to pay a legacy of £1,000 to each of nine named nieces, with a substitutional gift to their children in case any of them should die in his lifetime. He then bequeathed certain other legacies, including eleven charitable legacies, & directed that these charitable legacies "be paid exclusively out of such part of my personal estate as may lawfully be appropriated to such purposes & in preference to any other payments thereout." Testator's estate comprised real & leasehold property & impure personality:—*Held*: (1) the direction as to the payment of the charitable legacies must be read as a direction to pay them out of the whole personal estate, including leasehold property, not specifically bequeathed to the exclusion of the real estate, but in priority so far as the personal estate went, to all other payments thereout; (2) the legacies bequeathed to the nephews were not entitled to priority over the legacies bequeathed to the nieces.—*Re HARRIS, HARRIS v. HARRIS*, [1912] 2 Ch. 241; 81 L. J. Ch. 512; 106 L. T. 755.

4896. ————.]—*BURRIDGE v. BRADY*, No. 4973, *post*.

4897. ————.]—*SAYER v. SAYER* (1714), Gilb. Ch. 87; Prec. Ch. 392; 2 Vern. 688; 25 E. R. 60, L. C.

4898. ————.]—A residuary legatee, on a deficiency of assets, allowed to come in *pari passu* with the other legatees, by reason of the special circumstances of the case.—*DYCKE v. DYCKE* (1715), 1 P. Wms. 305; 24 E. R. 401, L. C.

Annotations:—*Consd. Fonnereau v. Poyntz* (1785), 1 Bro. C. C. 473; *Humphreys v. Humphreys* (1789), 2 Cox, Eq. Cas. 184; *Page v. Leapingwell* (1812), 18 Ves. 463; *Re Chadwin, Ex p. Chadwin* (1818), 3 Swan. 380. *Dodd. Baker v. Farmer* (1868), 3 Ch. App. 537. *Reid. Partington v. Carrington* (1859), 34 L. T. O. S. 69; *Miller v. Huddleston* (1855), 16 W. R. 478.

4899. ————.]—*ANON.* (1723), No. 4901, *post*.

4900. — — —.]—Legacies, & an annuity being likewise given out of the personal estate, & the personal estate not being sufficient, the legacies as well as the annuities were to abate in proportion.—*ROGERS v. MILLICENT* (1780), 2 Dick. 570; 21 E. R. 392, L. C.

Annotations.—*Held*. *Creed v. Creed* (1844), 11 Cl. & Fin. 491; *Paget v. Hulsh* (1863), 1 Hem. & M. 663.

4901. — — —.]—Testator directed that certain legacies & annuities should be paid as soon as the realisation of his estate would admit, & that if there should not be sufficient assets the several legacies should be proportionately reduced:—*Held*: on a question of abatement arising, that both annuities & legacies must abate proportionately.—*STUTELY v. KEPP* (1869), 20 L. T. 60; 17 W. R. 393.

4902. — — —.]—Testator bequeathed to his son £10,000, & directed that as regards any money due to him at his decease from that legatee the same should, but not to an amount exceeding £10,000, be set off & retained in or towards satisfaction of the legacy. The legatee was indebted to testator's estate, & the exors. obtained judgment against him for £26,398 12s. 6d., after giving credit for the amount of the legacy. The legatee became bkpt., & testator's estate proved insufficient to pay the legacies in full. The exors. proved in the bkpy. for £5,356 1s. 2d., the difference between the amount of the legacy of £10,000, with which bkpt. had been credited, & £4,613 18s. 10d. the proportion due on abatement:—*Held*: the legacy was not specific, & was subject to abatement, & the proof must be admitted.—*Re RICHARDSON, Ex p. THOMPSON v. HUTTON* (1902), 86 L. T. 25.

4903. — — —.]—Testatrix gave, by her will dated Mar. 16, 1911, to her sister a sum of £1,000, but should the sister predecease her to the personal representative of the sister, "as part of her personal estate." The sister who made her will in 1901, died in testatrix's lifetime, shortly after testatrix had made her will. The sister bequeathed a sum of money in trust to pay the income to A. during her life, & after her death in trust for B. absolutely. The sister's estate was insufficient to pay the legacies bequeathed by her in full. B. died in 1913 & testatrix died in 1914:—*Held*: (1) the £1,000 must be applied in making up the legacies bequeathed by the sister which had abated on account of the insufficiency of her estate, but the legal personal representative of B. he having predeceased testatrix, could not take any part of the £1,000 to make up his legacy, & the estate of the sister was relieved to that extent, subject to the life interest of A.; (2) the sister's residuary legatee could take no part of the £1,000 until the legacies, other than that to B. had been paid in full.—*Re BOSANQUET, UNWIN v. PETRE* (1915), 85 L. J. Ch. 14; 113 L. T. 152.

4904. Immediate legacy to testator's wife.]—*BLOWER v. MORRET*, No. 4886, *ante*.

4905. — — —.]—*Re HARDY, WELLS v. BORWICK*, No. 4891, *ante*.

4906. — — —.]—Where the estate of testator is insufficient to pay all legacies in full, a legacy given to his wife to be paid to her immediately after his death, for her immediate requirements, is liable to abatement as well as the others.—*CAZENOVE v. CAZENOVE* (1889), 61 L. T. 115.

4907. — — —.]—Where the personal estate is insufficient to pay all the legacies in full, a legacy to testator's wife for her immediate requirements is liable to abatement, though directed to be paid within three months after testator's decease.—*Re SCHWEDER'S ESTATE, OPPENHEIM v. SCHWEDER*,

[1801] 3 Ch. 44; 60 L. J. Ch. 656; 65 L. T. 64; 30 W. R. 588.

4908. Gift of death duty—Legacy duty payable on specific legacy.]—A gift of the legacy duty payable on a specific legacy ranks as a pecuniary legacy, & in the case of a deficiency of assets must abate along with other pecuniary legacies.—*FARRER v. ST. CATHARINE'S COLLEGE, CAMBRIDGE* (1873), L. R. 16 Eq. 19; 42 L. J. Ch. 809; 28 L. T. 800, L. C.

Annotations.—*Consd.* *Re Turnbull, Skipper v. Wade*, [1905] 1 Ch. 726. *Mentd.* *Burton v. Newbery* (1875), 1 Ch. D. 234; *Green v. Tribe* (1878), 9 Ch. D. 231; *Follett v. Pettman* (1883), 23 Ch. D. 337; *Re Yates, Singleton v. Povah* (1922), 128 L. T. 619.

4909. — — — Settlement estate duty payable on pecuniary legacy.]—(1) Testatrix, who made her will in 1893 & died in 1903, bequeathed numerous pecuniary legacies & directed that all the legacies should be paid free from duty. Her estate was insufficient to pay all the legacies & duties in full:—*Held*: the legacy duty payable on each legacy must be treated as an additional legacy & be added to the legacy for the purposes of abatement.

(2) Testatrix by her will settled one of the legacies on certain trusts:—*Held*: the direction to pay "free from duty" included the settlement estate duty, which must, like the legacy duty, be treated as an additional legacy & be added to the legacy for the purposes of abatement. *Re TURNBULL, SKIPPER v. WADE*, [1905] 1 Ch. 726; 74 L. J. Ch. 438; 53 W. R. 440; 49 Sol. Jo. 417.

Annotation.—*As to* (2) *Consd.* *Re Snape, Eam v. Phillips*, [1915] 2 Ch. 179.

4910. Gift of profit costs of solicitor appointed executor.]—Where the estate of testator is solvent, but is insufficient to pay the legacies in full, the profit costs of a solr. given to him by the will of which he is appointed exor. & trustee do not take priority over the other legacies, but must abate proportionally. *Re BROWN, WACE v. SMITH* (1918), 62 Sol. Jo. 487.

4911. Effect of appropriation.]—One of several exors. whilst testator's assets were sufficient for payment of his debts & the several legacies given by his will, which were a charge on his real estate, appropriated two sums in favour of two legacies, & afterwards, becoming bkpt., was found a defaulter to testator's estate in a considerable sum of money in respect of assets wasted by him. A bill was afterwards filed by one of the residuary legatees against the several other parties interested in testator's estate & effects, seeking the administration thereof, but containing no prayer for a direction that the legatees who have received their legacies in full should proportionally abate the same. The master, on reference to him, had, by his report, which had been duly confirmed, found that the two legacies in question had been appropriated by the exor.:—*Held*: the two legatees whose legacies had been appropriated, could not be ordered to contribute in respect of the deficiency of testator's estate to answer the demands upon it. The bkpt. exor. was ordered to be paid his ordinary costs incurred since the date of his bkpy.; his assignees were dismissed from the suit without costs. *Knight v. Knight* (1816), 15 L. J. Ch. 363.

— — —.]—*See, generally*, Part V., Sect. 5, sub-sect. 4, *post*.

4912. Effect of subsequent lapse—One of several legacies—Whether legatees or residue legatees benefit.]—E. L., by will, gave to trustees £1,000 upon trust for A. & B. for life successively, with remainder for the children of B. absolutely; but in case all B.'s children should die before attaining the age of twenty-one, he directed that the £1,000

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& all securities, should become part of his residuary estate. All the residue he gave in trust for B. & the children of L. equally. By codicil he gave one pecuniary legacy, & declared that in case his personal estate at the time of his decease should be insufficient to pay all the legacies in full, they should abate proportionally. The personal estate was insufficient, & the trustees set apart £598 to answer the £1,000. A. & B. having died, the latter without issue, the trustees appropriated the £598 for the benefit of the residuary legatees:—*Held*: the fund must be paid to the legatees whose legacies had abated.—*Re* LYNE'S ESTATE, SANDS v. LYNE (1869), L. R. 8 Eq. 482; 17 W. R. 840.

*B. Annuities.**See, further, RENTCHARGES & ANNUITIES.*

4913. General rule—Annuities must abate proportionably if estate insufficient.—Where a testator bequeathed to his widow two annuities one payable to her so long as she should continue his widow provided she should not permanently quit England before her daughter's marriage, & the other payable to her generally for life, & the assets were insufficient to pay the annuities & legacies in full, the ct. ordered the annuities to be valued & to abate proportionably with the legacies, & directed the amount of the apportionment, in respect of the former of the annuities, to be laid out in the purchase of a govt. annuity, & the amount of the apportionment of the latter of the annuities to be paid out to the annuitant.—*CARR v. INGLEBY* (1831), 1 De G. & Sm. 362; 63 E. R. 1105.

Annotations:—*N.F. Re* Sinclair, Allen v. Sinclair, Hodgkins v. Sinclair, [1897] 1 Ch. 921. *Apld. Re* Dempster, Borthwick v. Lovell, [1915] 1 Ch. 795.

4914. ———.]—Testator, after giving pecuniary legacies which had priority & were provided for, gave the residue of his property upon trust to pay the income of eight specified sums to eight persons respectively for life, each capital sum on the death of each of four of the legatees to fall into the ultimate residue, the other four sums being settled. The estate was insufficient to provide the eight sums:—*Held*: (1) the four legatees, the capital of whose legacies was at their respective deaths to fall into residue, ought to be treated as annuitants; (2) their annuities & the other four legacies ought to be put on a level & abate ratably; (3) the annuities must be valued as at a year from testator's death & the four amounts so ascertained must be treated as pecuniary legacies, & each of those amounts & of the other four legacies must bear its ratable proportion of the total abatement.—*Re* RICHARDSON, RICHARDSON v. RICHARDSON, [1915] 1 Ch. 353; 84 L. J. Ch. 438; 112 L. T. 554.

4915. Right of annuitant to proportionate part of capital value of annuity—Defeasible annuity.—*CARR v. INGLEBY*, No. 4913, *ante*.

4916. ———.]—Where testator gave an estate in trust for certain persons, & provided that the share of each should be subject to the payment of an annuity to R. during his life:—*Held*: the annuities were given out of the property itself, & not merely out of the income.—*GRATRIX v.*

CHAMBERS (1860), 2 Giff. 321; 7 Jur. N. S. 960; 66 E. R. 134.

Annotation:—*Re* Sinclair, Allen v. Sinclair, Hodgkins v. Sinclair, [1897] 1 Ch. 921.

4917. ———.]—An annuity payable to one for life or until he should do or suffer some act whereby the annuity or any part thereof if belonging to him absolutely would become vested in some other person was secured by deed of covenant. The estate of the covenantor was insufficient for payment of the annuity in full, & in an administration action, the annuity was valued & was represented by a fund in court:—*Held*: the whole fund ought to be paid to the annuitant.—*Re* SINCLAIR, ALLEN v. SINCLAIR, HODGKINS v. SINCLAIR, [1897] 1 Ch. 921; 66 L. J. Ch. 514; 76 L. T. 452; 45 W. R. 596.

Annotations:—*Consd. Re* Cottrell, Buckland v. Beddingfield, [1910] 1 Ch. 402. *Dist. Re* Dempster, Borthwick v. Lovell, [1915] 1 Ch. 795.

4918. ———.]—By a will certain pecuniary legacies were given to relations, & two annuities were given to two ex-servants of testatrix, who directed that her trustees should provide for the annuities by setting aside & appropriating a portion of her estate sufficient to answer them by the income thereof; that until such appropriation the annuities should be paid out of the residuary estate; & that upon cesser of an annuity a proportion of the capital so set aside & appropriated should sink into & form part of her residuary estate. She also declared that neither annuitant should be allowed to have the value of the annuity in lieu thereof, & that if the annuitant should do or suffer any act or thing whereby, the annuity should be assigned, charged, or incumbered, the annuity should thenceforth cease to be payable. She gave her residuary estate in trust for other persons. The estate was sufficient to pay all the pecuniary legacies in full & to provide sums enough to purchase annuities of the amounts given by the will, but was not sufficient to pay the legacies in full & to provide the two funds sufficient by their income to pay the annuities in full:—*Held*: (1) the declaration as to cesser of the annuity on assignment, charge or incumbrance was not repugnant to the previous gift of the annuities, but that there was a good gift over on such an event happening, to the residuary legatees; (2) sums sufficient to buy annuities of the amounts mentioned in the will must be set aside; (3) the annuitants, having regard to the fact that their annuities were determinable, were not entitled to payment of the sums set aside, but that those sums must be invested by the trustees in the purchase of annuities to be paid to the annuitants for their lives or until they should assign, charge, or incumber them.—*Re* DEMPSTER, BORTHWICK v. LOVELL, [1915] 1 Ch. 795; 84 L. J. Ch. 597; 112 L. T. 1124.

4919. ———.]—Form of decree where an annuity abates by reason of deficiency of assets. Amount of abated valuation ordered to be paid to representatives of deceased annuitants.—*LONG v. HUGHES* (1831), 1 De G. & Sm. 364; 7 L. J. O. S. Ch. 105; 63 E. R. 1106.

Annotations:—*Apld. Wroughton v. Colquhoun* (1847), 1 De G. & Sm. 357. *Consd. Todd v. Bielby* (1859), 27 Beav. 353. *Apld. Re* Ross, Ashton v. Ross, [1900] 1 Ch. 162.

4920. ———.]—Where testator's effects are insufficient to satisfy an annuity bequeathed by the

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k. General rule—Mode of valuation.—Testator bequeathed two annuities, one of which was payable to testator's widow during her life while

she remained a widow, & the other payable to the annuitant for life. The estate was insufficient to pay the two annuities in full:—*Held*: the value should be ascertained as if the annuity were a life annuity, & after the amount

representing such value had been ratably abated, it should be invested in the purchase of a life annuity to be paid to the widow until re-marriage.—*Re* RICHARDSON, MAHONY v. TREACY, [1915] 1 I. R. 39.—*IR.*

will & the pecuniary legacies:—*Held*: (1) the annuity ought to be valued, & that the annuitant was entitled at once to the amount of the valuation, subject to an abatement in proportion to the abatement of the pecuniary legacies; (2) although the annuitant died before the payment of the annuity in full would have equalled the abated amount of the valuation, the other legatees would have no claim to the surplus of that amount.—*WROUGHTON v. COLQUHOUN* (1847), 1 De G. & Sm. 357; 11 Jur. 940; 63 E. R. 1103.

Annotations:—As to (1) *Apld.* *Daniell v. Daniell* (1849), 3 De G. & Sm. 337. *Consd.* *Todd v. Bielby* (1859), 27 Beav. 353. *Distd.* *Gratrix v. Chambers* (1860) 2 Giff. 321. *N.F.* *Re Edwards, Ex p. Shand* (1867), 16 L. T. 208. *Apld.* *Re Sinclair, Allen v. Sinclair, Hodgkins v. Sinclair*, [1897] 1 Ch. 921. *Reid.* *Re Ross, Ashton v. Ross* (1899), 69 L. J. Ch. 192; *Re Robbins, Robbins v. Legge*, [1906] 2 Ch. 648; *Re Cottrell, Buckland v. Beddingfield*, [1910] 1 Ch. 402.

4921. —[.]—Testator bequeathed an annuity to three sisters, & the survivors & survivor of their lives & the life of the survivor, with a gift to the survivor of the corpus of the fund, from the interest whereof the annuity was payable. The fund set apart to answer the annuity was improperly sold out by the surviving trustee immediately after the death of one of the annuitants, & in consequence thereof the annuity fell into arrear; but a fund, less in amount than the original fund, afterwards became available:—*Held*: the survivor was entitled to a ratable proportion of this fund, in respect not only of the arrears of the annuity which became due during the joint lives of herself & her sister, but also of the arrears of the annuity which became due after her sister's death up to the time of her own decease, as well as of the corpus to which she became entitled as the survivor.—*INNES v. MITCHELL* (1817), 2 Ph. 346; 16 L. J. Ch. 415; 41 E. R. 976, L. C.

Annotations:—*Consd.* *Street v. Street* (1863), 2 New Rep. 56. *Reid.* *Miner v. Baldwin* (1853), 1 Sm. & G. 522; *Re Sinclair, Allen v. Sinclair, Hodgkins v. Sinclair*, [1897] 1 Ch. 921.

4922. —[.]—Testator directed his exors. to stand possessed of his personal estate, upon trust to invest a sufficient portion thereof in the funds to produce an annuity of £2 per week, to be paid to one of his sons, & that after his son's decease the sum to be so invested should fall into the residue. He directed his exors., as soon as his youngest child should attain twenty-one, to divide his remaining estate amongst all his children, except the annuitant, equally, & directed that, upon the decease of the annuitant, the sum invested to produce his annuity should be divided in like manner among all testator's other children who should then be living & the issue of such as should be dead, share & share alike. The income of the residuary estate was insufficient to pay the annuity:—*Held*: the annuitant was entitled to have the deficiency made up out of the capital, but not to have the annuity value & the amount of the valuation paid to him.—*WRIGHT v. CALLENDER* (1852), 2 De G. M. & G. 652; 21 L. J. Ch. 787; 19 L. T. O. S. 308; 16 Jur. 647; 42 E. R. 1027, L. J.

Annotations:—*Consd.* *Hindle v. Taylor* (1855), 20 Beav. 109. *Fold.* *Ingelman v. Worthington* (1855), 25 L. J. Ch. 46. *Distd.* *Baker v. Baker* (1858), 6 H. L. Cas. 616. *Consd.* *Upton v. Vanner* (1861), 1 Drew & Sm. 594. *Apld.* *Brayne v. Rees* (1866), 15 L. T. 349. *Consd.* *Michell v. Wilton* (1875), L. R. 20 Eq. 269; *Gee v. Mahood* (1878), 9 Ch. D. 151. *Apld.* *Carmichael v. Gee* (1880), 5 App. Cas. 588; *Re Cottrell, Buckland v. Beddingfield*, [1910] 1 Ch. 402. *Reid.* *Croly v. Weld* (1853), 3 De G. M. & G. 993; *Miner v. Baldwin* (1853), 1 Sm. & G. 522; *Hickman v. Upsall* (1860), 6 Jur. N. S. 367; *Re Dempster, Borthwick v. Lovell*, [1915] 1 Ch. 795.

4923. — *Effect of restraint on anticipation.*—In the final distribution of an insufficient estate

the dividend on the capital value of an annuity bequeathed to a married woman, with restraint on anticipation, was ordered to be laid out in the purchase of an annuity for her. Before the annuity was purchased she died:—*Held*: the capital belonged to her estate.—*Re Ross, ASHTON v. Ross*, [1900] 1 Ch. 162; 69 L. J. Ch. 192; 81 L. T. 578; 48 W. R. 261.

Annotation:—*Reid.* *Re Dempster, Borthwick v. Lovell*, [1915] 1 Ch. 795.

4924. —[.]—Testatrix by her will, after giving certain pecuniary legacies, bequeathed to her husband an annuity of £1 a week during his life, & directed her trustees to appropriate & set apart & invest such sum of money as would when invested produce by the income thereof an annual sum equal to the amount of the annuity & to apply the income or, if necessary, the corpus of the fund so appropriated in payment of the annuity, which sum should on the dropping of the annuity fall into & form part of her residuary trust estate; & she devised & bequeathed the residue of her real & personal estate to her trustees upon trust for sale & conversion & payment of her debts, funeral & testamentary expenses, & legacies, & to invest the moneys which should remain in certain investments, & to hold such investments upon certain trusts for the benefit of her son. The estate of testator was insufficient to pay the pecuniary legacies & to set apart a sum sufficient to answer the annuity to the husband in full. It was, however, sufficient, to pay the pecuniary legacies & the value of the annuity as at the date of her death:—*Held*: the proper course for the trustees to adopt was to value the annuity as at the date of the death of testatrix according to the govt. scale & to pay the amount of such valuation to the annuitant or invest it in the purchase of an annuity, as he should choose, & to pay the pecuniary legacies in full.—*Re COTTRELL, BUCKLAND v. BEDDINGFIELD*, [1910] 1 Ch. 402; 79 L. J. Ch. 189; 102 L. T. 157.

Annotations:—*Apld.* *Re Dempster, Borthwick v. Lovell*, [1915] 1 Ch. 795. *Reid.* *Re Richardson, Richardson v. Richardson*, [1915] 1 Ch. 353.

4925. Mode of valuation—Annuitants dead at period of division.—When the corpus of an estate charged by will with annuities is insufficient to pay the arrears, it will be divided between the annuitants in proportion to the value of their respective annuities. If all the annuitants be living at the period of the division, the value must be ascertained as at the death of testator. If they be all dead the values must be taken to be the respective amounts of arrears; but if some be dead & others living, the value, as to the former, will be taken at the amount of their arrears, & as to the latter, at the amount of their arrears added to the calculated value of the future payments.—*TODD v. BIELBY* (1859), 27 Beav. 353; 54 E. R. 138.

Annotations:—*Fold.* *Re Edwards, Ex p. Shand* (1867), 16 L. T. 208; *Potts v. Smith* (1869), L. R. 8 Eq. 683. *Consd.* *Re Metcalf, Metcalf v. Blencowe*, [1903] 2 Ch. 424. *Reid.* *Re Tucker, Tucker v. Tucker*, [1893] 2 Ch. 323; *Re Sinclair, Allen v. Sinclair, Hodgkins v. Sinclair*, [1897] 1 Ch. 921.

4926. —[.]—In the course of administration of an insufficient estate, there being a legacy, several life annuities, & an annuity to A. for life, with remainder to B. for life; before further consideration of the cause some of the annuitants had died, & A. had died, so that B.'s reversionary annuity had fallen into possession:—*Held*: in determining the value of the annuities for the purpose of fixing the proportions in which they were abate, regard must be had to the events which

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had happened up to the then present time; consequently that the value of B.'s annuity must be taken to be the present value of the annuity added to the amount of arrears accrued due to B. since the death of A.—*POTTS v. SMITH* (1869), 1 L. R. 8 Eq. 683; 39 L. J. Ch. 131; 21 L. T. 54; 17 W. R. 1083.

*Annotation:—*Consd. *Re Metcalf, Metcalf v. Blencowe*, [1903] 2 Ch. 424.

4927. Right of annuitant to have deficiency made good out of corpus.—Testator having directed his exors. to lay out in what government security they pleased, as much money as would produce a certain annual interest, & having given that annual interest to his wife during her life, in case she did not marry again, the exors. invested in the 5 per cents. a sum which yielded dividends exactly equal to the specified income; those dividends being afterwards diminished by the conversion of the 5 per cents. into 4 per cents.:—*Held*: the widow was entitled to have the deficiency made good, either by the sale from time to time of portions of the appropriated stock, or out of any other part of the residue which could be made available.—*MAY v. BENNETT* (1826), 1 Russ. 370; 38 E. R. 144.

*Annotations:—*Consd. *Kendall v. Russell* (1830), 3 Sim. 424; *Arundell v. Arundell* (1833), Coop. temp. Brough. 139. *Apld.* *Wright v. Callender* (1852), 2 De G. M. & G. 652; *Mills v. Drewitt* (1855), 20 Beav. 632. *Distd.* *Hindle v. Taylor* (1855), 20 Beav. 109; *Baker v. Baker* (1858), 6 H. L. Cas. 616. *Apld.* *Brayne v. Rees* (1866), 15 L. T. 349; *Carmichael v. Gee* (1880), 5 App. Cas. 588. *Refd.* *Innes v. Mitchell* (1846), 1 Ph. 710.

4928. ——*WRIGHT v. CALLENDER*, No. 4922, ante.

4929. ——*Annuitants not payable out of corpus.*—*HINDLE v. TAYLOR* (1855), 20 Beav. 105; 26 L. T. O. S. 81; 1 Jur. N. S. 1031 n.; 52 E. R. 543; *reversed* on other grounds, 5 De G. M. & G. 577, 1 L. C.

*Annotations:—**Refd.* *Cooper v. Macdonald* (1873), L. R. 16 Eq. 258; *Re Bristol, Grey v. Grey*, [1897] 1 Ch. 946. *Mentd.* *Boyd v. Boyd* (1863), 2 New Rep. 486; *Leigh v. Leigh* (1870), 22 L. T. 837; *Trew v. Perpetual Trustee Co.*, [1895] A. C. 264; *Re Beaumont, Bradshaw v. Packer*, [1913] 1 Ch. 325; *Re Wood, Wodehouse v. Wood*, [1913] 2 Ch. 674; *Re Arnell, Re Edwards, Prickett v. Prickett*, [1924] 1 Ch. 473.

4930. ——(1) Testator directed the investment in the funds of sufficient to produce £40 a year, & the dividends to be paid to his wife for life, & he bequeathed his general residue & the fund invested, after her death, to other persons. An investment was made in 5 per cents., which were reduced & produced less than £40:—*Held*: the widow was entitled to have the deficiency made good out of the corpus of the fund.

(2) The widow had received less than £40 for thirty-three years:—*Held*: there had been no laches or acquiescence, the question now relating to the respective rights of parties to an existing trust fund.—*MILLS v. DREWITT* (1855), 20 Beav. 632; 25 L. T. O. S. 203; 1 Jur. N. S. 816; 3 W. R. 626; 52 E. R. 748.

*Annotations:—*As to (1) *Distd.* *Earle v. Bellingham* (1857), 24 Beav. 445. *Consd.* *Gee v. Mahood* (1878), 9 Ch. D. 151. *Refd.* *Re Baker, Baker v. Baker* (1855), 7 De G. M. & G. 681; *Phillips v. Gutteridge* (1862), 7 L. T. 402.

4931. ——*Testator directed his brother A., whom he appointed his exor. & trustee, to get in his estate to stand possessed of the produce thereof on trust, to raise thereout & invest in the stocks or upon mtge. such a sum of money as that, when invested, the dividends should "realise the clear annual income or sum of £200," & to pay to "my wife such dividends, interest, or annual income," etc., for her life or widowhood. On her death or second marriage, A. was to stand possessed "of*

the said principal or trust money, & the stocks upon which the share shall be invested," in trust for himself & the other brothers & sisters of testator; & as to the residue, "after raising thereout the money sufficient to realise the annuity for my said wife," A. was to stand possessed thereof on similar trusts; provided that if testator should die leaving children, the trusts for his brothers & sisters were to be null, & the children were to take the whole. The estate when got in & invested did not produce £200 a year:—Held: the widow was not entitled to have the deficiency made good out of the corpus of the estate. A certain portion of the fund itself had, under the order of the ct. below, been sold to make good the deficiency; the House, on reversing the order, directed the widow to replace that portion.—*Re BAKER'S ESTATE, BAKER v. BAKER* (1858), 6 H. L. Cas. 616; 27 L. J. Ch. 417; 31 L. T. O. S. 62; 4 Jur. N. S. 491; 6 W. R. 410; 10 E. R. 1436, H. L.

*Annotations:—**Distd.* *Bright v. Larcher* (1858), 3 De G. & J. 148. *Consd.* *Hickman v. Upsall* (1860), 2 Giff. 124. *Apld.* *Tarbottom v. Earle* (1863), 11 W. R. 680. *Consd.* *Salvin v. Weston* (1866), 35 L. J. Ch. 552. *Apld.* *Michell v. Wilton* (1875), L. R. 20 Eq. 269. *Expld.* *Re Mason, Mason v. Robinson* (1878), 8 Ch. D. 411. *Distd.* *Carmichael v. Gee* (1880), 5 App. Cas. 588; *Re Taylor, Hilsley v. Randall* (1884), 53 L. J. Ch. 1101. *Refd.* *Stelfox v. Sugden* (1859), John. 234; *Upton v. Vanner* (1861), 1 Drew. & Sm. 394; *Perkins v. Cooke* (1862), 2 John. & H. 393; *Prowett v. Prowett* (1864), 10 L. T. 564; *Brayne v. Rees* (1866), 15 L. T. 349; *Re Tootal's Estate, Hankin v. Kilburn* (1876), 2 Ch. D. 628; *Re Howarth, Howarth v. Makinson*, [1909] 1 Ch. 485.

4932. ——*GRATRIX v. CHAMBERS*, No. 4916, ante.

4933. ——*Testator directed his trustees to invest a sum sufficient to pay £50 per annum to T., & on her marriage or death to divide the stocks, etc., from which the £50 should have been produced equally amongst his nephews & nieces. The interest on the estate was insufficient to produce £50 per annum:—Held: on the construction of the will that the deficiency could not be supplied out of the corpus.*—*TARBOTTOM v. EARLE* (1863), 11 W. R. 680.

*Annotations:—**Refd.* *Michell v. Wilton* (1875), L. R. 20 Eq. 269; *Gee v. Mahood* (1879), 48 L. J. Ch. 657.

4934. ——*Where an annuity is charged upon a fund or an estate, & the dividends arising from the fund, or the income from the estate, prove insufficient to meet the annuity, the annuitant is entitled to have the deficiency paid out of the fund, or so much of the estate sold as would be sufficient to meet the deficiency, unless the grant of the annuity can be construed as showing a contrary intention.*—*BRAYNE v. REES* (1866), 15 L. T. 349; 15 W. R. 195.

4935. ——*Testator gave the residue of his estate to trustees to pay the income for the benefit of his wife & unmarried daughters & youngest son, & directed that upon the youngest son attaining the age of twenty-one years the trustees should invest a sufficient sum to secure the receipt of the annual sum of £50, to be paid by instalments as the dividends were received, to his wife for her maintenance, & subject thereto the trustees were to divide the whole of the trust estate amongst his eight children; & on the death of his wife the amount invested to secure her the annual income of £50 was to be divided in like manner amongst his eight children. The youngest son attained twenty-one in 1872. The income arising from the whole of the estate did not amount to £50 a year:—Held: the widow was not entitled to be paid any arrears out of the corpus.*—*MICHELL v. WILTON* (1875), L. R. 20 Eq. 269; 44 L. J. Ch. 490; 23 W. R. 789.

4936. —.]—Testator appointed his wife & two other persons his trustees & exors.; he empowered his trustees to make grants of his real estate in fee, or otherwise to sell his real & personal estate, & to stand possessed of the money arising therefrom in trust to invest the same, & set apart a sufficient portion of such investments as will produce the annuity of £1,200, "which I bequeath to my wife for her life," payable on the usual quarter days, "the first payment to be made on the first of such days as shall happen after my decease, such annuity, in case of my wife's second marriage, to be reduced to the annual sum of £150," & subject to such investment to set apart £5,000 for his daughter Z. "As to the entire residue of my trust estate, & as to that part set apart in favour of my wife, & as to such part thereof as shall be no longer required to be set apart in consequence of her second marriage" in trust for three grandchildren:—*Held*: this was the bequest of an annuity, & of an annuity not so restricted as to make it payable exclusively out of the income of a particular fund arising during the widow's lifetime. While the property remained unconverted, as might be the case during the whole of her life, the annuity was a charge on the whole income of the estate. The fund not being sufficient to produce the £1,200 a year, the deficiency was to be made good out of the corpus.—*CARMICHAEL v. GEE* (1880), 5 App. Cas. 588; 49 L. J. Ch. 829; 43 L. T. 227; 29 W. R. 293, H. L.

Annotation:—*Reid. Re Campbell*, [1902] 1 K. B. 113.

4937. —.]—Where there is in a will an absolute gift of an annuity the fact that this is followed by a direction to set apart a fund to answer the annuity out of the income thereof does not exonerate the capital of the estate from the liability to have the amount necessary for payment of the annuity made up thereout from time to time in case of insufficiency of income.—*Re TAYLOR, ILLSLEY v. RANDALL* (1884), 53 L. J. Ch. 1161; 50 L. T. 717; 33 W. R. 13.

C. Specific Legacies and Devises.

4938. No abatement with general legacies.—*SMALLHORN v. BRACE* (1877), Cas. temp. Finch, 303; 23 E. R. 166.

4939. —.]—*BROWN v. ALLEN*, No. 4883, ante.

4940. —.]—*BURRIDGE v. BRADY*, No. 4973, post.

4941. —.]—*LINGEN v. SOURAY* (1715), Gilb. Ch. 91; 1 Eq. Cas. Abr. 175; Prec. Ch. 400; 1 P. Wms. 172; 25 E. R. 63, L. C.

Annotations:—*Mentid. Scudamore v. Scudamore* (1720), 2 Eq. Cas. Abr. 376; *Lechmere v. Lechmere* (1735), Cas. temp. Talb. 80; *Guldot v. Guldot* (1745), 3 Atk. 254; *Croftree v. Bramble* (1747), 3 Atk. 680; *Pulteney v. Darlington* (1783), 1 Bro. C. C. 223; *Thynne v. Glengall* (1848), 2 H. L. Cas. 131.

4942. —.]—(1) One devises the sum of £6,000 South Sea Stock to J. & has but £5,360.

No more than the £5,360 shall pass, & the rest of testator's personal estate shall not be obliged to make it up to £6,000. But it might be otherwise, if testator had no stock at all.

(2) Specific legacies have in some respects the advantage of those that are pecuniary so as to be paid *in toto* and not in average, on a deficiency of assets (*LORD TALBOT, (C.)*).—*ASHTON v. ASHTON* (1735), 3 P. Wms. 384; Cas. temp. Talb. 151; 24 E. R. 1111, L. C.

Annotations:—*As to* (1) *Consd. Slesch v. Thorington* (1754), 2 Ves. Sen. 500; *Wilson v. Brownsmith* (1803), 9 Ves. 178. *Reid. Puse v. Snaphin* (1738), 1 Atk. 414; *Jeffreys v. Jeffreys*, (1743), 3 Atk. 120; *Avelyn v. Ward* (1749), 1 Ves. Sen. 420; *Page v. Young* (1875), L. R. 19 Eq. 501. *Generally, Mentid. Hambling v. Lister* (1761), Amb. 401; *Ashburner v. Macquire* (1786), 2 Bro. C. C. 108; *Hill v. Hill* (1865), 12 L. T. 797.

4943. —.]—*LAWSON v. STITCH*, No. 4571, ante.

4944. —.]—*Re WEDMORE, WEDMORE v. WEDMORE*, No. 4584, ante.

4945. — In absence of contrary direction by testator. —]—Testator gave to B. a specific legacy of stocks, bonds & shares, "as general & not as specific legacies." He gave other shares in trust for B. for life, & after her death to transfer such shares to P. "as a general & not as a specific legacy." He gave other shares in trust for U. for life, then to D. for life, & after D.'s death to transfer the shares to E. absolutely (omitting the words "as a general & not as a specific legacy"). The will also contained general pecuniary legacies. The estate was insufficient to pay all the legacies in full:—*Held*: the legacies to B. & in trust for B. & P., although specific, must abate with the general legacies. They must be taken as of their value at the expiration of a year from testator's death, & no income of the property given was payable to the legatees in the interval.—*Re COMITON, VAUGHAN v. SMITH*, [1914] 2 Ch. 119; 83 L. J. Ch. 862; 111 L. T. 245; 58 Sol. Jo. 580.

4946. Abatement inter se.—*COMYNS v. COMYNS* (1685), 2 Cas. in Ch. 171; 22 E. R. 898, L. C.

4947. —.]—*ANON* (1723), No. 4901, post.

4948. —.]—An estate for three lives granted to A. his exors. & administrators, is a personal estate, & will on A.'s death be liable to all his debts by simple contract as a lease for years would be.

Here the exors. & administrators are made special occupants & also take as exors., whereby the premises are personal estate as naturally as if limited originally to exors. Wherefore I shall decree this to be personal estate, & consequently that it could not be devised away by testator from his creditors; nevertheless being a specific devise, all the rest of testator's personal estate not specifically devised must be first applied to pay the debts, & if there be any other specific devise, the same ought to come in average with this & pay its proportion; but if that will not serve, all must be sold to pay testator's debts (*KING, C.*).—*DEVON (DUKE) v. ATKINS* (1720), 2

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4946 I. Abatement inter se.—]—Calls made on shares after testator's death are to be paid by the specific legatees & not out of testator's estate, & so long as the shares are retained in the trustees' hands the calls are to be raised by sale or mortgage of a sufficient number of the shares.—*SMITH v. BARTON* (1896), 17 N. S. W. Eq. 180.—*AUS.*

4946 II. —.]—If the fund is insufficient to pay all the specific legacies they must abate proportionally.—*BLACKER v. WHITE* (1876), 23 Gr. 163.—*CAN.*

4946 III. —.]—Where personal estate turned out insufficient to pay legacies, of which one of \$2,000 was first payable:—*Held*: if this legacy absorbed all the personal estate, the daughters would get none of it as their legacies were charged on the land, & this legacy & a legacy for maintenance must abate proportionately.—*COOK v. NOBLE* (1886), 12 O. R. 81.—*CAN.*

4946 IV. —.]—A. by disposition & settlement, conveyed his property, heritable & movable, to exors. for payment of debts & special legacies. He subsequently executed a will nominating different exors., & directing

a different distribution of his movable property. At testator's death his heritable estate proved insufficient to meet legacies left by the first deed, but the heritable & movable property together were more than sufficient to pay all the legacies under both deeds:—*Held*: legacies bequeathed by the first deed were not chargeable on the movable estate, but only on the heritable, & must suffer a proportionate abatement.—*HOOD'S EXECUTORS* (1889), 7 Macph. (Ct. of Sess.) 774; 41 Sc. Jur. 402.—*SCOT.*

1. — *With residuary bequest pro rata.*—]—Where specific legacies are

Sect. 5.—Legacies: Sub-sect. 6, C. & D.]

P. Wms. 381; Cas. temp. King, 71; 24 E. R. 776, L. C.

*Annotations:—***Reid**, *Ripley v. Waterworth* (1802), 7 Ves. 425; *Zouch d. Forse v. Forse* (1806), 3 Smith, K. B. 191; *Tombs v. Roch* (1846), 2 Coll. 490.

4949. —. —.]—Bequest of “£400 East India bonds,” under the circumstances, was not specific, but a legacy of quantity was to be made good out of the general assets, testatrix having repeatedly, in this bequest, omitted the word “my,” which she had used in other bequests clearly specific, & having only one East India bond at her death. Bequests of South Sea stock, in parcels, to a larger amount than testatrix was possessed of:—*Held*: specific, the bequest of the last parcel being called “the remaining S.S. stock standing in her name.” These legatees must abate in proportion *inter se*.—**SLEECH v. THORINGTON** (1754), 2 Ves. Sen. 500; 28 E. R. 357.

*Annotations:—***Apld.** *Newman v. Williams* (1840), 10 L. J. Ch. 106. **Mentd.** *Simmons v. Vallance* (1793), 4 Bro. C. C. 345; *Like v. Beresford* (1797), 3 Ves. 506; *Wright v. Morley* (1805), 11 Ves. 12; *Duncan v. Duncan* (1815), 19 Ves. 394; *Beresford v. Hobson* (1816), 1 Madd. 362; *Wilkinson v. Charlesworth* (1847), 10 Beav. 324; *Horwood v. Griffith* (1853), 2 W. R. 71; *Taunton v. Morris* (1878), 26 W. R. 674; *Re Sharp, Maddison v. Gill*, [1908] 2 Ch. 190.

4950. —. —.]—Testator bequeathed the money to be received under a policy of insurance on his life, which at the date of the bequest would have amounted to £6,410, to trustees upon trust to invest it in Govt. securities, & pay the income to his wife for life, & after her death, to pay thereout two sums of £2,000, which he had agreed to settle on his daughters, & he gave £1,000, part of the residue of the money, to A., £1,000 to B., & “£410, residue & remainder of the moneys to be received under the policy, after payment of the four several sums of £2,000, £2,000, £1,000, & £1,000, with any future additions that may be made on the said policy,” to C. £6,532 was received under the policy, & invested in Reduced 3 per cents. at 94. At the death of the widow the price of the stock had fallen to 89:—*Held*: the legacy to C. was a specific legacy of £532, & consequently, the legacies to A., B., & C. must abate ratably.—**WALPOLE v. APTHORP** (1867), L. R. 4 Eq. 37; 15 W. R. 632.

4951. —. —.]—Testator gave his real estate & the residue of the personality, on trust to sell & convert & pay certain annuities, & after the decease of his wife £5,000 to such persons, etc., as she should by will appoint. The widow by her will, reciting the power, gave £5,000 in her husband's will mentioned to his trustees, upon trust to call in & invest the same, & stand possessed of the dividends & interest as to one moiety during the life of her niece A., for her separate use, & after her decease, subject to the power of her appointing any part of such moneys not exceeding £1,000, on like trusts for her niece S., & as to the other moiety, on the same terms as were used with respect to the first moiety to her niece S., & she gave her nieces power to appoint by will any part of the said trust moneys, not exceeding £1,000, & after the decease of the survivor, that the trustees should stand possessed of the trust moneys, sub-

ject to the payment of the respective sums not exceeding £1,000 each, for C. & D. Testator's estate was deficient, & £2,148 19s. only was apportioned in respect of the £5,000. A. by her will gave £1,000 to S., & the representative of C. & D. contended that there must be an abatement in respect of the £1,000:—*Held*: there must be such abatement.—**MILLER v. HUDDLESTONE** (1868), L. R. 6 Eq. 65; 37 L. J. Ch. 421; 18 L. T. 203; 10 W. R. 478.

*Annotation:—***Reid**, *Gilbert v. Whitfield* (1882), 52 L. J. Ch. 210.

4952. —. —.]—Testatrix bequeathed to one daughter “£800 invested in 2½ per cent. Consols,” to another daughter “£700 invested in 2½ per cent. Consols,” & to her grandson “£800 invested in 2½ per cent. Consols.” Neither at the date of her will, nor at the time of her decease, did testatrix possess any 2½ per cent. Consols, but there was at the date of her will & thenceforth to her death a sum of £1,800, 2½ per cent. Consols standing in the joint names of her deceased husband & herself:—*Held*: the legacies were specific, not demonstrative, & did not fail, but were answered by the £1,800, 2½ per cent. Consols, & must abate in the proportion of £1,800, to £2,300.—*Re PRATT, PRATT v. PRATT*, [1894] 1 Ch. 491; 63 L. J. Ch. 484; 70 L. T. 489; 8 R. 601.

4953. Effect of gift of fixed sums out of particular fund & gift of balance as residue.]—Devise in trust to sell, but not for less than £10,000, & to pay several sums, amounting to £7,800 & the over-plus moneys arising from the sale to A. A specific legacy of £10,000, & the sale producing less, A. & the others to abate.—**PAGE v. LEAPINGWELL** (1812), 18 Ves. 463; 34 E. R. 392.

*Annotations:—***Distd.** *Parrott v. Worsfold* (1820), 1 Jac. & W. 594. **Apld.** *Newman v. Williams* (1840), 10 L. J. Ch. 106; *Laurie v. Clutton* (1851), 15 Beav. 65. **Distd.** *Petre v. Petre* (1851), 14 Beav. 197. **Consd.** *Hewitt v. George* (1854), 18 Beav. 522; *Booth v. Allington* (1856), 6 De G. M. & G. 613. **Apld.** *Wright v. Weston* (1859), 26 Beav. 429; *Elwes v. Causton* (1862), 30 Beav. 554; *Walpole v. Apthorp* (1867), L. R. 4 Eq. 37; *Miller v. Huddleston* (1868), L. R. 6 Eq. 65. **Consd.** *De Lisle v. Hodges* (1874), L. R. 17 Eq. 440; *Gilbert v. Whitfield* (1882), 52 L. J. Ch. 210; *Wilson v. Kenrick* (1885), 31 Ch. D. 638. **Distd.** *Re Saunders-Davies, Saunders-Davies v. Saunders-Davies* (1887), 34 Ch. D. 482. **Consd.** *Re Currie, Bjorkman v. Kimberley* (1888), 57 L. J. Ch. 743. **Distd.** *Re Tunno, Raikes v. Raikes* (1890), 45 Ch. D. 66. **Extd.** *Re Phillips, Eddowes v. Phillips* (1897), 66 L. J. Ch. 714. **Reid.** *Scott v. Salmond* (1833), *Coop. temp.* Brough. 46; *A.-G. v. Barham* (1835), 4 L. J. Ch. 128; *Creed v. Creed* (1844), 11 Cl. & Fin. 491; *Green v. Pertwee* (1846), 5 Hare, 249; *A.-G. v. Trinity College, Cambridge* (1856), 24 Beav. 385; *Bernard v. Minshull* (1859), *John.* 276; *Re Harries' Trust* (1859), *John.* 199; *Hastelow v. Green* (1860), 28 Beav. 1; *Harley v. Moon* (1861), 1 Drew. & Sm. 623; *Hodgson v. Bective* (1863), 1 Hen. & M. 376; *Lakin v. Lakin* (1865), 34 Beav. 443; *Penny v. Penny* (1865), 13 L. T. 496; *Re Jeaffreson's Trusts* (1866), L. R. 2 Eq. 276; *Re Jeffery's Trusts* (1866), L. R. 2 Eq. 68; *Baker v. Farmer* (1868), 3 Ch. App. 537; *Wilday v. Barnett* (1868), L. R. 6 Eq. 193; *Springett v. Jennings* (1870), 39 L. J. Ch. 652; *Aston v. Wood* (1874), 43 L. J. Ch. 715; *Stokes v. Bridgman* (1878), 47 L. J. Ch. 759; *Re Judkin's Trusts* (1884), 50 L. T. 200; *Re Doane* (1893), 10 T. L. R. 100; *Re Tilt, Lampet v. Kennedy* (1896), 74 L. T. 163; *Re Margetta, Smith v. Margetta* (1906), 50 Sol. Jo. 290.

4954. —. —.]—Testatrix bequeathed all the residue of her personal estate to trustees, who were also her exors., to invest & pay the income to A. for life, & after his death to pay £1,000 to B., £1,000 to C., & the residue to D., E. & F.

given & a child of testator is made residuary legatee & testator's wife applies for relief:—*Held*: the allowance made to her should be payable out of the whole estate, & the specific legacies & residuary bequest abate *pro rata*.—*Re DAVIDSON'S ESTATE*, [1919] 1 W. W. R. 497; 12 Sask. L. R. 167; 46 D. L. R. 259.—**CAN.**

m. —. —.]—Where person-

ality comprised in an ultimate gift as the wife should appoint was alone primarily liable for the payment of debts & legacies:—*Held*: in the event of a deficiency of such personality, the residuary comprised in the ultimate gift & the specific legacies & devises must abate proportionately.—*Re PHARAZYN* (1897), 15 N. Z. L. R. 709.—**N.Z.**

a. —. —.]—If without resort to residue.]

—Where testator, who had been married in community, had purported to deal with the whole estate, & had bequeathed certain specific legacies, & the wife claimed her half:—*Held*: such specific legacies must abate by one half in order to satisfy the claim of testator's wife to her half of the community, & the legatees were not entitled to have the amount so abated

The exors. ascertained the residue, & invested it as directed by the will. The surviving exor. afterwards applied part of the trust fund for his own use:—*Held*: the loss which was thus occasioned must be borne *pro rata* by all the legatees; & the legatees of £1,000 were not entitled to their legacies in full.—*NEWMAN v. WILLIAMS* (1810), 10 L. J. Ch. 106; 4 Jur. 1123, L. C.

4955. —.]—Testator having a power of appointment by will over a sum of stock, bequeathed two sums of £5,000 & £500 sterling thereout to A. & B., & the residue to his son. The stock became in equity liable to his debts, & by payment thereof, & of the costs of the suit, the fund became less than £5,500 sterling:—*Held*: the pecuniary & residuary gift were not liable to abate proportionately but the residuary gift failed altogether.—*PETRE v. PETRE* (1851), 14 Beav. 197; 18 L. T. O. S. 14; 15 Jur. 693; 51 E. R. 262.

Annotations:—*Apld.* *Baker v. Farmer* (1868), 37 L. J. Ch. 820. *Consd.* *De Lisle v. Hodges* (1874), L. R. 17 Eq. 440. *Re Saunders-Davies, Saunders-Davies v. Saunders-Davies* (1887), 34 Ch. D. 482. *Reid.* *Springett v. Jennings* (1871), 6 Ch. App. 333; *Re Orford, Neville v. Cartwright, Cartwright v. Balzo* (1895), 73 L. T. 681; *Re Margetts, Smith v. Margetts* (1906), 50 Sol. Jo. 290. *Mentd.* *Re Chisholm, Goddard v. Brodie*, [1902] 1 Ch. 457.

4956. —.]—Testatrix, after reciting that she was entitled to a legacy of £1,000 under her husband's will, gave the £1,000, as to £100, part thereof, to A., as to £400, part thereof, to B., & as to all the residue of the said legacy of £1,000 & all the residue of her estate, to C. At the death of testatrix, £216 only was due on the legacy:—*Held*: A., B. & C. must abate in proportion.—*WRIGHT v. WESTON* (1859), 26 Beav. 429; 53 E. R. 963.

Annotation:—*Foll.* *Miller v. Huddleston* (1868), L. R. 6 Eq. 65.

4957. —.]—Testatrix bequeathed various sums of her bank stock, part of £9,000 like stock, to several legatees, & all the residue of her said bank stock to C. The stock, at her death, was insufficient to pay the specified sums:—*Held*: all these legacies, including the residue to C., must abate in proportion.—*ELWES v. CAUSTON* (1862), 30 Beav. 554; 54 E. R. 1004.

Annotation:—*Reid.* *De Lisle v. Hodges* (1874), L. R. 17 Eq. 440.

4958. —.]—B. by voluntary settlement vested £600 in trustees upon trust to pay the interest to herself for life, & after her decease, as to principal & income for such of her issue as she should by deed or will appoint. By her will expressed to be made in execution of this power, she directed her trustees to call in the trust funds, & after payment of her debts & funeral & testamentary expenses, pay to her two daughters £75 each, & the residue to S. on trust to invest the same & apply the interest thereof for the benefit of her granddaughter until she should attain the age of seventeen, & then she directed S. to pay to her daughters a further sum of £100 each & apply the interest of the residue, for the benefit of her granddaughter until she should attain twenty-one, & then the principal to her absolutely. The legacies of £75 each were paid to the two daughters, who subsequently sold four-fifths of their £100

legacies to L. & afterwards the remaining one-fifth to C. By payment of costs the fund became reduced to £121 which L. claimed to receive in priority to C.:—*Held*: (1) the gift to the granddaughter was the gift of the residue, & not of any specific sum; (2) L. & C. were entitled to the fund *pari passu*.—*HARLEY v. MOON* (1861), 1 Drew. & Sm. 623; 31 L. J. Ch. 140; 6 L. T. 411; 7 Jur. N. S. 1227; 10 W. R. 146; 62 E. R. 516.

Annotations:—*As to* (1) *Apld.* *Baker v. Farmer* (1868), 3 Ch. App. 537. *Reid.* *Re Margetts, Smith v. Margetts* (1906), 50 Sol. Jo. 290.

4959. —.]—By deed & by will two funds of £37,914 & £800 consols were settled, with powers of varying investments, upon trusts for the nephew & nieces of R., subject to a power in R. of exclusive appointment among them. R. made & revoked a series of appointments, & ultimately, by a deed poll in Nov. 1870, at which time the fund had been reduced to £27,170 consols & £8,000 cash, R. after reciting a desire to revoke the subsisting appointment of the two funds, & to appoint the same amongst his nephews & nieces named, in the shares and proportions & in manner expressed, in pursuance of that desire appointed that the trustees should stand possessed of the two funds "or other the stocks, funds, & securities" of which the same then consisted, or thereafter should or might consist, or upon which the same or any part thereof was then or thereafter should or might be invested, upon trust as to £7,000 consols, part of the £37,914 & £800 consols, or other the stocks, funds, or securities of which the same might consist, for his nephew, N., absolutely. R. then appointed in like manner further sums, making an aggregate of £37,000 consols, in trust for the four nieces & nephew named; & the residue of the two several sums of consols or other the stocks, funds, or securities, etc., in trust for his niece C. The trust funds at the death of R. were insufficient to pay the £37,000 consols:—*Held*: the gift to C. was residuary & not specific, & that it failed altogether.—*DE LISLE v. HODGES* (1874), L. R. 17 Eq. 440; 43 L. J. Ch. 385; 30 L. T. 158; 22 W. R. 363.

Annotations:—*Consd.* *Re Phillips, Eddowes v. Phillips* (1897), 66 L. J. Ch. 714. *Mentd.* *Re Cruddas, Re Smith, Cruddas v. Smith* (1900), 69 L. J. Ch. 355.

4960. —.]—Testatrix bequeathed her diamonds upon trust for sale, & thereout to pay two legacies of £600 & £700; the will contained a residuary bequest, but did not otherwise deal with the surplus, if any, of the proceeds of sale. The diamonds only realised £900; the legacy of £700 failed:—*Held*: the £600 legacy was not liable to abate in favour of the residuary legatee, but was in effect a first charge on the proceeds of sale, which must be satisfied before the residuary legatee could take anything.—*Re TUNNO, RAIKES v. RAIKES* (1890), 45 Ch. D. 66; 59 L. J. Ch. 573; 63 L. T. 23; 38 W. R. 636.

D. Demonstrative Legacies.

4961. Special fund deficient—Abatement inter se.—Where several legacies are given out of bonds, securities, etc., & these fall deficient, there shall be an abatement among them only, & not affect

made up out of the residue of the estate.—*WATSON v. BURCHELL* (1891), 9 S. C. 2.—*S. AF.*

PART IV. SECT. 5, SUB-SECT. 6.—D.

a. *Special fund deficient—Abatement inter se—Payment from residue—After providing for specific legacy.*—Where the assets are not sufficient to admit of setting apart a specific legacy & the payment of two other legacies

from a special fund, the former legacy was first to be provided for without abatement, & the other legacies were to come out of the residue & abate in the event of a deficiency.—*KING v. YORSTON* (1895), 27 O. R. 1.—*CAN.*

4961. —.]—Testator directed that a farm should be sold & that his exors. should set apart \$2,000 & invest it for the benefit, maintenance & education of his grandson, & pay the residue

as legacies to his three daughters & a son:—*Held*: the general rule of equality among legatees applied, & that, there not being sufficient to pay all the legacies in full, the grandson's legacy should abate proportionately.—*LINSMAY v. WALDBROOK* (1897), 24 A. R. 604.—*CAN.*

p. *Assets insufficient to pay debts—Abatement with specific legacies.*—In the event of assets not specifically

Sect. 5.—Legacies: Sub-sect. 6, D., E., F. & G.; sub-sect. 7, A. (a).]

other legatees, where there are several pecuniary legatees they must abate in proportion, but no specific legatee, except in case of his legacy (*per CUR.*).—ANON. (1723), 2 Eq. Cas. Abr. 557; 8 Vin. Abr. 424; 22 E. R. 469.

4962. ———.]—A., having become possessed of property under the will of H., expressed a desire in his will to make gifts to her relations. He then gave legacies to several persons by name, & added, "but if the personal estate & effects I became entitled to under the will of H. should fall short in paying these legacies, my desire is that £500 out of any other part of my personal estate shall be applied for that purpose." The legacies given amounted to £2,800; the personal estate of H. amounted only to £1,279 5s. 6d., & after adding the £500 was insufficient to pay the legacies in full by £1,020 14s. 6d.:—*Held*: the general personal estate of testator was not liable to make up the deficiency. That the sums of £1,279 5s. 6d. & £500 were alone applicable to pay the legacies, & they must abate proportionately.—*READ v. STRANGWAYS* (1851), 14 Beav. 139; 20 L. J. Ch. 487; 17 L. T. O. S. 218; 51 E. R. 240.

4963. ———.]—**Abatement with general legacies.**—(1) Pecuniary & demonstrative legatees, with a deficient fund on which their legacies are charged, have a right to throw simple contract creditors on descended estates, so as to marshal the assets in their favour.

(2) Demonstrative legatees must get their legacies, first out of the demonstrative fund as far as it extends; & the balances only, together with the general legacies, out of the general estate.

(3) Demonstrative legatees must abate with general legatees, & have no right, after getting what they can out of the demonstrative fund, to claim their entire legacies with the other legatees out of the general estate.—*SELLON v. WATTS, SMITH v. WATTS* (1861), 9 W. R. 847.

E. Legacies to Executors.

4964. General rule.—After debts are discharged all legacies shall be paid in proportion so far as the estate will extend; & not like the case at common law, where exors. may retain their own legacies, or pay him who first gets judgment (*per CUR.*).—*BUTLER v. COOT* (1671), Nels. 142; 3 Rep. Ch. 64; 21 E. R. 811; *sub nom.* *BUTLER v. WALLIS & COOLE*, Freem. Ch. 134; 2 Eq. Cas. Abr. 552.

4965. ———.]—Where a legacy is given to an exor. generally, or for his care & pains, it makes no difference; for if there is a deficiency of assets he must abate in proportion with other legatees.—*HERON v. HERON* (1741), 2 Atk. 171; 26 E. R. 507; *sub nom.* *HERNE v. HERNE*, Barn. Ch. 430, L. C. Annotation:—*Mentd.* *Hoghton v. Hoghton* (1852), 15 Beav. 278.

bequeathed being insufficient to pay debts, specific & demonstrative legacies abate ratably.—*Re TURNER, ARMSTRONG v. GAMBLER*, [1908] 1 I. R. 274; 41 I. L. T. 237.—*IR.*

PART IV. SECT. 5, SUB-SECT. 6.—E.

4966 i. General rule.—A legacy to an exor. should not have priority; but on a deficiency of assets, should abate ratably with the other legacies.—*ROOPE v. HARDING* (1858), 7 I. Ch. R. 358; 10 Ir. Jur. 253.—*IR.*

4966 i. Legacy given for care & trouble.—Upon a question of abatement, a legacy to an exor. in consideration of his trouble, is entitled to a preference over other general legacies.

4966. Legacy given for care & trouble.—A legacy given to exors. for care & pains, if a deficiency of assets, they must abate in proportion with the other legatees.—*FRETWELL v. STACY* (1702), 2 Vern. 434; 23 E. R. 878.

Annotation:—*Foll.* *Heron v. Heron* (1741), 2 Atk. 171.

4967. ———.]—*HERON v. HERON*, No. 4965, *ante*.

4968. ———.]—A bequest of an annuity to an exor., for his trouble in the conduct & management of testator's affairs, has no priority over other legacies, in case of a deficiency, & it must abate.—*DUNCAN v. WATTS* (1852), 16 Beav. 204; 51 E. R. 756.

Annotation:—*Consd.* *Re Thorley*, *Thorley v. Massam*, [1891] 2 Ch. 613.

4969. ———.]—D., after appointing three persons exors. of his will, gave & bequeathed all the rest & residue of his leasehold houses & property to them upon trust to receive the rents, & to pay certain legacies at his death, & annuities during the lives of the annuitants. D. then gave to his exors., & the survivors or survivor of them, an annuity of £65, to be retained by them or him out of the rents, & to be received by them or him in compensation for their or his care & trouble in the performance of the trusts, or to be appropriated by them or him as they or he might think fit. The property was insufficient to pay the annuities in full. The exors. claimed to be paid their own annuity in full in priority:—*Held*: the annuity to the exors. must abate proportionally with the other annuitants, they not being entitled to any priority, or to be paid in full.—*DEBNEY v. ECKRETT* (1858), 4 Jur. N. S. 805.

F. Legacies in Satisfaction of Debts.

4970. Effect of release by legatee—Actual existence of debt not established.—Testator by his will bequeathed a legacy to a person, between whom & himself accounts had subsisted, on condition of the legatee's executing to his exors. a general release of all claims & demands. The legatee executed the release. It subsequently appeared that the assets were insufficient for the payment of all the legacies:—*Held*: the legatee was not, by executing the release, it not being established that any debt was actually due to him, a purchaser of his legacy, so as to avoid an abatement with the other legatees.—*DAVIES v. BUSH* (1831), 1 You. 341; 159 E. R. 1024; *previous proceedings* (1830), 4 Bli. N. S. 305, H. L.

Annotations:—*Consd.* *Re Lawley*, *Zaiser v. Lawley*, [1902] 2 Ch. 799; *Re Wedmore*, *Wedmore v. Wedmore*, [1907] 2 Ch. 277; *Re Whitehead*, *Whitehead v. Street*, [1913] 2 Ch. 56.

4971. Effect of election to take legacy—Legacy far in excess of debt.—*Re WEDMORE, WEDMORE v. WEDMORE*, No. 4584, *ante*.

4972. ———.]—W. by settlements declared that moneys paid by him to the trustees of an orphanage should be held by them upon trust for investment

—*ALLEN v. EDMONDS* (1886), 12 V. L. R. 789.—*AUS.*

4966 ii. ———.]—A legacy to exors., expressly as a compensation for their trouble, does not, on a deficiency of assets, abate with legacies which are mere bounties, even though the legacy somewhat exceeds what the exors. would otherwise have been entitled to demand.—*ANDERSON v. DOUGALL* (1868), 15 Gr. 405.—*CAN.*

q. When co-executor misappropriates fund.—Testator gave the residue of his estate to his two exors. to invest & pay the annual income to the wife for life, & after her death to divide between themselves in the proportion of two-thirds to one & one-third to the

other. By codicil testator gave certain specific legacies to be paid by the exors. after the decease of his wife out of the two-thirds given to one of the exors. That exor. died in 1885, & the other exor. appropriated a part of the moneys of the estate, & died insolvent in 1900. The widow died in 1901. It was then found that more than one-third of the estate had been dissipated:—*Held*: the part which remained belonged to the estate of the innocent exor., subject to the legacies in the codicil to be paid in full, & did not abate proportionally with the two-thirds share given to the other exor.—*Re DUNN* (1904), 34 C. L. T. 295; 7 O. L. R. 560; 3 O. W. R. 311.—*CAN.*

49821. Right of executor to security to refund.—In the case of a covenant entered into by testator, which may

Sect. 5.—Legacies: Sub-sect. 7, A. (a), (b), (c) & (d).] sufficient to pay debts, to be afterwards discovered, & to refund in proportion, if not sufficient to pay other legacies.—ANON. (*circa* 1670), *Freem.* (Ch. 134; 22 E. R. 1110).

4983. —.]—Exor. not bound to pay a legacy without security to refund.—*NELTHROP v. HILL* (1669), 1 Cas. in Ch. 135; 22 E. R. 730.

4984. —.]—*NORRIS v. NORRIS* (1679), *Cas. temp. Finch*, 419; 23 E. R. 228.

4985. —.]—Payment ordered, where one party entitled had not been heard of for twenty years, upon a recognisance to refund in the event of a claim.—*BAILEY v. HAMMOND* (1802), 7 Ves. 590; 32 E. R. 237.

4986. Effect of covenant to refund—Right of executor to retain out of proceeds of sale of real estate sum equal to legacy paid.]—Where exors. & trustees have paid a pecuniary legacy, not charged on real estate, to a legatee who is also one of the residuary legatees of the proceeds of sale of testator's real estate, the legatee covenanting to repay the legacy if required so to do; & the personal estate, after defraying prior charges upon it, proved to be insufficient to meet the pecuniary legacy; the exors. & trustees are entitled, as against a mtgee., subsequent in date, of the legatee's residuary interest in the proceeds of sale of realty, to retain thereout a sum equal in amount to the pecuniary legacy which was paid in advance.—*Re MOORE, MOORE v. MOORE* (1881), 45 L. T. 460.

Annotation:—Reid. Re Langham, Otway v. Langham (1896), 74 L. T. 611.

(b) *Executor and Legatees generally.*

4987. Whether legatee liable to refund.]—This bill both rightly presuppose a rule of equity, that whosoever a legacy is paid by an exor., & afterwards an unknown bond appears when the assets are gone, the exor. hath equity in this case against the legatee to make him refund, though he have no equity at all against the creditor (*per CUR.*).—*JEWON v. GRANT* (1677), 3 Swan. App. 659; 36 E. R. 1012, L. C.

4988. —.]—If in the Spiritual Ct. they would compel an exor. to pay a legacy without security to refund, there shall go a prohibition . . . but in this ct. [of equity], though there be no provision made for refunding yet the common justice of this ct. will compel a legatee to refund. It is certain that a creditor shall compel the legatee to refund, & so shall one legatee compel the other, where the assets become deficient: but whether the exor. himself, after he has once voluntarily assented unto a legacy shall compel the legatee to refund, is *causa primæ impressionis*: & it must be allowed that there is a great difference between a voluntary assent, & where the exor. was compelled to assent (*per CUR.*).—*NOEL v. ROBINSON* (1680), 1 Vern. 90; 2 Vent. 358; 23 E. R. 334, L. C.

Annotations:—Consd. Anon. (1738), 1 Atk. 491. *Reid. March v. Russell* (1837), 3 My. & Cr. 31. *Mentd. Elliott v. Elliott* (1841), 9 M. & W. 23; *Re Fitzgerald, Surman v. Fitzgerald*, [1903] 1 Ch. 933.

4989. — Payment under compulsion of action.]—A creditor shall follow the assets in equity, into whosoever hands they come. But where the

exor. had voluntarily paid the full legacy, & afterwards assets proved deficient to pay the other legacies, they conceived neither the exor., nor any of the other legatees should compel him to refund; but if the payment had not been voluntary, but he had recovered his legacy by decree, there he should have refunded (*per CUR.*).—*NEWMAN v. BARTON* (1690), 2 Vern. 205; 23 E. R. 733.

4990. —.]—An exor. having voluntarily paid legacies, & the assets afterwards proving deficient, the legatee was decreed to refund.—*DAVIS v. DAVIS* (1718), 1 Dick. 32; 2 Eq. Cas. Abr. 554; 21 E. R. 178.

4991. —.]—If an exor. pays a legacy on a supposition that there are assets to pay all other legacies, & afterwards there is a deficiency of assets, the legatee must refund.—*EDWARDS v. FREEMAN* (1727), 2 P. Wms. 435; 1 Eq. Cas. Abr. 249; 24 E. R. 803.

Annotations:—Mentd. Evelyn v. Evelyn (1731), 2 P. Wms. 659; *Morris v. Burroughs* (1737), 1 Atk. 399; *Wallis v. Hodson* (1740), 2 Atk. 115; *Green v. Ekins* (1742), 2 Atk. 473; *Parsons v. Parsons* (1744), 9 Mod. Rep. 464; *Elliott v. Collier* (1747), 3 Atk. 526; *Boyd v. Boyd* (1867), L. R. 4 Eq. 305; *Taylor v. Taylor* (1875), L. R. 20 Eq. 155; *Re Blockley, Blockley v. Blockley* (1885), 29 Ch. D. 250; *Re Ford, Ford v. Ford* (1901), 46 Sol. Jo. 51; *Villar v. Gilbey*, [1907] A. C. 139.

4992. —.]—*DESCHAMPS v. TOMKINS* (1780), cited in 1 Dick. at p. 32; 21 E. R. 178.

4993. —.]—If such [repayment of a legacy] had been the object of the action, I agree that it could not have been maintained. If an exor., thinking that he has settled the affairs of his testator, pay the legacies, I have no difficulty in saying that a ct. of common law would not entertain an action for money had & received against a legatee, since such a ct. cannot take into consideration, as a ct. of equity would do, the mode in which the funds might have been applied (*LORD ALVANLEY, C.J.*).—*JOHNSON v. JOHNSON* (1802), 3 Bos. & P. 162; 127 E. R. 89.

Annotations:—Reid. Clare v. Lamb (1875), L. R. 10 C. P. 334; *Re West, West v. Roberts*, [1909] 2 Ch. 180. *Mentd. Walker v. Moore* (1829), 10 B. & C. 416; *Sikes v. Wild* (1861), 1 B. & S. 587; *Lock v. Furze* (1866), L. R. 1 C. P. 441; *Bain v. Fothergill* (1874), L. R. 7 H. L. 158; *Allen v. Richardson* (1879), 13 Ch. D. 524; *Sinclair v. Brougham*, [1914] A. C. 398.

4994. — After lapse of many years.]—*ROWE v. THORPE* (1837), 1 Jur. 771.

4995. —.]—An exor. allowed the legatee of leasehold to occupy for fifteen years, the legacy duty being unpaid. The exor. was then called upon to pay duty on the profits accruing for the fifteen years, as well as on the principal value of the premises:—*Held*: he was liable to the whole of such duty; & he might recover all the money paid on that account, as money paid to the use of the legatee.—*BATE v. PAYNE* (1849), 13 Q. B. 900; 18 L. J. Q. B. 273; 13 Jur. 609; 116 E. R. 1507.

4996. —.]—*FENWICK v. CLARKE*, No. 3957, *ante*.

4997. — Severance of portion of estate in favour of legatee.]—Testatrix directed her trustees to pay the interest or annual rent of £2,000 to A. during her life & after her death to divide that sum among her children; & to pay the interest or annual rent of a similar amount to B. in life-
rent, with the fee to her children.

The trustees were empowered by the deed to

be broken, the exor. may call upon the legatee whose legacy he is satisfying to give security to refund it.—*WARREN v. WARREN* (1829), 3 Ir. L. Rec. 1st ser. 65.—*IR.*

1. Right of executor to indemnify against calls on shares bequeathed.]—A legatee of shares upon which calls may

be made must indemnify the exors. against them as a condition of the transfer of the shares.—*Re PHARAZYN* (1897), 15 N. Z. L. R. 709.—*N.Z.*

PART IV. SECT. 5, SUB-SECT. 7.—
A. (b).

1. Whether legatee liable to refund

—*Will held invalid.]*—Pltf. as exor. of W., having paid money to deft. as legatee, & the will with the probate having been set aside pltf. was held entitled to recover back the money.—*HALDAN v. BRATTY* (1876), 40 U. C. R. 110.—*CAN.*

realise, or to continue to "hold any or all of such shares or stocks" as might belong to testatrix at her decease, "should they consider it advisable or expedient to do so without any personal responsibility for loss, if any, thereby sustained," with power also "to lend or place out on such securities, heritable or moveable, as they shall consider advantageous, the foresaid legacies of £2,000 & £2,000 respectively, the securities to be conceived in favour of my trustees, & that for the purpose of this trust & not otherwise."

Testatrix at her death left £850 stock of an unlimited bank. The trustees, at the desire of A. & without consulting B. set £200 of this stock aside as part of the fund appropriated to A., & realised the remainder. They afterwards, on the narrative of the purposes of the trust deed & of the sums invested for the two specific legacies of £2,000, & that they had paid the residue, received their discharge from A. & B. Statements & separate accounts of interest on the investments allocated to each were sent half-yearly to A. & B. All the investments stood in the names of testatrix's trustees. The bank became insolvent, & calls were made upon the trustees in respect of the £200 stock. They sought to indemnify themselves for payment of the calls out of the whole estate. B. objected to any portion of her legacy being taken:—*Held*: the trustees had the power to sever & had severed the two legacies & had placed them in separate investment for behoof of the respective beneficiaries, & therefore the trustees had no right to relief from the investments allotted to B. & her family for liabilities incurred on those allotted to A. & her family.—*FRASER v. MURDOCH* (1881), 6 App. Cas. 855; *sub nom.* *ROBINSON v. MURDOCH*, 45 L. T. 417; 30 W. R. 162, 11 L.

Annotations:—*Reid*. *Re Brooks*, *Coles v. Davis* (1897), 76 L. T. 771; *Hardoon v. Bellios*, [1901] A. C. 118; *Re Hall*, *Foster v. Metcalfe* (1902), 72 L. J. Ch. 74; *Matthews v. Ruggles-Brice*, [1911] 1 Ch. 194; *Re Craven*, *Watson v. Craven*, [1914] 1 Ch. 358. *Mentd.* *Hobbs v. Wayet* (1887), 36 Ch. D. 256; *Re Kidd*, *Kidd v. Kidd* (1894), 42 W. R. 571; *Re Richardson*, *Ex p. St. Thomas's Hospital*, [1911] 2 K. B. 705; *Re Towndrow*, *Gratton v. Machen*, [1911] 1 Ch. 662; *Re Wragg*, *Wragg v. Palmer*, [1919] 2 Ch. 58.

4998. Whether legatee liable to pay interest.—*Legatee entitled to other funds making interest.*—On refunding sums paid under an erroneous construction of a will, a legatee entitled to other funds making interest in the hands of the exor., is to be charged with interest; not a legatee who has no further concern in the estate.—*GITTINS v. STEELE* (1818), 1 Swan. 199; 36 E. R. 356, L. C. *Annotations*:—*Reid*. *Parker v. Morrell* (1848), 17 L. J. Ch. 226; *Re West*, *West v. Roberts*, [1909] 2 Ch. 180.

(c) Executor and Residuary Legatees.

4999. Whether residuary legatee liable to refund—Executor with notice of liability.—Notice of remote contingent liability on the part of a testator is not sufficient to prevent his exor. from distributing his residuary estate; & if the exor. distributes with such notice, & the liability afterwards ripens into a debt, he will be entitled to call on the residuary legatees to refund.

A person who has covenanted to bequeath or otherwise provide that a share of his estate shall go to the covenantee fulfils his covenant by bequeathing the share to the covenantee, who then stands in the same position as any other legatee.

An exor. who compels a legatee to refund can recover only the capital sum which he has paid to the legatee without any intermediate income.—

JERVIS v. WOLFERSTAN (1874), L. R. 18 Eq. 18; 43 L. J. Ch. 809; 30 L. T. 452.

Annotations:—*Apprvd.* *Whittaker v. Kershaw* (1890), 45 Ch. D. 320. *Reid*. *Fraser v. Murdoch* (1881), 6 App. Cas. 855; *Re Knott*, *Bax v. Palmer* (1887), 56 L. J. Ch. 318; *Re Nixon*, *Gray v. Bell* (1904), 73 L. J. Ch. 446. *Mentd.* *Hobbs v. Wayet* (1887), 36 Ch. D. 256; *A.-G. v. Smith* (1892), 66 L. T. 857; *Hosegood v. Pedler* (1896), 66 L. J. Q. B. 18; *Matthews v. Ruggles-Brice*, [1911] 1 Ch. 194.

5000. —[—]—A residuary legatee assigned the residue to his wife K. for her separate use. The residue comprised some shares not fully paid up in a joint stock co. The exors. handed over to K. the certificates of the shares, but did not transfer them, & they paid over to her the cash balance of the residue. After this a call was made on the shares which the exors. were compelled to pay. K. refused to indemnify them, & they brought this action against her to enforce indemnity:—*Held*: if K. had been a *feme sole* she would have been liable to refund at the suit of the exors., for that the liability on the shares did not constitute a debt at the time of paying away the residue, & though the exors. would have had no right to call on the residuary legatee to refund for payment of a debt of which they had notice when they paid away the residue, they did not lose the right to refunding by paying it away with notice of a liability which had not become a debt.—*Re KERSHAW, WHITTAKER v. KERSHAW* (1890), 45 Ch. D. 320; 60 L. J. Ch. 9; 63 L. T. 203; 30 W. R. 22, C. A.

Annotations:—*Reid*. *Hood Barrs v. Cathcart*, [1894] 2 Q. B. 559; *Hosegood v. Pedler* (1896), 66 L. J. Q. B. 18. *Mentd.* *Braunstein v. Lewis* (1891), 7 T. L. R. 246; *Houso v. Niblett*, [1891] 1 Q. B. 781.

5001. What amount repayable—Not intermediate income.—[—]*JERVIS v. WOLFERSTAN*, No. 4999, *ante*.

(d) Equalisation out of Future Payments.

5002. Right of executor to equalise.—[—]Testatrix having given a legacy by will, & a nuncupative legacy on her death-bed, which was invalid, her exor. & residuary legatee paid the nuncupative legacy on terms, & afterwards attempted to attribute this payment to the legacy given by the will, upon an allegation that it was paid under misapprehension:—*Held*: the legacy could not be recovered back & the other was still payable.—*METTFORD v. PETERS* (1840), 4 Jur. 715, L. C.

5003. —[—]—Where trustees, under an erroneous view of the effect of a will, pay to parties money to which they are not entitled, this ct., in administering the estate, will compel a restitution & repayment, & will give a lien on the other interests of such parties under the will, even as against an assignee, for valuable consideration.—*DIBBS v. GOREN* (1849), 11 Beav. 483; 50 E. R. 904.

Annotations:—*Reid*. *Re Horne*, *Wilson v. Cox Sinclair*, [1905] 1 Ch. 76; *Re Robinson*, *McLaren v. Public Trustee*, [1911] 1 Ch. 502.

5004. —[—]—Legatees are not liable to refund at the suit of other legatees, payments voluntarily made to them by the exors., under a mistake, but are liable to recoup out of the undistributed funds in which they are interested.—*DOWNES v. BULLOCK* (1858), 25 Beav. 54; 53 E. R. 556; *affd.* on other grounds, *sub nom.* *BULLOCK v. DOWNES* (1860), 9 H. L. Cas. 1, H. L.

Annotations:—*Mentd.* *Chalmers v. North* (1860), 28 Beav. 175; *Lees v. Massey* (1861), 3 De G. F. & J. 113; *Royds v. Royds* (1863), 1 New Rep. 516; *Mitchell v. Bridgson* (1864), 11 L. T. 727; *Travis v. Taylor* (1866), 12 Jur. N. S. 791; *Stockdale v. Nicholson* (1867), L. R. 4 Eq. 359; *Re Tanking's Settlt. Trusts* (1868), L. R. 6 Eq. 601; *White v. Springett* (1869), 4 Ch. App. 390; *Day v.*

et. & its officers.—*Re DRUMMOND* (1912), 22 O. W. R. 554; 3 O. W. N. 1459; 5 D. L. R. 516.—*CAN.*

PART IV. SECT. 5, SUB-SECT. 7.—A. (d).

a. Duties of equalisation personal to exccutors—Carried out by court where

exccutors dead.—*Held*: on the facts, the duties imposed as to equalisation were personal to the exors., & as they were dead, would be carried out by the

Sect. 5.—Legacies: Sub-sect. 7, A. (d), & B. (a) & (b).]

Day (1870), 18 W. R. 417; *Cusack v. Rood* (1876), 24 W. R. 391; *Re Morley's Trusts* (1877), 25 W. R. 825; *Mortimer v. Slater* (1877), 7 Ch. D. 322; *Mortimore v. Mortimore* (1879), 4 App. Cas. 448; *Sturge v. G.W. Ry.* (1881), 19 Ch. D. 444; *Clarke v. Hayne* (1889), 37 W. R. 667; *Hood v. Murray* (1889), 14 App. Cas. 124; *Re King's Settlement*, *Gibson v. Wright* (1889), 60 L. T. 745; *Re Rees, Williams v. Davies* (1890), 44 Ch. D. 484; *Re Nash, Prall v. Revan* (1894), 71 L. T. 5; *Re Ford, Patten v. Sparks* (1895), 72 L. T. 5; *Re Wilson, Wilson v. Batchelor*, [1907] 2 Ch. 572; *Re Roby, Howlett v. Newington*, [1908] 1 Ch. 71; *Re Nightingale, Bowden v. Griffiths*, [1909] 1 Ch. 385; *Re Winn, Brook v. Whitton*, [1910] 1 Ch. 278; *Re Helsby, Neate v. Bozle* (1914), 84 L. J. Ch. 682; *Re Mellish, Day v. Withers*, [1916] 1 Ch. 562; *Hutchinson v. National Refuges for Homeless & Destitute Children*, [1920] A. C. 794.

5005. — In own favour—Executor responsible for mistake.]—Where a trustee, who was himself one of the beneficiaries, had inadvertently overpaid the other beneficiaries their shares of income, & died before any adjustment had been made:—*Held*: the exors. of deceased trustee were not entitled to recover from the other beneficiaries the amounts so overpaid, or to have accrued or future income impounded till the shares were equalised, by reason of the fact that their testator himself was the person responsible for the mistake that had been made.—*Re HORNE, WILSON v. COX SINCLAIR*, [1905] 1 Ch. 76; 74 L. J. Ch. 25; 92 L. T. 203; 53 W. R. 317.

Annotations:—Consd. Re Ainsworth, Finch v. Smith, [1915] 2 Ch. 96. *Refd. Re Sharp, Rickett v. Rickett* (1906), 75 L. J. Ch. 458; *Re Musgrave, Machell v. Parry*, [1916] 2 Ch. 417; *Re Reading, Edmonds v. Reading* (1916), 60 Sol. Jo. 655.

5006. — — — — —.]—Where the extrix. of the last surviving exor. of a deceased testator had purported to appoint herself & others trustees of his will, which appointment was bad as to herself, but she had nevertheless acted as trustee & stipulated that she should have the sole control of the income & in effect her hand made the improper distribution whereby she benefited:—*Held*: one of the other trustees so appointed was not debarred, merely by being a party to the overpayment of the income which had constituted the improper distribution, from having a proper adjustment made in respect of such overpayment.—*Re READING, EDMONDS v. READING* (1916), 60 Sol. Jo. 655.

B. As between Legatees.

(a) Legatees generally.

5007. Whether legatee liable to refund.]—*MAUTER v. FOTHERBY* (1634), Nels. 25; 21 E. R. 780.

5008. —.]—*ROGERS v. BAMFIELD* (1680), *Cas. temp. Finch*, 460; 23 E. R. 249.

5009. — Deficiency caused by devastavit.]—*NOEL v. ROBINSON*, No. 4988, *ante*.

5010. — — — — —.]—As legatees are to be paid in proportion, so if an exor. pays one legatee, & there is not enough to pay all, the legatee who is paid shall refund in proportion; so if one legatee recovers his legacy in equity, & there is not enough to pay the rest, he shall refund; *secus*: if the defect of assets arises by the wasting of the exor.—*ANON.* (1718), 1 P. Wms. 495; 24 E. R. 487.

5011. —.]—A legatee shall refund against a creditor of testator that can charge an exor. only in equity, viz. upon a wasting by the first exor.:

but if an exor. pays a debt upon a simple contract, there shall be no refunding to a creditor of an higher nature.—*HODGES v. WADDINGTON* (1683), 2 Vent. 360; 86 E. R. 485.

Annotations:—Refd. March v. Russell (1837), 3 My. & Cr. 31; *Jervis v. Wolferstan* (1874), L. R. 18 Eq. 18.

5012. —.]—*NEWMAN v. BARTON*, No. 4989, *ante*.

5013. — Insolventy of executor.]—A legatee paid by an exor. voluntarily not obliged to refund to the rest; except in the case of his insolventy. Even in the case of the exor.'s insolventy, legatees are not always bound to refund. The distinction seems between the cases where there was originally a deficiency of assets, & those where the executor has wasted them.—*ORR v. KAINES* (1750), 2 Ves. Sen. 194; 28 E. R. 125.

5014. — — — — —.]—Exor. advanced sums of money to his daughters *pendente lite*, to two of them on their marriage, to the others as a voluntary gift, & afterwards died insolvent, having received assets; on a bill by the legatees, the voluntary gifts were considered fraudulent, but those daughters being also legatees, they were permitted to retain in part of their legacies, subject to abatement.—*PARTRIDGE v. GOPP* (1758), Amb. 596; 1 Eden, 163; 27 E. R. 388.

5015. — — — — —.]—Legacy to A. payable at twenty-one or marriage, with interest, a vested legacy, & exor. having become bkpt., might have been proved under the commission, his certificate therefore a bar, & the residuary legatee not liable.—*WALCOTT v. HALL* (1788), 2 Bro. C. C. 305; 29 E. R. 167.

Annotations:—Refd. Re Makin, Ex p. Holt (1835), 5 L. J. Rep. 9; *Re Fenwick, Ex p. Brown* (1849), 13 L. T. O. S. 468. *Mentd. Davies v. Fisher* (1842), 5 Beav. 201.

5016. —.]—As to whether residuary legatees, paid by exor., shall refund to legatees who were not paid immediately. The consideration is, how far there is a right to call on the residuary legatees to pay back money they have received as to the surplus from the exors. on account of the personal estate? That is hard after such a length of time & no proof of fraud. I do not doubt but that might be done as to debts: but here is something particular in this case; all these three legacies were to remain in the hands of the exors., & not then to be paid. Were the residuary legatees necessarily to wait until all these particular legacies became payable before they received a voluntary payment from the exors.? It is hard to say that: testator has trusted the exors. with this money in their hands, they have not (*LORD HARDWICKE, C.*)—*MOORE v. MOORE* (1755), 2 Ves. Sen. 596; 28 E. R. 380, L. C.

Annotations:—Mentd. Doe d. Wightwick v. Truby (1774), 2 Wm. Bl. 944; *Goold v. White* (1834), Kay. 683.

5017. —.]—*DOWNES v. BULLOCK*, No. 5004, *ante*.

5018. — Payment under mistake of law.]—The ct. will not in all cases relieve against a payment of money under mistake of law. An exor. acting on the advice of counsel on the construction of a will, proposed to divide in certain proportions a fund between two legatees. One of the legatees being dissatisfied took the opinion of counsel, which agreed with the former opinion. The exor. then divided & paid over the fund in accordance with the opinions. Two years afterwards the dissatisfied legatee filed a bill against the exor. &

PART IV. SECT. 5, SUB-SECT. 7.—B. (a).

b. Whether legatee liable to refund—Mistake by executor as to assets.]—A legatee who has been overpaid by an exor. is only liable to refund the

surplus at the suit of a co-legatee, where the exor. has made a wrong estimate of the assets at the time of the distribution or has made a mistake as to what the assets of testator are.—*HARRERT v. BADGERY* (1894), 15

N. S. W. L. R. 236; 10 N. S. W. N. 128.—*AUS.*

c. —.]—*UFFNER v. LEWIS* (No. 2), *BOYS' HOME v. LEWIS* (No. 2) (1903), 23 C. L. T. 217; 5 O. L. R. 684; 2 O. W. R. 441.—*CAN.*

the other legatee, alleging that the will had been wrongly construed, & claiming repayment from the other legatee:—*Held*: the suit could not be maintained.—*ROGERS v. INGHAM* (1876), 3 Ch. D. 351; 35 L. T. 677; 25 W. R. 338, C. A.

Annotations:—*Reid*. *Re Bowman, Whythead v. Bolton* (1889), 37 W. R. 583; *Allcard v. Walker*, [1896] 2 Ch. 369; *Haylis v. London (Bp.)*, [1913] 1 Ch. 127; *Stanley v. Nuneaton Corpn.* (1913), 108 L. T. 986; *Carnell v. Harrison*, [1916] 1 Ch. 328. *Mentd. Sinclair v. Brougham*, [1914] A. C. 398.

5019. — *Institution of administration proceedings by residuary legatee.*—In a suit by a residuary legatee for the administration of testator's estate, the ct. has jurisdiction to compel the residuary legatee to refund for the purpose of paying the legacy of a legatee who is not a party to the suit, assets paid to the residuary legatee by the exor. before the suit.—*PROWSE v. SPURGIN* (1868), 1 L. R. 5 Eq. 99; 37 L. J. Ch. 251; 17 L. T. 590; 16 W. R. 413.

5020. — *Where exors. have made a proper distribution pro tanto of their testator's estate, & have been ready to produce proper accounts to the unpaid residuary legatees, & an administration action is then instituted by the unpaid residuary legatees, & it turns out that the accounts are substantially correct, the costs of the action must be borne by the residuary legatees who take the benefit of it.* But where, after exors. had made a partial distribution of the residue, an administration action was instituted by the residuary legatees who had not received their shares, & it then turned out that the exors. had made two mistakes, first, in making their distribution upon an erroneous assumption that the residue was divisible among five persons instead of six; & secondly, in expending part of the general personal estate in repairs of property specifically devised:—*Held*: (1) the overpaid residuary legatees could not be made to refund; (2) the exors. must stand in the same position as if no distribution had taken place, & the costs of the action should be paid as out of the entire residuary estate, so as to charge the exors. with the share of costs attributable to each of the distributed shares; (3) the exors. should pay the balance necessary to make up to the unpaid legatees one-sixth of the residue each.—*HILLIARD v. FULFORD* (1876), 4 Ch. D. 389; 46 L. J. Ch. 43; 35 L. T. 750; 25 W. R. 161.

Annotations:—*Folld. Re Bell's Estate, Bath v. Bell* (1878), 39 L. T. 422. *Reid. Re Giles* (1886), 55 L. J. Ch. 695.

5021. — *Re SCHWEDER, OPPENHEIM v. SCHWEDER* (1893), 37 Sol. Jo. 249.

Annotation:—*Consd. Re Trollope, Game v. Trollope*, [1915] 1 Ch. 853.

5022. — *Effect of setting apart fund to meet legacies—Right to follow assets into hands of residuary legatees.*—Where annuities & legacies are charged on property, the ct.'s jurisdiction to set apart a fund to answer the annuities & legacies & distribute the rest of the property is based on administration only, & the exercise of the jurisdiction does not release the rest of the property, which, if the fund fails to answer the annuities & legacies, may be followed into the hands of those who take it.—*Re EVANS & BETTELL'S CONTRACT*, [1910] 2 Ch. 438; 79 L. J. Ch. 669; 103 L. T. 181; 54 Sol. Jo. 680.

5023. — *Testator who died in 1863 gave certain life annuities including one of £8 to the mother of pltf., & after her death he bequeathed a legacy of £200 to her children equally.*

The interest of his residuary estate was given to testator's daughter for life, & then the capital to her children. In an action to administer testator's estate, it was ordered in 1873 that a sum of £266 13s. 4d. consols should be carried to a separate account to answer the annuity of £8. By subsequent orders made in 1865, & 1901, of which no notice was given to the annuitant or her children, various sums were directed to be paid out to the residuary legatees. On the death of pltf.'s mother in 1917 the sum of consols proved insufficient to satisfy in full the legacy of £200 to her children. In an action by pltf., as one of the children entitled to a share of this legacy, against the representatives of one of the residuary legatees to make good the deficiency:—*Held*: the fund having been set aside to secure the annuity only, pltf. was entitled to follow the assets in the hands of the residuary legatees & to recover the deficiency in her legacy, as she could not be held bound by proceedings to which she was not a party.—*Re RIVERS, POLLEN v. RIVERS*, [1920] 1 Ch. 320; 88 L. J. Ch. 462; 121 L. T. 57; 63 Sol. Jo. 531.

(b) *Residuary Legatees.*

5024. Whether legatee liable to refund.—A tenant for life was wrongfully permitted to enjoy a perishable property in specie. The exor. died, & the tenant for life then proved the will, & continued to receive the income. On a bill against the representatives of the exor. & the tenant for life, which contained no special charge, & after the common decree:—*Held*: (1) in such a suit a legatee could not be made to refund over-payments voluntarily made by the exor.; (2) the tenant for life must account for the surplus income received by her after she had proved the will, but not for that received before.—*LICHFIELD v. BAKER* (1840), 13 Beav. 447; 51 E. R. 172, L. C.

Annotation:—*Generally, Reid. Craig v. Wheeler* (1860), 29 L. J. Ch. 374.

5025. — *Estate wasted after payment of some beneficiaries—Onus of proof as to time of wasting.*—Where one of several residuary legatees or next of kin has received his share of the estate of a testator or an intestate, the others cannot call upon him to refund if the estate is subsequently wasted; *secus*: if the wasting has taken place before such share was received. In the latter case, the burden of proof lies on those who call upon the residuary legatee or next of kin to refund, to show that the wasting took place before the share was paid over.—*PETERSON v. PETERSON* (1866), 1 L. R. 3 Eq. 111; 36 L. J. Ch. 101; 15 W. R. 164.

Annotation:—*Reid. Re Lepine, Dowsett v. Culver*, [1892] 1 Ch. 210.

5026. — *Testator devised & bequeathed his residue to his wife & two sons, his extri. & exors., on trust for his wife for life, & after her death as to one-fourth for each of his two sons, & as to the other two-fourths respectively on trust for each of his two daughters & their children. The widow & sons proved the will during the life of the widow. She managed the estate; she paid sums of money in respect of each fourth by anticipation, one son receiving more than was paid in respect of the other shares. It turned out after her death that the estate was insufficient to bring up the other shares to an equality with what such son had received:—*

PART IV. SECT. 8, SUB-SECT. 7.—B. (b).

5025 i. Whether legatee liable to refund—Estate wasted after payment of some beneficiaries.—*O'NEILL v. HAMILL* (1824), Beav. 618.—*IR.*

Sect. 5.—Legacies: Sub-sect. 7, B. (b), C. (a) & (b).]

Held: it not being shown that the deficiency had not arisen from subsequent wasting of the estate, neither son was liable as trustee to make good the deficiency of the other shares, & the son who had received the excess was not liable as beneficiary to refund; but he could not be paid his separate costs as beneficiary because he had already received more in excess of his proper share than the amount of such costs.—*Re WINSLOW, FRERE v. WINSLOW* (1890), 45 Ch. D. 249; 60 L. J. Ch. 20; 63 L. T. 485; 39 W. R. 120.

Annotation:—*Consd. Re Hurst, Addison v. Topp* (1892), 67 L. T. 96.

*C. In favour of Creditors.**(a) Creditors and Legatees.*

5027. Right of creditor to recover against legatee.]—An exor. pays legacies, leaving £800 debt to pay, & dies. Administration *de bonis non* was taken out; the creditor exhibits his bill against the administrator & the legatees; & the ct. decreed that the legatees should refund, for no exor. is bound to pay a legacy, till he be secured to repay when debts are discovered; therefore in equity the laches of the exor. shall not hurt the creditor.—*ANON. (circa 1660)*, Freem. Ch. 137; 22 E. R. 1112.

5028. —.]—*CHAMBERLAINE v. CHAMBERLAINE* (1674), Freem. Ch. 141; 1 Cas. in Ch. 256; 22 E. R. 1115.

Annotation:—*Consd. Doe d. Saye & Seale v. Guy* (1802), 3 East, 120.

5029. —.]—Legatees to refund to make up assets.—*GERMAN v. COLSTON (LADY)* (1678), 2 Rep. Ch. 137; 21 E. R. 639.

5030. —.]—*NOEL v. ROBINSON*, No. 4988, *ante*.

5031. —.]—Legatees paid before creditors where the assets fell short, decreed to refund to an unsatisfied creditor.—*ANON.* (1683), 1 Vern. 162; 23 E. R. 388.

5032. — Equitable charge.]—*HODGES v. WADDINGTON*, No. 5011, *ante*.

5033. —.]—*NEWMAN v. BARTON*, No. 4989, *ante*.

5034. —.]—*WILSON v. FIELDING, MILLERSDEN v. FIELDING*, No. 4173, *ante*.

5035. — Effect of carrying funds to separate account in administration action.]—In a suit for the administration of testator's assets, after the decree on further directions had sanctioned payments made by the exor. in discharge of legacies, & had directed the fund in ct. to be apportioned among the other legatees, a creditor obtained permission to prove his debt; the master subsequently reported a debt to be due to him; but, in the meantime, the fund had been apportioned, & part of it had been paid over, while the remainder had been carried to the account of particular legatees:—**Held:** the creditor was entitled to receive out of the funds of the legatees so remaining in ct., not the whole of the debt, but only a part of it, bearing the same proportion to the whole, as the legacies given to those legatees bore to the whole amount of the legacies given by the will.—*GILLESPIE v. ALEXANDER* (1827), 3 Russ. 130; 38 E. R. 525, L. C.

Annotations:—*Folld. Greig v. Somerville* (1830), 1 Russ. & M. 338. *Consd. David v. Frowd* (1833), 1 My. & K. 200; *Sawyer v. Birchmore* (1836), 1 Keen, 391; *March v. Russell* (1837), 3 My. & Cr. 31; *Todd v. Studholme* (1857), 3 K. & J. 324. *Distd. Davies v. Nicolson* (1858), 2 De G. & J. 693. *Consd. Montefiore v. Browne* (1858), 7 H. L. Cas. 241; *Seale v. Buller* (1860), 2 Giff. 312; *Ridgway v. Newstead* (1861), 3 De G. F. & J. 474. *Apld.*

Cresswell v. Dewell (1863), 4 Giff. 460. *Consd. Harrison v. Kirk*, (1904) A. C. 1. *Refd. Hartwell v. Colvin* (1852), 16 Beav. 140; *Waller v. Barrett* (1857), 24 Beav. 413; *Dilkes v. Broadmead* (1860), 2 Giff. 113; *Re McMurdo*, Penfield v. McMurdo, [1902] 2 Ch. 684; *Cloutte v. Storey*, [1911] 1 Ch. 18.

5036. —.]—In a suit instituted in 1914, to administer the personal estate of an intestate who died in 1907, the master reported that no debts had been proved; & by the decree on further directions, in 1917, the whole of the residue was apportioned & distributed; but as pltf. was then an infant, his share, amounting to four-ninths of the fund, was retained & carried to his separate account. In 1925, a foreign prince claiming to be a creditor of the intestate, petitioned for leave to prove his debt against the sum remaining in ct.; & pltf., coming of age soon after, applied to have that sum paid out:—**Held:** (1) the creditor was not precluded by the previous proceedings, or the lapse of time, from tendering such proof before the master; but every defence should be allowed there which would have been competent upon a new bill; (2) the debt, if established, must be restricted, as against the fund in ct., to that proportion which pltf.'s share bore the whole amount distributed; & after reserving a sum equal to four-ninths of the claim, the residue of the fund ought to be paid out to pltf.—*GREIG v. SOMERVILLE* (1830), 1 Russ. & M. 338; 39 E. R. 131, L. C.

Annotations:—*As to (1) Consd. Sawyer v. Birchmore* (1836), 1 Keen, 391; *Ridgway v. Newstead* (1861), 3 De G. F. & J. 474. *As to (2) Consd. Todd v. Studholme* (1857), 3 K. & J. 324. *Distd. Davies v. Nicolson* (1858), 2 De G. & J. 693. *Apld. Cresswell v. Dewell* (1863), 4 Giff. 460. *Generally, Refd. Dilkes v. Broadmead* (1860), 2 Giff. 113; *Seale v. Buller* (1860), 2 Giff. 312.

5037. — Legatees ignorant of creditors' claims.]—*MARCH v. RUSSELL*, No. 5044, *post*.

5038. — Right to proceed against any legatee.]

—Property specifically bequeathed is not discharged from its liability to testator's debts by the circumstances that there has come to the hands of the exor. personal property of testator not specifically bequeathed more than sufficient to pay his debts & funeral & testamentary expenses, & that the specifically bequeathed property has been made over by the exor. to the specific legatee.

An exor. assigned a leasehold to a person to whom it was specifically bequeathed, & allowed the residuary legatee to take possession of the rest of the property, including another leasehold. After this the rent of the second leasehold fell into arrear & the landlord, being unable to obtain payment from the residuary legatee, filed a bill for administration of testator's estate:—**Held:** he was entitled to have the arrears paid in full out of the specifically bequeathed leasehold, whatever the rights of the specific legatee might be as against the exor. or the residuary legatee. The rule applied in *Gillespie v. Alexander*, No. 5035, *ante*, is not applicable where the estate has not been administered by the ct.—*DAVIES v. NICOLSON* (1858), 2 De G. & J. 693; 27 L. J. Ch. 719; 31 L. T. O. S. 374; 5 Jur. N. S. 49; 6 W. R. 790; 44 E. R. 1158, L. J.

Annotations:—*Consd. Partington v. Carrington* (1859), 34 L. T. O. S. 69; *Dilkes v. Broadmead* (1860), 2 Giff. 113; *Ridgway v. Newstead* (1861), 3 De G. F. & J. 474. *Refd. Price v. Mayo* (1873), 21 W. R. 539.

5039. — Laches of creditor.]—Testator had mortgaged a leasehold brewery, & covenanted to pay the mtge. debt. By his will he bequeathed legacies & an annuity, & made a residuary devise & bequest. His son, to whom he bequeathed the equity of redemption in the brewery, carried on the business, & kept down the interest on the mtge. for thirteen years, & then, in 1856, became bkpt. In the meantime the estate of the mtgor. had been

administered by the exors., & the legacies paid & annuity kept down. In 1857 the mtgee.'s representatives instituted a suit for the administration of testator's estate & payment of the balance of the mtge. debt, if any, which the proceeds of the mortgaged premises might be insufficient to satisfy. The mortgaged premises, having become depreciated, were sold for less than the debt, & the balance was certified to be due from the exors., & was ordered to be paid by them, but they were unable to pay it, whereupon, in 1860, the mtgee.'s representatives filed a bill to have the mtgor.'s residuary real estate applied in payment of his debts, so far as it would extend, & to compel the legatees & annuitant to refund. The residuary devisees had mortgaged their "portions, shares & interest as residuary legatees & exors. of & in the moneys to arise from the sale of" testator's residuary real & personal estates:—*Held*: (1) the lapse of time & intervening circumstances were a sufficient answer to the suit, so far as it sought to call on the legatees & mtgees. to refund; (2) the mtge. made by the residuary devisees was subject to the payment of testator's debts.—*RIDGWAY v. NEWSTAD* (1861), 3 De G. F. & J. 474; 30 L. J. Ch. 889; 4 L. T. 6, 492; 7 Jur. N. S. 451; 9 W. R. 401; 45 E. R. 962, L. C.

Annotations.—As to (1) *Apprvd.* *Blake v. Gale* (1886), 32 Ch. D. 571; *Harrison v. Kirk*, [1904] A. C. 1. *Consd.* *Re Horne, Wilson v. Cox Sinclair*, [1905] 1 Ch. 76. *Appld.* *Re Eustace, Lee v. McMillan*, [1912] 1 Ch. 561. *Refd.* *Re Baker, Collins v. Rhodes, Re Seaman, Rhodes v. Wish* (1881), 20 Ch. D. 230; *Re Bruce, Lawford v. Bruce* (1908), 99 L. T. 704.

5040. ——— *and acquiescence in distribution of personal estate.*—The right of mtgees. of real estate whose security proves insufficient, to come against the residuary legatees of the mtgor., amongst whom his personal estate has been distributed is a purely equitable right, & the ct. will not enforce it if there are circumstances which would make it inequitable to do so. Testator devised his freehold farm to two of his sons upon trusts for his children & issue, & directed that his unmarried daughters should be at liberty to carry on his farming business upon it, paying a rent of £600. He gave his residuary personal estate, in the events which happened, equally among his six children, the above two sons, who were exors. as well as trustees, & his four daughters. Testator had made a first mtge. for £12,000 & a second mtge. for £2,400, & his personal estate was under £11,000. Shortly after the death of testator in 1859, the solrs. of the mtgees. made inquiry as to his affairs, & the solr. of the trustees informed them of the state of the assets & stated that the two unmarried daughters would probably carry on the farm for a time, & that their shares of the personal estate would no doubt afford them sufficient means to do so. The solrs. of the mtgees. wrote back to say that they should be glad to hear that the daughters would be able to continue at the farm. The two daughters carried on the farm till 1863, when one of them married & the farm was then let by the trustees to her husband. The interest was duly paid till 1880, when owing to agricultural depression, the security proved insufficient. The mtgee. for £2,400 in 1882 commenced an action to enforce his security, & to prove for the deficiency against the mortgaged estate, seeking to charge the exors. with a *devastavit* in distributing the personalty without providing for his mtge. debt. The ct. held the exors. not

guilty of *devastavit*; they were charged with their own shares of the residuary personalty as assets in hand, & the balance found due from them was applied in payment of the mtge. debt, without prejudice to any proceeding to make the other residuary legatees refund. *Pltf.* then brought this action against the four daughters to recover the shares of personalty which they had received:—*Held*: *pltf.* could not recover, for the mtgees., having assented to the distribution of the personal estate among the residuary legatees, could not, after this lapse of time, claim it back from them.—*BLAKE v. GALE* (1886), 32 Ch. D. 571; 55 L. J. Ch. 559; 55 L. T. 234; 34 W. R. 555, C. A.

Annotations.—*Distd.* *Re Fludyer, Wingfield v. Erskine*, [1898] 2 Ch. 562. *Appld.* *Re Eustace, Lee v. McMillan*, [1912] 1 Ch. 561.

5041. ——— *Delay not amounting to laches*—Mere delay does not deprive a creditor of his equitable right to follow his deceased debtor's assets for payment of an existing debt.

The mtgor. of a freehold house died shortly after assigning the equity of redemption. Six months later the mtgee. was informed of the assignment & death, but as he received his interest regularly from the assignee, he took no steps to realise his security or to enforce the mtgor.'s covenant. After thirteen years the assignee made default, & the security was found insufficient. The mtgor.'s estate had long since been distributed:—*Held*: the mtgee. was entitled to follow the mtgor.'s assets for any deficiency on the security.—*Re EUSTACE, LEE v. McMILLAN*, [1912] 1 Ch. 561; 81 L. J. Ch. 529; 106 L. T. 789; 56 Sol. Jo. 408.

5042. ———.]—*HUNTER v. YOUNG*, No. 3971, *ante*.

5043. ——— *Payment of legacy de bonis propriis.*—*Re BROGDEN, BILLING v. BROGDEN*, No. 3889, *ante*.

(b) Right to Follow Legacies.

5044. Against volunteer claiming through legatee.—In the year 1810 a sum of stock was transferred into the names of A. & B., in trust for a father & mother, in certain proportions, for their respective lives, with remainder to their children. Shortly afterwards, the stock was transferred by A. & B. into the name of B. only, who appropriated it to his own use. In 1818, the father & mother filed a bill against A. & B., to have the stock replaced; & the children, two in number, were co-plts., & being infants, sued by their father, as their next friend; but that suit was soon afterwards compromised, upon B. giving security for the payment of interest for the time past & for the time to come. A. subsequently died, & his personal estate was distributed among his legatees; & two of those legatees then died, having received their legacies; & the residuary personal estate of one of them was paid over to her residuary legatee. These distributions were made in ignorance of any demand arising out of the breach of trust in which A. had concurred. The elder of the two children attained twenty-one in 1821, & the other in 1823. In 1833 they filed a bill alone against B. & the personal representative of A. & his surviving legatees, & the personal representatives of his deceased legatees, & the residuary legatee of one of those deceased legatees, & against the father & mother of plts., praying to have the fund replaced:—*Held*: plts. were entitled to call upon the surviving legatees of

PART IV. SECT. 5. SUB-SECT. 7.— C. (b).

d. Against assignee for value from legatee—Costs incurred after assignment.]

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—Exor. having assigned his legacy, & having afterwards been decreed to pay costs, the legacy which had been assigned was held subject to make

good those costs, although the liability had arisen after the assignment.—*HOR- KIN v. GOWAN* (1828), 1 Mol. 561.—*IR.* e. ——.]—A purchaser for value

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Sect. 5.—Legacies: Sub-sect. 7, C. (b) & D.; sub-sects. 8, 9, 10, 11 & 12, A.]

A., & the personal representatives & legatees of his deceased legatees to refund; & without any previous inquiry, as to whether pltfs. had known of or acquiesced in the breach of trust, or the compromise of the suit of 1818.—**MARCH v. RUSSELL** (1837), 3 My. & Cr. 31; 6 L. J. Ch. 303; 1 Jur. 588; 40 E. R. 836, L. C.

Annotations:—**Consd.** *Waller v. Barrett* (1857), 24 Beav. 413; *Re King, Mellor v. South Australian Land Mortgage & Agency Co.*, [1907] 1 Ch. 73. **Refd.** *Partington v. Carrington* (1859), 34 L. T. O. S. 69; *Life Assn. of Scotland v. Siddall, Cooper v. Greene* (1861), 3 De G. F. & J. 58; *Ridgway v. Newstead* (1861), 3 De G. F. & J. 474; *Williams v. Headland* (1864), 3 New Rep. 412; *Re Blow, St. Bartholomew's Hospital v. Camden*, [1914] 1 Ch. 233.

, 5045. —[—]**HUNTER v. YOUNG**, No. 3971, ante.

5046. Against assignee for value from legatee—Effect of payment of legacy into court.]—Testator, by his will, gave several legacies, among which were two legacies of £2,000 each, upon which a duty of 10 per cent. was paid, & the sums set apart until the legatees attained twenty-five. The residuary estate was given to one of the exors., who was allowed to receive & apply it for his own use, as the debts & legacies of testator were considered to be satisfied. After this, upon the expiration of a lease which had been granted to testator, an action was brought against the exors. for breach of covenants contained therein. One of the exors. then instituted two suits, the one to administer the estate of testator, & the other to get the two appropriated legacies into ct. Orders were made in each of these suits in accordance with the prayer, but the residuary legatee, when pressed to pay the residuary estate into ct., took the benefit of the Insolvent Act. Upon a petition by the creditor to obtain payment of his debt:—**Held**: he was entitled to enforce the orders made in the suits, & the two appropriated sums were liable to make good the debt claimed in the action together with all costs incurred, though one of the legacies had been sold & assigned by the legatee to a stranger.—**NOBLE v. BRETT** (1858), 24 Beav. 499; 27 L. J. Ch. 516; 31 L. T. O. S. 228; 4 Jur. N. S. 623; 6 W. R. 219; 53 E. R. 450.

Annotations:—**Consd.** *Graham v. Drummond*, [1896] 1 Ch. 968. **Refd.** *Montellore v. Browne* (1858), 7 H. L. Cas. 211; *Sabin v. Hoape* (1859), 5 Jur. N. S. 1146; *Dilkes v. Broadwood* (1860), 2 Off. 113.

5047. —[—]—In an administration suit all the certified debts were paid, & the residuary legatees were declared entitled to the estate of testator subject to an annuity, to provide for which a fund was retained in ct. to the credit of the cause. The fund in ct. was assigned for value by the residuary legatees & stop orders were obtained. Afterwards other creditors of testator established their claim in another suit, to which the exor. of testator & the residuary legatees were parties:—**Held**: these creditors were entitled to payment out of the fund in ct. in priority to the assignees of the residuary legatees.—**HOOPER v. SMART, PIPER v. PIPER, BAILEY v. PIPER** (1875), 1 Ch. D. 90; 45 L. J. Ch. 99; 33 L. T. 490; 24 W. R. 152.

Annotations:—**Consd.** *Graham v. Drummond*, [1896] 1 Ch.

of a legacy is but a purchaser of a chose in action, & is subject to the same equities in respect of the legacy as his vendor, & if necessary, must refund it to pay debts.—**JENNINGS v. BOND** (1845), 8 I. Eq. R. 755; 2 Jo. & Lat. 720.—**IR.**

I. Payment of legacy by executor

—**Probate revoked by consent & payments satisfied—Whether action lies against legatee to refund.]—****DUANE v. LEE** (1884), 14 L. R. Ir. 56.—**IR.**

PART IV. SECT. 5, SUB-SECT. 8.

5051 I. Whether action maintainable—

968. **Refd.** *Re Rhodesia Goldfields, Partridge v. Rhodesia Goldfields*, [1910] 1 Ch. 239.

5048. —[Effect of settlement of testator's assets in consideration of marriage.]—Assets of testator, consisting of personality which could be identified, were settled *bond fide* upon the marriage of his daughter & residuary legatee:—**Held**: they thereupon ceased to be liable to subsequently accruing claims in respect of breaches of covenants which had been entered into by testator, but of which the parties to the settlement had no notice when they executed it.—**DILKES v. BROADMEAD** (1860), 2 De G. F. & J. 566; 30 L. J. Ch. 268; 3 L. T. 605; 7 Jur. N. S. 56; 9 W. R. 238; 45 E. R. 740, L. C.

Annotations:—**Refd.** *Ridgway v. Newstead* (1861), 3 De G. F. & J. 471; *Adamson v. Hammond* (1873), L. R. 3 P. & D. 141; *Re Hedgely, Small v. Hedgely* (1886), 35 W. R. 472; *Graham v. Drummond*, [1896] 1 Ch. 968.

D. Insolvency of Legatees.

5049. Effect of direction by court for contribution among legatees for payment of debts—Additional liability of solvent legatees.]—A contribution was directed amongst specific legatees for payment of the debts & costs of suit. One of such legatees became insolvent, & by his non-payment, the fund raised was deficient. The ct. directed an additional contribution amongst the solvent legatees.—**CONOLLY v. FARRELL, CONOLLY v. BUTCHER** (1846), 10 Beav. 142; 50 E. R. 536.

Annotation:—**Refd.** *Re Peerless, Peerless v. Smith* (1901), 45 Sol. Jo. 670.

5050. —[—]—**Re PEERLESS, PEERLESS v. SMITH** (1901), 45 Sol. Jo. 670.

SUB-SECT. 8.—RECOVERY OF LEGACIES.

5051. Whether action maintainable—For legacy.]

—In the case of a personal legacy where the will is destroyed or concealed by the exor., the rule is to cite the exor. into the ecclesiastical ct., yet the legatee may properly come here for a decree upon the head of spoliation & suppression.—**TUCKER v. PHIPPS** (1746), 3 Atk. 359; cited in 1 Ves. Sen. at p. 284; 20 E. R. 1008, L. C.

Annotation:—**Mentd.** *Pinney v. Hunt* (1877), 6 Ch. D. 98.

5052. —[—]—No action at law can be maintained for a legacy.—**DEEKS v. STRUTT** (1791), 5 Term Rep. 690; 101 E. R. 384.

Annotations:—**Consd.** *Doe d. Saye & Sele v. Guy* (1802), 3 East, 120. **Expld.** *Barnes v. Hedley* (1809), 2 Taunt. 184. **Expld. & Apd.** *Jones v. Tanner* (1827), 7 B. & C. 542. **Expld. & Distd.** *Gregory v. Harman* (1828), 1 Moo. & P. 209; *Hart v. Minors* (1834), 2 Cr. & M. 700. **Refd.** *Knights v. Quarles* (1820), 4 Moore, C. P. 532; *Holland v. Clark* (1842), 1 Y. & C. Ch. Cas. 151.

5053. —[Void & Informal legacy.]—

Among the papers of testator were found two letters, sealed & directed "For S. my late servant." S. had been in the service of testator as house-keeper for some years before his death, but had left him for some time previously to that event. These letters contained promissory notes for large sums of money, & one of the letters stated, that testator inclosed £200 as a mark of respect; & the other letter stated, that the inclosed was for her long & faithful services. S. applied to the exors. for payment of the notes; & upon seeing

For legacy.]—An action for a legacy can be maintained against any person who under a will is made liable to pay such legacy, or receives under such will funds sufficient to pay it.—**ELLS v. ELLS** (1841), 1 Thom. 2nd ed. 173.—**CAN.**

the notes, they paid her a portion of the amount, & promised to pay the remainder, but afterwards refused to do so:—*Held*: (1) an action was not maintainable by S. upon the notes, which were, in effect, a legacy, & an informal one, in not being duly attested as required by the Wills Act, 1837 (c. 26), & therefore void; (2) the action was not maintainable on the account stated, inasmuch as the promise of the exors. was made on a supposed debt, which, in fact, was not due.—*GOUGH v. FINDON* (1851), 7 Exch. 48; 21 L. J. Ex. 58; 18 L. T. O. S. 79; 155 E. R. 850.

Annotations:—*As to* (1) *Consd. Hulce v. Hulce* (1856), 17 C. B. 711. *As to* (2) *Refd. Marshall v. Wilson* (1866), 14 W. R. 699.

— *Effect of assent to legacy.*—*See* Nos. 4629–4655, *ante*.

— *On promise by representative to pay.*—*See* Part VI., Sect. 4, sub-sect. 2, D., *post*.

— *In county court.*—*See* COUNTY COURTS, Vol. XIII., pp. 404, 474, 544, 545, Nos. 138, 237–240, 993.

— *Effect of lapse of time—Presumption of payment.*—*See* Sub-sect. 4, F., *ante*.

5054. — *Laches.*—*Testator* bequeathed to his widow a pecuniary legacy & a life annuity. She survived him twenty-eight years, & after her death, her extrix. filed a bill for their recovery. No explanation was given of the circumstances, & no proof of any intermediate payment. The bill was dismissed on the ground of great laches.—*PATTISON v. HAWKESWORTH* (1817), 10 Beav. 375; 50 E. R. 620.

See, generally, EQUITY, Vol. XX., pp. 524 *et seq.*; *ESTOPPEL*, Vol. XXI., pp. 347 *et seq.*

— *Statutes of Limitation.*—*See* LIMITATION OF ACTIONS.

5055. — *Effect of receiving interest in meantime—Bankruptcy of executor—Right to recover against co-executor.*—If a man makes two persons his exors. & residuary legatees & dies, & then one of the exors. becomes a bkpt., a legatee under the will is intitled to recover from the other out of any part of testator's estate in his hands what remains due of his legacy, notwithstanding he had received interest upon it from bkpt. for several years after it became payable, if bkpt. would not during that time pay the principal, particularly if he were an infant during that time.—*SPENDLOVE v. ALDRICH* (1714), 2 Ld. Raym. 1320; 92 E. R. 362, L. C.

SUB-SECT. 9.—FAILURE OF LEGACIES.

— *Uncertainty.*—*See, generally, WILLS.*

— *Charitable trust.*—*See* CHARITIES, Vol. VIII., pp. 305 *et seq.*

— *Lapse.*—*See* WILLS.

— *Legacy to attesting witness.*—*See* WILLS.

SUB-SECT. 10.—DISCLAIMER OF LEGACIES.

— *Generally.*—*See* EQUITY, Vol. XX., pp. 440, 466, WILLS.

— *By infant.*—*See* Sub-sect. 14, E., *post*.

SUB-SECT. 11.—LEGACIES TO CREDITORS.

— *Satisfaction of debt by legacy.*—*See* EQUITY, Vol. XX., pp. 478 *et seq.*

— *Ademption of legacies.*—*See* EQUITY, Vol. XX., pp. 454 *et seq.*

SUB-SECT. 12.—LEGACIES TO DEBTORS.

A. What are.

5056. *Release of debt.*—*Pltf.'s* grandmother said by her will, "I likewise forgive my son-in-law R. a debt of £500 due to me upon bond, & desire my exor. to deliver the same to be cancelled." The legatee died in the lifetime of testatrix:—*Held*: *pltf.*, his representative, ought to have the benefit of this discharge of the debt, & the bond should be delivered up to be cancelled.

Giving or forgiving a debt to debtor is a testamentary act & to be considered as a legacy with regard to the administration of assets (*LORD HARDWICKE, C.*).—*SIBTHORP v. MOXOM* (1747), 3 Atk. 580; 1 Ves. Sen. 40; 1 Wils. 178; 20 E. R. 1134, L. C.

Annotations:—*Refd. Toplis v. Baker* (1789), 2 Cox, Eq. Cas. 118; *Izon v. Butler* (1815), 2 Price, 34. *Mentd. Walte v. Templer* (1829), 2 Sim. 524.

5057. — *What amounts to release.*—*A.* devised to B. £400 which he owed her, provided that thereout he paid several sums to his wife & children; & the rest she freely gave to him, & directed her exor. to deliver up the security, & not to claim any part of the debt, but to give such release as B. his exors. etc., should require. B. died in the lifetime of testatrix. Decreed the legacies given out of the £400 to be paid, & the residue of the debt to be paid to the exor.

If a person says in his will I forgive such a debt, or my exor. shall not demand it, or shall release it, this is a discharge of the debt, though debtor die in the lifetime of testator. But if a debt is devised by will to the debtor, without words of release or discharge of the debt, & the debtor dies in the life of testator, the legacy is lapsed, & the debt subsists.—*ELLIOTT v. DAVENPORT* (1705), 2 Vern. 521; 1 P. Wms. 83; 23 E. R. 935.

Annotations:—*Consd. Sibthorp v. Moxom* (1747), 3 Atk. 580; *Toplis v. Baker* (1789), 2 Cox, Eq. Cas. 118. *Refd. Izon v. Butler* (1815), 2 Price, 34; *Shuttleworth v. Greaves* (1838), 4 My. & Cr. 35; *Re Currie's Settlement, Re Rooper, Rooper v. Williams*, [1910] 1 Ch. 329.

5058. — *Necessity for clear expression of intention.*—Though a gift of a legacy may release a debt, yet where the bond remains uncancelled, it must clearly express the intention so to do.—*WILMOT v. WOODHOUSE* (1793), 4 Bro. C. C. 227; 20 E. R. 865.

5059. — *Joint debt.*—"I return A. his bond" in a will, is not a release, but a legacy; & having lapsed, the bond remains in force against a surviving co-obligor.—*MAITLAND v. ADAIR* (1796), 3 Ves. 231; 30 E. R. 984; *on appeal, sub nom. ADAIR v. MAITLAND* (1798), 7 Bro. Parl. Cas. 587, H. L.

Annotation:—*Apld. Izon & Whitehurst v. Butler* (1815), 2 Price, 34.

5060. — — — — — *A bequest by the obligee to one of joint obligors, of a debt due on the bond, in these terms "I remit & forgive to T. W. the sum of £500 which he stands indebted to me on his bond; & I direct said bond to be delivered up to him & cancelled," is merely a personal legacy to T. W. & lapses, by his death in the lifetime of testator; for, notwithstanding the terms in which it is bequeathed, such a bequest does not operate by way of equitable release, or as an extinguishment of the debt. Therefore the surviving co-obligor, & the representatives of deceased legatee, are not discharged from the payment of the money due on the bond.*—*IZON v. BUTLER* (1815), 2 Price, 34; 146 E. R. 13.

Annotation:—*Apld. A.-G. v. Holbrook* (1823), 12 Price, 407.

5061. — — — — — *Testator gave J. & P. £10 each for mourning, & £100 to N., his exor. for the*

Sect. 5.—Legacies: Sub-sect. 12, A. & B. (a).]

trouble he would have in the execution of the will. By a codicil, he gave legacies to other persons, & directed that if they or any other person who had a legacy left them by any will should owe him any sum or sums of money at his decease, it should be considered as part of their legacy. At testator's death N. owed testator £4,000, & two of the other legatees also owed him sums much greater than their legacies:—*Held*: testator intended to remit their debts as well as to give them their legacies.—*HYDE v. NEATE* (1847), 15 Sim. 554; 9 L. T. O. S. 35; 11 Jur. 259; 60 E. R. 734.

5062. ———.—[A direction by testator in his will to his trustees to pay his son a sum of money, coupled with evidence that at the time when testator took security from his son for a debt still owing, he had said that he did not intend to enforce such security, does not amount to a release of such debt, & the trustees can accordingly retain such legacy, & set it off against the debt, which was of larger amount than the legacy.—*Re TYNLINE, ELDER v. TYNLINE* (1912), 56 Sol. Jo. 310.

5063. ———.—[Testator in his lifetime advanced money from time to time to his son-in-law. In his ledger he made an entry in Feb. 1907, "£5,000 is given off this debt for a definite object arranged between me & M.," wife of debtor, "as from July 3, 1906, with interest due to that date." After deducting the sum of £5,000 the indebtedness amounted in June, 1909, to £4,800, & testator then made another entry: "This debt is absolutely cancelled from this date, viz. £4,800 & interest." By his will dated Mar. 12, 1908, testator, after appointing debtor to be one of his exors, gave a settled legacy to debtor's wife & children & directed that the debt due from debtor should be treated as a loss to the legacy & not as a loss to his residuary estate:—*Held*: the debt of £4,800 & interest had been effectively released, but the rest of debtor's indebtedness remained a debt due to testator's estate.—*Re PINK, PINK v. PINK*, [1912] 2 Ch. 528; 81 L. J. Ch. 753; 107 L. T. 241; 28 T. L. R. 528; 56 Sol. Jo. 608, C. A.

Annotation:—*Mentd. Re Stoneham, Stoneham v. Stoneham*, [1919] 1 Ch. 149.

5064. ———.—[Where tenants for life of shares of residue under a will are indebted to testator for sums lent to them during his lifetime, a general direction in the will that such sums shall be brought into hotchpot & treated as part of debtors' shares does not extinguish the personal liability of debtors.—*Re BARKER, GILBEY v. BARKER*, [1918] 1 Ch. 128; 87 L. J. Ch. 166; 118 L. T. 206.

Annotation:—*Reid. Re Greg Fordham v. Greg*, [1921] 2 Ch. 243.

5065. ———.—**What debts released—Debts incurred between dates of codicil & death.**—[Testator, after reciting that his son was "now indebted" to him in various sums of money in respect of advances, & that he was desirous that his son should be released from the said several sums, & that the securities held in respect thereof should be given up to him, bequeathed to his son all the aforesaid several moneys, with the securities then in testator's custody relating thereto, & also released him from all claims in respect of the aforesaid moneys, " & all other moneys due from him" to testator. By a codicil testator released the son from another specified debt for money misappropriated by the son:—*Held*: the will must be construed as speaking from the death of testator; & the son was released from the repay-

ment of money advanced to him by testator between the date of his codicil & of his death.—*EVERETT v. EVERETT* (1877), 7 Ch. D. 428; 47 L. J. Ch. 367; 38 L. T. 580; 26 W. R. 333, C. A. *Annotations*:—*Mentd. Re Portal & Lamb* (1884), 27 Ch. D. 600; *Re Horton, Lloyd v. Hatchett*, [1920] 2 Ch. 1.

Release generally.—*See CONTRACT*, Vol. XII., pp. 497 *et seq.*

Appointment of debtor as executor.—*See Part I., Sect. 5, sub-sect. 1, ante.*

*B. Effect of.**(a) In General.*

5066. Whether debt must be brought into account.—[Retainer allowed to one exor. out of a legacy to his co-exor. in respect of a *devastavit*.—*SIMS v. DOUGHTY* (1800), 5 Ves. 243; 31 E. R. 567.

Annotations:—*Mentd. Constantine v. Constantine* (1801), 6 Ves. 100; *Sherratt v. Bentley* (1834), 2 My. & K. 149.

5067. ———.—*SKINNER v. SWEET* (1818), 3 Madd. 244; 58 E. R. 499.

5068. ———.—**Debt waived but not formally released.**—[An annuity of £200 was bequeathed to A. provided he paid £2,000 due to testator; but if he paid £1,000, then an annuity of £100, with a recommendation to the exor. to lean on the side of mercy, & to be liberal to him. A. paid off £1,400. The exor., who was also residuary legatee, paid the annuity of £200 during his life, & waived in writing, but did not formally release the remainder of the debt:—*Held*: his exor. might, notwithstanding withhold the annuity until the remainder of the debt was paid.—*HEMMING v. GURREY* (1825), 2 Sim. & St. 311; 57 E. R. 365; *on appeal, sub nom. HEMMING v. CLUTTERBUCK* (1827), 1 Bli. N. S. 479, H. L.

Annotations:—*Mentd. Suisse v. Lowther* (1843), 2 Hare, 424; *Lee v. Palm* (1844), 4 Hare, 201; *Kidd v. North* (1846), 2 Ph. 91; *Tuckey v. Henderson* (1863), 33 Beav. 174; *Wilson v. O'Leary* (1872), 7 Ch. App. 448; *Whyte v. Whyte* (1873), 22 W. R. 180.

5069. ———.—[Testator domiciled in Jamaica, gave legacies in Jamaica currency to J., H., & M., persons also domiciled in that island, & desired them to be paid out of money due to him on certain bonds which the will specified. At his death, in Scotland in 1790, no such bonds were to be found; but J. was then indebted to his estate upon other bonds, in a sum which exceeded the value of his legacy, & which, a year after testator's death, including interest, was equal to the amount of the penalties. In 1794 actions were brought in Jamaica upon those bonds, by testator's personal representative there, & judgments recovered against J. for the full penalties & costs; but no attempt was made to levy execution upon the judgments, & they remained unsatisfied. About the time of testator's death the legatees came to England, & never returned to Jamaica, nor did any of them set up a claim to their legacies prior to 1817. In 1818 H. & M. assigned their respective legacies to plff. who was the personal representative of J., the other legatee; & he, in 1821, when administration was for the first time taken out to testator's estate in England, filed the bill for the purpose of enforcing payment:—*Held*: J. must be considered as having been paid his legacy by retaining the amount out of the bond debts, & that amount was to be deducted, first from the interest, & then *pro tanto* from the principal due from him upon the bonds, as at the end of a year after the death of testator; & interest was then to be calculated on the balance till the amount equalled the sum for which the judgments were recovered, & no further.—*CAMPBELL v. GRAHAM* (1831), 1 Russ. & M. 453; 9 L. J. O. S. Ch. 234;

39 E. R. 175; *on appeal, sub nom.* CAMPBELL v. SANDFORD (1834), 8 Bli. N. S. 622, II. L.

Annotations :—*Refd.* Courtenay v. Williams (1844), 3 Haro. 539; Dingle v. Coppen, Coppen v. Dingle, [1899] 1 Ch. 726. *Mentd.* Baldwin v. Peach (1835), 1 Y. & C. Ex. 453; Grenfell v. Girdlestone (1837), 2 Y. & C. Ex. 662; Freeman v. Dowling (1856), 2 Jur. N. S. 1014; Williams v. Hughes (1857), 4 Jur. N. S. 42; Pitt v. Dacre (1876), 3 Ch. D. 295.

5070. —.]—J. & R. being joint tenants of a freehold estate, subject to a mortgage to T. for £1,200, R., by articles made on his marriage, covenanted to settle his moiety of the estate on himself for life, remainder to his intended wife for life, remainder to the children of the marriage; & afterwards, he bought J.'s moiety of the estate, & then mortgaged the entirety to J., without notice of the articles for £1,000. J. died, having by will given his residuary real & personal estate to R. absolutely, subject to a life interest therein to his wife. The exors. of J., without notice of the articles, lent R. £3,200, being the residue of J.'s personal estate, to pay off the mtge. of T., & also for his other occasions, on mtge. of the entirety of the estate; & afterwards R. died, leaving his wife & children surviving, & the exors. of J. took possession of the estate, & applied the rents in payment of the interest of the mtges.; & some years afterwards the widow of J. died:—*Held*: the widow of R. had no right to be paid out of the assets of R., in priority to his other creditors, the amount of the rents of the settled moiety of the estate, received by the exors. of J., & by them applied, after they had entered into possession, in paying the interest of the mtges. during the life of J.'s widow; & she had no lien against any portion of J.'s assets coming to the estate of R. for the discharge of such arrears, but she could only claim as a specialty creditor against R.'s estate.

What happened is, that part of the debt due on the mtge. was part of the estate of J. at his death; & by the will of J., that debt ceased to be a debt. It was given to R., who became, by the bequest, a creditor, as, by the mtge., he was a debtor of J.'s estate.

It seems to me, that there was an extinguishment of the debt due from the estate of R. to that of J. & under these circumstances, I do not think the widow of R. is entitled to the lien she claims. She, therefore, can only come in as a specialty creditor (LORD LANGDALE, M.R.).—ALLEN v. ALDRIDGE (1842), 6 Jur. 183.

5071. —.]—One of the creditors of an insolvent died intestate, leaving the insolvent one of his next of kin:—*Held*: the administrators of the creditor were not entitled to retain the debt out of the insolvent's distributive share of the creditor's estate.—BELL v. BELL (1849), 17 Sim. 127; 13 Jur. 1040; 60 E. R. 1077.

5072. —.]—(1) Testator, by will, gave a legacy to his son, who was a member of a co-partnership firm. The members of the firm were after the death of testator adjudged bkpt. & at the time of bkpy. the firm was indebted to testator's estate:—*Held*: the assignees of the bkpt. partnership were not entitled to the legacy so long as the partnership debt remained due to testator's estate.

(2) In 1834 testator advanced a sum of money to his son W. on his commencing business. In 1840 the business was wound up. Testator subsequently lent other sums to W. on his promissory notes. In 1860 more than six years from the dates having elapsed testator died, having bequeathed the residue of his estate to trustees to distribute among his children equally. In the same year the firm of which W. was a partner, &

to the whole of the members of which one share had been lent, was adjudicated bkpt. The chief clerk certified that these sums were due to the estate from W. & the ct. held that such sums must be retained by the exors. out of his share of the residue.—SMITH v. SMITH (1861), 3 Giff. 263; 31 L. J. Ch. 61; 5 L. T. 302; 7 Jur. N. S. 1140; 66 E. R. 408.

Annotations :—*As to* (1) *Expld. & Distd.* Turner v. Turner, [1911] 1 Ch. 716. *Generally, Mentd.* Eno v. Tatam (1863), 32 L. J. Ch. 159.

5073. —.]—Where a beneficiary under a testator's will was a debtor of his who had owed him moneys under a promissory note given in 1877, & who had, in 1882, entered into an agreement with testator to pay him a certain sum of money for which no distinct consideration could now be clearly ascertained:—*Held*: there was a presumption of law that the promissory note had been discharged by "accord & satisfaction," on the entrance into the later agreement, but there was no presumption that the moneys still due under the agreement had been forgone by testator; therefore the exors. were entitled to deduct the latter, but not the former, from the beneficiary's share.—WOODCOCK v. EAMES (1925), 60 Sol. Jo. 444.

5074. — *Residuary legatee.*—The exors. of testator, who was surely upon two promissory notes drawn by his son, borrowed £4,000 to take up the notes, & stop proceedings by the creditors to obtain payment:—*Held*: the share, to which the son was entitled as one of the residuary legatees under his father's will, was bound, as against subsequent mtges. to repay to the trustees, not only the principal due upon the notes, but also the interest upon the amount for which they were originally drawn. WILLES v. GREENHILL (1860), 29 Beav. 376; 30 L. J. Ch. 808; 9 W. R. 217; 54 E. R. 673.

Annotations :—*Appld.* *Re* Palmer, Palmer v. Clarke (1894), 13 R. 220. *Consd.* *Re* Melton, Milk v. Towers, [1918] 1 Ch. 37. *Refd.* *Re* Watson, Turner v. Watson, [1896] 1 Ch. 925. *Mentd.* Newman v. Newman (1885), 28 Ch. D. 674; Quartermaine v. Selby (1889), 5 T. L. R. 223; *Re* Langham, Otway v. Langham (1896), 71 L. T. 611; *Re* Goy, Farmer v. Goy, [1900] 2 Ch. 149; Lloyd's Bank v. Pearson, [1901] 1 Ch. 865; *Re* Phillip's Trusts, [1903] 1 Ch. 183; *Re* Brown & Gregory, Shephard v. Brown & Gregory, Andrews v. Brown & Gregory, [1904] 1 Ch. 627; *Re* Rhodesia Goldfields, Partridge v. Rhodesia Goldfields, [1910] 1 Ch. 239.

5075. —.] After testator's death a legatee of a one-fourth reversionary share in a residuary fund, on whose behalf testator had given a continuing guarantee fully securing his banking account, but limiting testator's liability to a specified amount, mortgaged his reversionary share to the bank to secure his account & subsequently became bkpt. The bank as principal creditors valued their security & proved for the whole balance of their overdraft, on which they received under 10s. in the pound, & had no chance of obtaining full payment. The exors. as sureties were then compelled to pay the sum of £313, the full amount for which they were liable under the guarantee. The bank, with the concurrence of the legatee's trustee in bkpy., subsequently sold the reversionary share to an assignee. On the reversion falling in & the estate becoming divisible:—*Held*: the £313 must be brought into hotchpot by the assignee on the ground that it did not form part of the assignor's estate at the time of his bkpy.

Re Binns, [1896] 2 Ch. 584, overrd.

Apart from the debtor having become bkpt., I think it cannot be questioned that the debt arising under an obligation to indemnify a surety can be deducted from a legacy or share of residue

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given to the debtor (SWINFEN EADY, L.J.).—*Re MELTON, MILK v. TOWERS*, [1918] 1 Ch. 37; 87 L. J. Ch. 18; 117 L. T. 679; 34 T. L. R. 20, C. A.

— **Bankruptcy of legatee.**—*See* BANKRUPTCY, Vol. IV., p. 418, No. 3773.

5076. — As between debtor & residuary legatee of creditor.—E. sole residuary legatee of K. bequeathed to W. a debtor to K.'s estate, a share of her residuary estate; K.'s estate yielded a clear residue, exclusive of W.'s debt:—*Held*: as between the other residuary legatees of E. & the assignees in bkpy. of W. the debt must be set off against W.'s share of E.'s residuary estate.—*HOUSFIELD v. LAWFOORD* (1863) 1 De G. J. & Sm. 459; 2 New Rep. 293; 33 L. J. Ch. 26; 8 L. T. 619; 11 W. R. 843; 46 E. R. 182, L. J.J.

Annotations:—*Consd.* *Stammers v. Elliott* (1867), L. R. 4 Eq. 675; *Re Watson, Turner v. Watson*, [1896] 1 Ch. 925.

5077. — Expenses in administration caused by legatee's conduct.—(1) An assignee for value of an unpaid legacy takes subject to liabilities attaching to the same as part of the assets, such as costs of administering the estate, & also subject to a lien for moneys owing by the legatee to the estate.

(2) The husband of a *feme covert* legatee takes his wife's legacy subject to the same liabilities.

(3) Where expenses in the administration, chargeable by the extrix. against the estate, had been caused by a legatee's conduct & were a debt from him to the extrix.:—*Held*: his legacy was subject to a lien in the hands of the extrix. for the amount, to the exoneration of the residuary & other legatees.—*Re Knapman, Knapman v. WREFOED* (1881), 18 Ch. D. 300; 50 L. J. Ch. 629; 45 L. T. 102; 30 W. R. 395, C. A.

Annotations:—*As to* (1) *Consd.* *Re Pain, Gustavson v. Haviland*, [1919] 1 Ch. 38. *Reid.* *Re Langham, Otway v. Langham* (1896), 74 L. T. 611. *As to* (3) *Consd.* *Re Harrold, Wilde v. Walford* (1883), 52 L. J. Ch. 435. *Generally, Mentd.* *Bolton v. Currie* (1894), 70 L. T. 759.

5078. — Debt due from partnership of which legatee is member.—*SMITH v. SMITH*, No. 5072, ante.

5079. ——The principle that a legatee who is indebted to testator's estate can receive nothing from testator's bounty until he has brought into account the amount due in respect of the debt does not apply where the debt is owed by a partnership of which the legatee is a member.—*TURNER v. TURNER*, [1911] 1 Ch. 716; 80 L. J. Ch. 473; 104 L. T. 901, C. A.

5080. — Debt arising after testator's death — Payment by executors of promissory notes on which testator & legatee liable.—In Mar. 1885, W. a son of testator, entered into a contract for the purchase of a business for £1,500, of which £300 was to be paid at once & the residue by instalments, to be secured by the joint & several promissory notes of W. & testator. W. had no property of his own, & testator, who was not a party to the contract, paid the £300, & he & W. gave their joint & several promissory notes to the vendor for the instalments. Testator paid the amount due on the first promissory note, but died before any of the others became due, having by his will, dated

Oct. 1885, given benefits to his sons, & declared that before any of them should participate under his will they should repay all sums of money advanced to them during his lifetime & if unable to do so, "such advances" should be taken as part of their share under the will. Shortly after testator's death W. executed a creditors' deed whereby he assigned all his property for the benefit of his creditors, & the creditors released him, but reserved their rights as against his sureties. Nothing further having been paid in respect of the purchase-money, the vendor proved under the deed for the whole balance secured by the remaining promissory notes, & failing to obtain payment, carried in a claim against the estate of testator, & the exors. paid the amount less a discount:—*Held*: the exors. of testator having paid the amounts of the promissory notes falling due after his death, were entitled to elect whether they would recover against the principal debtor under the agreement arising out of the suretyship, in which case they would be entitled to be paid or retain out of the income of W.'s share, or whether they would stand in the place of the vendor the principal creditor, whom they had paid; but in the latter case they must give up their right of retainer.—*Re WHITEHOUSE, WHITEHOUSE v. EDWARDS* (1887), 37 Ch. D. 683; 57 L. J. Ch. 161; 57 L. T. 761; 36 W. R. 181.

Annotations:—*Apld.* *Re Watson, Turner v. Watson*, [1896] 1 Ch. 925. *Consd.* *Re Melton, Milk v. Towers*, [1918] 1 Ch. 37.

5081. — Payment under guarantee — Testator surety for legatee.—A surety for a mtgor. bequeathed to him a share of the residue of his estate, subject to the life interest of testator's widow. After the death of testator the mtgor. became bkpt. He never obtained a discharge, & the bkpy. was never closed. Neither the mtgees. nor testator's exors. proved in the bkpy. After the bkpy. the exors. made some payments to the mtgees. in pursuance of testator's liability under his contract of suretyship:—*Held*: on the death of the tenant for life, the exors. were entitled, notwithstanding the bkpy., to retain out of the mtgor's share of the residue the amount of the payments which they had thus made to the mtgees., with interest thereon at 4 per cent.—*Re WATSON, TURNER v. WATSON*, [1896] 1 Ch. 925; 65 L. J. Ch. 553; 74 L. T. 453; 44 W. R. 571.

Annotations:—*Consd.* *Re Melton, Milk v. Towers*, [1918] 1 Ch. 37. *Reid.* *Re Powell, Powell v. Powell* (1904), 20 T. L. R. 374; *Re Sewell, White v. Sewell*, [1909] 1 Ch. 806. *Mentd.* *Re Goy, Farmer v. Goy*, [1900] 2 Ch. 149; *Re Brown & Gregory, Shephard v. Brown & Gregory, Andrews v. Brown & Gregory*, [1904] 1 Ch. 627; *Re Rhodesia Goldfields, Partridge v. Rhodesia Goldfields*, [1910] 1 Ch. 239.

5082. — Debt not immediately payable.—A owed B. a sum of £668. In May, 1883, A. filed a liquidation petition. B. proved for his debt, but did not receive any dividend. On Dec. 4, 1886, the liquidation was closed, but no discharge had been granted to A. In Jan. 1888, B. died, leaving A. a legacy of £1,000 by his will:—*Held*: inasmuch as there was no debt, which could be enforced until the expiration of three years from the close of the liquidation, the exors. of B. could not retain or

PART IV. SECT. 5, SUB-SECT. 12.— B. (a).

5082 I. Whether debt must be brought into account—Debt not immediately payable.—Two sons were to receive a share of the proceeds of land sold on the death of the widow, who was still

alive. They owed testator a debt, payable in five yearly instalments from his death. Two years subsequent, the sons made an assignment for the benefit of their creditors:—*Held*: the effect of the assignment was to accelerate payment of the debt due to the estate; but the exors. being also trustees of

the land of which the sons were to receive shares when sold, held security for their claim, having the right to impound the sons' shares under the will as against their debt to the estate.—*TILLIE v. SPRINGER* (1892), 21 O. R. 585.—*CAN.*

g. — Debt due to testator's firm.]

set off the debt as against the legacy.—*Re REES, REES v. REES* (1889), 60 L. T. 260.

Annotations:—*Distd.* *Re* Watson, Turner v. Watson, [1896] 1 Ch. 925; *Fold.* *Re* Abrahams, Abrahams v. Abrahams, [1908] 2 Ch. 69. *Reid.* *Re* Powell, Powell v. Powell (1904), 20 T. L. R. 374.

5083. ———. ———.]—Where at the death of testator a debt is owing to him by a person to whom a share of residue is immediately given by the will, but the debt is payable by instalments, the exors. are not entitled to retain the share of the beneficiary as against the future instalments of the debt that may become due, but are bound to pay it to the beneficiary without reference to such instalments.—*Re* ABRAHAM, ABRAHAM v. ABRAHAM, [1908] 2 Ch. 69; 77 L. J. Ch. 578; 99 L. T. 240.

Annotations:—*Mentd.* *Re* Smelting Corp'n., Seaver v. The Co., [1915] 1 Ch. 472; *Re* Jewell's Settlement, Watts v. Public Trustee, [1919] 2 Ch. 161.

5084. ———. After appropriation of assets to meet legacy.]—Exors. who have set apart & appropriated assets to meet a legacy, cannot retain or impound any part of the appropriated assets to meet a debt from the legatee to the general estate of testator.—*BALLARD v. MAUSDEN* (1880), 14 Ch. D. 374; 40 L. J. Ch. 614; 42 L. T. 763; 28 W. R. 914.

Annotations:—*Consd.* *Re* Milnes, Milnes v. Sherwin (1885), 53 L. T. 534. *Reid.* *Re* Moore, Moore v. Moore (1881), 45 L. T. 466.

— Statute-barred debts.]—*See* Sub-sect. 12, B. (c), *post*.

(b) Specific Legacies.

5085. Whether debt must be brought into account — Legacy of freeholds & leaseholds.]—Testator who had in his lifetime advanced to three of his sons various sums taking acknowledgments therefor, by his will gave to such sons certain specified freeholds & leaseholds & also gave them certain shares in his residuary estate. The right of action, if any, in respect of the advances had become barred by the Stat. Limitations:—*Held*: (1) the three sons ought to bring into account, as against their respective shares of the residue, any sums due by them respectively to testator at the day of his death, with interest at 4 per cent. from that date; (2) the sons were entitled to the properties specifically given to them, without making good what, if anything, they owed to testator's estate.—*Re* AKERMAN, AKERMAN v. AKERMAN, [1891] 3 Ch. 212; 61 L. J. Ch. 34; 65 L. T. 194; 40 W. R. 12.

Annotations:—*As to* (1) *Consd.* *Re* Watson, Turner v. Watson, [1896] 1 Ch. 925; *Re* Wheeler, Hankinson v. Hayter, [1904] 2 Ch. 66. *Distd.* *Re* Abrahams, Abrahams v. Abrahams, [1908] 2 Ch. 69. *Expld.* *Re* Sewell, White v. Sewell, [1909] 1 Ch. 806. *Consd.* *Re* Melton, Milk v. Towers, [1918] 1 Ch. 37; *Re* Savage, Cull v. Howard, [1918] 2 Ch. 146. *Reid.* *Re* Palmer, Palmer v. Clarke (1894), 13 R. 220; *Re* Goy, Farmer v. Goy, [1900] 2 Ch. 149; *Re* Brown & Gregory, Shephard v. Brown & Gregory, Andrews v. Brown & Gregory, [1901] 1 Ch. 627; *Re* Rhodesia Goldfields, Partridge v. Rhodesia Goldfields, [1910] 1 Ch. 239; *Re* Peruvian Ry. Construction Co. (1915), 85 L. J. Ch. 129; *Re* Smelting Corp'n., Seaver v. Smelting Corp'n., [1915] 1 Ch. 472; *Re* Dacre, Whitaker v. Dacre (1916), 85 L. J. Ch. 274; *Re* National Livestock Insee., *Re* National General Insee., [1917] 1 Ch. 628. *As to* (2) *Consd.* *Re* Taylor, Taylor v. Wade (1894), 8 R. 186. *Reid.* *Re* Savage, Cull v. Howard, [1918] 2 Ch. 146.

5086. ———. Legacy represented by money—Profits of business.]—Where a debtor to testator's estate is a specific legatee of the profits of a business represented by moneys in the hands of the exors. they may retain such moneys as against the debt.—*Re* TAYLOR, TAYLOR v. WADE, [1894]

1 Ch. 671; 63 L. J. Ch. 424; 70 L. T. 556; 42 W. R. 373; 38 Sol. Jo. 288; 8 R. 186.

Annotation:—*Consd.* *Re* Savage, Cull v. Howard, [1918] 2 Ch. 146.

5087. ———. Legacy of stock.]—*Re* SAVAGE, CULL v. HOWARD, No. 4395, *ante*.

(c) Legacies to Bankrupts.

See BANKRUPTCY, Vol. IV., pp. 416–420.

(d) Legacies to Married Women.

See, now, Married Women's Property Acts, &c., generally, HUSBAND & WIFE.

5088. Whether executor may retain against married woman legatee.]—Legacy of £1,000 to wife of A., who was largely indebted to testatrix. A. became bkpt. & his wife afterwards died without having asserted any claim in respect of this legacy. The assignees of A. claimed the legacy:—*Held*: the exors. of testatrix are entitled to retain the legacy in part discharge of the debt due to testatrix.—*RANKING v. BARNARD* (1820), 5 Madd. 32; 56 E. R. 806.

Annotations:—*Reid.* *Lee v. Egremont, Egremont v. Lee* (1852), 5 De G. & Sm. 318; *Re* Henley, Thurgood, *Re* Fairhead's Inspectorship (1863), 11 W. R. 1021; *Re* Briant, Poulter v. Shookel (1888), 39 Ch. D. 471. *Mentd.* *Harvey v. Palmer* (1851), 4 De G. & Sm. 425.

5089. ———. ———.]—Exors. allowed to set off a moiety of a legacy given by testator to the wife of the bkpt. against a debt due from the bkpt. to testator. The other moiety ordered to be settled on the wife for life, with remainder to issue of the marriage.—*Re* GORDON, *Ex p. O'FERRALL* (1822), 1 Gl. & J. 317.

Annotation:—*Reid.* *Lee v. Egremont, Egremont v. Lee* (1852), 5 De G. & Sm. 318.

5090. ———. ———.]—A. agreed that a legacy given to his wife should be set off against a sum of the same amount, which he owed to testator, on his promissory note; & he & his wife signed a receipt for the legacy; but it did not appear that the exors. had delivered up the note to him. A. afterwards died, leaving his wife surviving:—*Held*: she was entitled to be paid the legacy, no release having been given for it by her husband.—*HARRISON v. ANDREWS* (1843), 13 Sim. 595; 13 L. J. Ch. 243; 2 L. T. O. S. 146; 60 E. R. 231.

5091. ———. ———.]—Where a debt to the estate of testator may be set off by the exors. against a legacy bequeathed by testator to the debtor, such debt may also be set off against a legacy bequeathed by testator to the wife of the debtor, subject to her equity, if any, in the legacy.—*M'HAHON v. BURCHELL* (1846), 5 Hare, 322; 67 E. R. 936; *subsequent proceedings*, 1 Coop. Temp. Cott. 457, L. C.

Annotation:—*Reid.* *Lee v. Egremont, Egremont v. Lee* (1852), 5 De G. & Sm. 318.

5092. ———. ———.]—Where testatrix devised a freehold estate to trustees upon trust, to sell & to pay £140, part of the proceeds, to A., & the residue of the proceeds to B., & appointed the devisees in trust her exors.:—*Held*: in a suit by A. & her husband against the trustees, for payment of the £140, the latter were not entitled to set off the damages or costs of an action, brought by them as exors. against the husband, to recover a deposit note in the hands of the wife, forming part of testatrix's estate.—*REEVE v. RICHER* (1847), 1 De G. & Sm. 624; 17 L. J. Ch. 86; 10 L. T. O. S. 128; 11 Jur. 900; 63 E. R. 1224.

5093. ———. ———.]—Mrs. A. wrote a letter to her mother B. strongly urging her to lend Mr. A. the sum of £2,000, the amount of an intended legacy from B. to Mrs. A., at interest, to be paid to B.

—An exor. cannot, as a general rule, | debt due by legatee, not to testator, | partner.—*JACKSON v. YATES*, [1912] retain a legacy in satisfaction of a | but to a firm in which testator was a | 1 L. R. 267.—*IR*.

Sect. 5.—Legacies: Sub-sect. 12, B. (d) & (e); sub-sect. 13, A. (a).]

during her life. B. sold out £2,000 consols, & remitted the proceeds to Mr. A. & made the following indorsement on the broker's receipts: "The inclosed sums were sold out for Mrs. A. with a promise on her part that I should receive interest at 5 per cent. during my life, seeing that it was my intention to have left it to her at my death, but her application was too urgent." B. died intestate:—*Held*: the proceeds of the stock were lent & not given to Mr. A. & the amount was a debt due from him to B. at her death, & ought to be set off against the distributive share to which Mrs. A. was entitled in her mother's estate.—*RANNIE v. CHANDLER* (1854), 23 L. J. Ch. 609; 23 L. T. O. S. 205; 2 W. R. 537.

5094. —[—] Exors. allowed to set off a debt due to testator as against one moiety of a legacy given by him to the wife of the debtor. The other moiety ordered to be settled on the wife for life, with remainder to the issue of the marriage.—*M'CORMICK v. GARNETT* (1854), 2 Sm. & G. 37; 2 W. R. 151; 65 E. R. 291; *on appeal*, 5 De G. M. & G. 278, L. J. J.

5095. —[—] A married woman, whose husband was indebted to testator, having become entitled under his will to a legacy in reversion not limited to her separate use, joined with her husband in assigning it to L. for value, by deed duly executed & acknowledged by her under 20 & 21 Vict. (c. 57). On the reversion falling in, the exors. of testator claimed to be entitled to retain the amount of the debt out of the legacy:—*Held*: there was no right of retainer, & L. must be paid in full.—*Re BACHELOR, SLOPER v. OLIVER* (1873), L. R. 16 Eq. 481; 43 L. J. Ch. 101; 21 W. R. 901, L. C. *Annotations*:—*Consd.* *Re Briant, Poulter v. Shackel* (1888), 39 Ch. D. 471; *Re Watson, Turner v. Watson*, [1896] 1 Ch. 925. *Refd.* *Re Jakeman's Trusts* (1883), 23 Ch. D. 344.

5096. —[—] Priority of wife's equity to settlement.—[—] Testator gave his residuary estate to his exors. in trust for his wife for life, & after her death, in trust for sale & to divide the proceeds among his children equally. Testator left six children, one of whom, a daughter, had married in his lifetime, without a settlement. At the death of testator in 1877 the daughter's husband was indebted to testator in a sum exceeding the amount of the wife's share of residue. On the death of testator's widow in 1880, the exors. of the will claimed to retain the daughter's share for her husband's debt; but on the hearing of an originating summons, under 11. S. C. Ord. 55, by the exors. against the residuary legatees, including the daughter & her husband, the daughter asserted her equity to a settlement:—*Held*: the exors. had a right of retainer, but the wife's equity preceded that right: & accordingly, having regard to the means and position in life of the husband & wife, the ct. made an order on the summons declaring a settlement of a portion of the wife's share upon herself & her children, & directing the balance to be retained *pro tanto* against the debt due from the husband to testator's estate & to be divided among the other residuary legatees excluding the wife.—*Re BRIANT, POULTER v. SHACKEL* (1888), 39 Ch. D. 471; 57 L. J. Ch. 953; 50 L. T. 215; 30 W. R. 825.

Annotation:—*Mentd.* *Re Howard, Howard v. Howard* (1894), 13 R. 233

5097. —[—] Effect of Married Women's Property Act, 1893 (c. 63).—*Re WHEELER, HANKINSON v. HAYTER*, No. 5108, *post*.

5098. —[—] *Re PINK, PINK v. PINK*, No. 5063, *ante*.

5099. Whether administrator may retain against married woman's share in estate of intestate.—[—]

Upon the bill of a married woman, entitled to a share of the personal estate as one of the next of kin of the intestate, against her husband, & the administrator, the latter claiming to retain towards satisfaction of a debt by bond from the husband to him, declared, he was not entitled to retain; but pltf's. share was subject to a further provision in favour of her & her children; the settlement on her marriage being inadequate to the fortune she then possessed; & referred to the master to see a proper settlement made on her & her children; regard being had to the extent of her fortune & the settlement already made upon her.—*ELIBANK (LADY) v. MONTOLIEU* (1801), 5 Ves. 737; 31 E. R. 832, L. C.

Annotations:—*Refd.* *Murray v. Elbank* (1806), 13 Ves. 1; *Gibson v. Goldsmid* (1854), 1 Jur. N. S. 1; *Re Briant, Poulter v. Shackel* (1888), 39 Ch. D. 471. *Mentd.* *Green v. Otte* (1823), 1 Sm. & St. 250; *Sturgis v. Champney* (1839), 5 My. & Cr. 97; *Hanson v. Keating* (1844), 4 Hare, 1; *Wortham v. Pemberton, Newenham v. Pemberton* (1847), 1 De G. & Sm. 644; *Re Erskine's Trust* (1855), 1 K. & J. 302; *Duncombe v. Greenacre* (1860), 2 De G. J. & J. 509; *Gleaves v. Paine* (1863), 1 De G. J. & Sm. 87; *Wallace v. Auldjo* (1863), 2 Drew. & Sm. 216.

5100. —[—] Settlement by husband in consideration of the portion or fortune which he would have or receive upon his marriage, limited to the portion received upon the marriage; not extending to make him a purchaser of future accessions; unless that intention is clear. The wife, therefore entitled to an additional provision out of a subsequent interest, arising to her, as next of kin; which equity was administered upon her bill against the assignees under the bkpcy. of her husband; & the administrator cannot set off a debt from the husband to the intestate's estate.—*CARR v. TAYLOR* (1805), 10 Ves. 574; 32 E. R. 967.

Annotations:—*Consd.* *Re Briant, Poulter v. Shackel* (1888), 39 Ch. D. 471. *Mentd.* *Berensford v. Hobson* (1816), 1 Madd. 362.

(c) Statute-barred Debts.

5101. Right to set off statute-barred debt against legacy.—[—] An exor. is entitled to set off against a legacy a debt due from the legatee to testator, though such debt may have been barred by Stat. Limitations before testator's death.—*COURTNEY v. WILLIAMS* (1846), 15 L. J. Ch. 204; 6 L. T. O. S. 517, L. C.; *affg.* (1844), 3 Hare, 539.

Annotations:—*Fold.* *Coates v. Coates* (1864), 33 Beav. 249. *Akerman*, [1891] 3 Ch. 212; *Dingle v. Coppen, Coppen v. Dingle*, [1899] 1 Ch. 726. *Distd.* *Re Bruce, Lawford v. Bruce*, [1908] 2 Ch. 682. *Consd.* *Re Sewell, White v. Sewell*, [1909] 1 Ch. 806; *Re Rhodesia Goldfields, Partridge v. Rhodesia Goldfields*, [1910] 1 Ch. 239. *Refd.* *Harvey v. Palmer* (1851), 4 De G. & Sm. 425; *Re Morley, Morley v. Saunders* (1869), L. R. 8 Eq. 594; *Re Stead's Settmt. Trusts* (1876), 24 W. R. 698; *Re Milnes, Milnes v. Sherwin* (1885), 53 L. T. 534; *Re Taylor, Taylor v. Wade* (1894), 8 L. 186; *Re Langham, Otway v. Langham* (1896), 74 L. T. 611; *Re Watson, Turner v. Watson*, [1896] 1 Ch. 925; *Re Lloyd, Lloyd v. Lloyd*, [1903] 1 Ch. 385; *Re National Live Stock Insee., Re National General Insee.*, [1917] 1 Ch. 628; *Re Savage, Cull v. Howard*, [1918] 2 Ch. 146. *Mentd.* *Poole v. Poole* (1871), 7 Ch. App. 17.

5102. —[—] A. lent B. two sums of £1,000, for which B. gave two promissory notes for £1,000 each, & in one of them C. joined as surety. B. subsequently deposited a policy of insurance with A. as collateral security for both debts. A., by his will, gave C. a legacy of £1,000, payable six months after the death of his widow. After A.'s death B. became bkpt.; A.'s exors. without communicating with C., surrendered the policy, & proved against B.'s estate for the balance. After the death of the widow, A.'s exors. claimed to set off so much of the legacy of £1,000 as was necessary to make good the balance

due on the £1,000 promissory note, in which C. joined as surety:—*Held*: the legacy could be set off against the debt, although the debt was barred by the Stat. Limitations.—*COATES v. COATES* (1864), 33 Beav. 249; 3 New Rep. 355; 33 L. J. Ch. 448; 9 L. T. 795; 10 Jur. N. S. 532; 12 W. R. 634; 55 E. R. 363.

Annotation:—*Mentd.* *Gee v. Mahood* (1874), 23 W. R. 71.

5103. —[—]*Testator* [bequeathed a legacy of £2,000 to his nephew &] held £2,000 belonging to his nephew, on which for eight years he paid interest, notwithstanding the nephew owed him £1,000 on his promissory note. Though the nephew had paid no interest on the note, & had given no acknowledgment of the debt:—*Held*: although the remedy for recovering the £1,000 was barred by the Stat. Limitations, still the right of the exors. to set it off against the legacy remained.—*GER v. LIDDELL* (No. 2) (1866), 35 Beav. 629; 55 E. R. 1041.

Annotation:—*Refd.* *Rawley v. Rawley* (1876), 1 Q. B. D. 460.

5104. —[—]*Re AKERMAN, AKERMAN v. AKERMAN*, No. 5085, *ante*.

5105. —[—]*Although an exor. may retain a legacy against a statute-barred debt due from the legatee to testator, this rule does not entitle exors. to the benefit of a statute-barred debt as against a person who is claiming a legal right to damages against testator's estate as distinguished from a claim on testator's bounty.*—*DINGLE v. COPPEN*, *COPPEN v. DINGLE*, [1899] 1 Ch. 726; 68 L. J. Ch. 337; 79 L. T. 693; 47 W. R. 279.

Annotations:—*Consd.* *Re Lloyd, Lloyd v. Lloyd*, [1903] 1 Ch. 385. *Mentd.* *Powell v. Brodhurst*, [1901] 2 Ch. 160.

5106. —*Legatee executor & residuary legatee of debtor.*—B., entitled to a share in the residuary estate of his father, was also the sole residuary legatee & one of the exors. of his aunt, who was a debtor for £200 to the father's estate. This debt was long ago barred:—*Held*: this debt & interest need not be brought into account as against B.'s share in his father's residuary estate.—*Re BRUCE*, *LAWFORD v. BRUCE*, [1908] 2 Ch. 682, 78 L. J. Ch. 56; 99 L. T. 704, C. A.

5107. Right to set off statute-barred debt against share in estate of intestate.—An administrator is entitled to set off against the share of one of the next of kin in intestate's estate, the whole of a debt of which part had become barred by Stat. Limitations.—*Re CORDWELL'S ESTATE*, *WHITE v. CORDWELL* (1875), L. R. 20 Eq. 644; 44 L. J. Ch. 746; 23 W. R. 826.

Annotations:—*Consd.* *Re Milnes, Milnes v. Sherwin* (1885), 53 L. T. 534; *Re Akerman, Akerman v. Akerman*, [1891] 3 Ch. 212. *Refd.* *Re Langham, Otway v. Langham* (1896), 74 L. T. 611.

5108. — Partial intestacy.—(1) Under Married Women's Property Act, 1893 (c. 63), s. 1, in order to bind the separate estate of a married woman there must be a contract by her entered into after the passing of the Act, & then entered into for the first time. An acknowledgment since the Act of the fact that the married woman had had moneys advanced to her prior to the Act, but for which she was under no liability, having had no separate estate at the time of the advance, even if such acknowledgment is in such terms as would

make a debt recoverable though barred by Stat. Limitations, is not sufficient to render her liable to repay such advances.

(2) The right of an exor. to retain or set off the share of one of the next of kin in the estate under a partial intestacy against a debt owing by him to the estate, notwithstanding that it is barred by Stat. Limitations, depends upon whether there was due from the legatee a debt for which he but for the Stat. Limitations could have been sued.—*Re WHEELER, HANKINSON v. HAYTER*, [1904] 2 Ch. 66; 73 L. J. Ch. 576; 91 L. T. 227; 52 W. R. 580; 48 Sol. Jo. 493.

Annotations:—*As to* (1) *Refd.* *Re Abrahams, Abrahams v. Abrahams*, [1908] 2 Ch. 69. *As to* (2) *Refd.* *Re Abrahams, Abrahams v. Abrahams*, [1908] 2 Ch. 69; *Re Melton, Milk v. Towers* (1917), 117 L. T. 679. *Generally, Mentd.* *Re Derbyshire, Webb v. Derbyshire*, [1906] 1 Ch. 135.

5109. Right to set off statute-barred debt against realty descending to debtor as heir-at-law.—M. devised & bequeathed the residue of his real & personal estate to trustees upon trust to convert & divide the proceeds equally among his children, with the exception of W., his eldest son & heir-at-law. W. became entitled to a share of the residue which had lapsed on consequence of the death of one of testator's sons in his lifetime. At testator's death there was a debt of W. to him remaining unpaid, recovery of which was, however, barred by Stat. Limitations:—*Held*: the trustees & exors. of M.'s will could retain & impound W.'s debt to testator's estate out of so much of the residue coming to him as represented personal estate, but not out of the real estate which came to him as heir-at-law, & a release which had been executed by W., under a mistaken view of his rights in this respect, must be set aside.—*Re MILNES, MILNES v. SHERWIN* (1885), 53 L. T. 534; 33 W. R. 927.

SUB-SECT. 13.—LEGACIES TO EXECUTORS.

A. Presumption that Legacy given to Executor in Representative Character.

(a) In General.

5110. General rule.—Presumption, that a legacy to a person appointed exor. is given to him in that character, though not apparently connected, unless there are circumstances showing that it is intended for him personally. In this case the circumstances were rather the other way: the legacies, by codicils, to the persons appointed exors. by the will, standing all together & equal in amount. One of the exors. therefore, having renounced, not entitled to the legacies.—*STACK-POOLE v. HOWELL* (1807), 13 Ves. 417; 33 E. R. 350.

Annotation:—*Refd.* *Re Appleton, Barber v. Tebbit* (1885), 29 Ch. D. 893.

5111. Legacy given as "recompense for trouble."—A bequest of residue "to my exors. hereinafter named, to enable them to pay my debts, legacies, funeral & testamentary charges, & also to recompense them for their trouble, equally between them;" followed by the appointment of three persons as exors. is a gift to those persons

PART IV. SECT. 5, SUB-SECT. 13. — A. (a).

5110 i. General rule.—Where a legacy is given to a person named as exor., *prima facie* it is given to him in his capacity as exor.; & he may either accept the legacy or renounce it & apply to the ct. for commission. But if he accepts the legacy he cannot also

obtain commission unless there are circumstances appearing on the face of the will which rebut the presumption that the legacy was intended to be a complete recompense to the exor. for his pains & trouble.—*Re STEELE* (1915), 15 S. R. N. S. W. 247; 32 N. S. W. W. N. 66.—*AUS.*

5111 i. Legacy given as "recompense

for trouble."—Where testator gives legacies to exors. as remuneration for the trouble entailed on them in carrying out the trusts of his will they are not entitled to commission.—*Re RILEY'S ESTATE* (1878), 4 V. L. R. 28.—*AUS.*

5111 ii. —[—]*Re FELLOW'S WILL* (1879), 5 V. L. R. 82.—*AUS.*

5111 iii. —[—]*Re STRONELL*,

Sect. 5.—Legacies: Sub-sect. 13, A. (a) & (b), B., C. & D. (a).]

as a class in their official character; &, therefore, one having died in the lifetime of testator the whole residue vests in the two survivors.—**KNIGHT v. GOULD** (1833), 2 My. & K. 295; *Coop. temp. Brough*, 240; 30 E. R. 956, L. O.

Annotations:—*Consd.* **Barber v. Barber** (1838), 3 My. & Cr. 688. *Distd.* **Hoare v. Osborne** (1864), 33 L. J. Ch. 586. *Mentd.* **Havergal v. Harrison** (1843), 13 L. J. Ch. 30; *Re Gibson* (1861), 2 John. & H. 656; *Fell v. Biddolph* (1875), L. R. 10 C. P. 701; *Re Smith's Trusts* (1878), 9 Ch. D. 117.

5112. Nomination of sum in Post Office Savings Bank in favour of executor.]—Where testatrix subsequent to the execution of her will filled up a nomination in the prescribed form of the amount, being under £100, due to her by the Post Office Savings Bank at her decease, in favour of one of her exors. & there was sufficient evidence to rebut the presumption that such exor. should receive such amount as a gift:—*Held*: he received the same in his capacity as exor. & was ordered to account for the same accordingly.—*Re READ, TURNER v. READ* (1896), 75 L. T. 295.

(b) Rebuttal of Presumption.

5113. Position of bequest in will.]—The mere fact that the gift of the legacy precedes the appointment of the legatee as exor. or that the legacies to several persons appointed exors. differ either in their amount or subject-matter, is not enough by itself to rebut the presumption, that a legacy given to a person who is appointed exor. is annexed to the office.—*Re APPLETON, BARRER v. TEBBIT* (1885), 20 Ch. D. 893; 54 L. J. Ch. 954; 52 L. T. 906; 49 J. P. 708, C. A.

5114. —.]—*STACKPOOLE v. HOWELL*, No. 5110, *ante*.

5115. Designation of executor as "relation"—"Cousin."]—Testator named two persons to be his exors. & bequeathed to them £50 each, upon condition of their taking upon themselves a certain trust, & afterwards used these words, "I give to my cousin, T. £50, whom I appoint joint exor."; & testator also gave to T.'s sisters legacies of £50 each:—*Held*: the legacy to T. was not annexed to the office of exor. & he was entitled to it, although he had declined to act in the trusts of the will.—*DIX v. REED* (1823), 1 Sim. & St. 237; 57 E. R. 95.

Annotation:—*Reid.* **Wildes v. Davies** (1853), 1 Sm. & G. 475.

5116. — "Brother."]—Upon the construction of a will:—*Held*: a legacy was given to an exor., B., not in his character as exor. & he did not lose the legacy by not proving & not acting under the will.

THOMAS v. STRONELL (1893), 19 V. L. R. 64.—*AUS.*

5111 iv. —.]—Where testator directed his exors. to retain for their own use & benefit \$200 each, in lieu of all charges for their services as exors.:—*Held*: in no circumstances could the exors. who had accepted probate claim a larger sum than the amount specified as compensation for their services.—**WILLIAMS v. ROY** (1885), 9 O. R. 534.—*CAN.*

PART IV. SECT. 5, SUB-SECT. 13.—A. (b).

5117 i. Designation of executor as "friend."]—Where testator gives a legacy to his friend & partner P., & afterwards appoints him one of his exors., & gives him other benefits much greater than those bequeathed to any other exor.:—*Held*: the legacies

I do not observe that testator ever names B. without calling him his brother (**KNIGHT BRUCE, V.C.**).—**COMPTON v. BLOXHAM** (1845), 2 Coll. 201; 14 L. J. Ch. 380; 5 L. T. O. S. 368; 9 Jur. 935; 63 E. R. 699.

Annotations:—*Reid.* *Re Appleton, Barber v. Tebbitt* (1885), 20 Ch. D. 893. *Mentd.* *Re Battie-Wrightson, Cecil v. Battie-Wrightson*, [1920] 2 Ch. 330.

5117. Designation of executor as "friend."]—A legacy "to my friend, S., of M., banker's clerk & one of the exors. of this my will":—*Held*: not conditional on the acceptance of the office of exor.—*Re DENBY* (1861), 3 De G. F. & J. 350; 31 L. J. Ch. 184; 5 L. T. 514; 10 W. R. 115; 45 E. R. 914; *sub nom.* *Re DENDY*, 31 L. J. Ch. 184, L. J.

5118. —.]—Testator appointed his "friend" P. his exor. & gave him a legacy "as a remembrance." P. did not act as exor.:—*Held*: he was entitled to the legacy without proving the will.—**BUBB v. YELVERTON** (1871), L. R. 13 Eq. 131; 20 W. R. 164.

5119. —.]—*Re RUSSELL, PUBLIC TRUSTEE v. CAMPBELL*, No. 5135, *post*.

5120. Legacy given as mark of respect.]—A legacy given to testator's trustees & exors. as a mark of his respect for them:—*Held*: not revoked by a codicil appointing other trustees in their room, & giving a legacy of equal amount to the newly appointed trustees & exors. in similar language.—**BURGESS v. BURGESS** (1844), 1 Coll. 367; 3 L. T. O. S. 452; 8 Jur. 660; 63 E. R. 458.

5121. Gift "as a remembrance."]—**BUBB v. YELVERTON, No. 5118, *ante*.**

5122. Legacy given after death of tenant for life.]—Bequest of annuities for life "when dead to return to exors." Legacy to exors. beneficially.—**SELEY v. WOOD** (1804), 10 Ves. 71; 32 E. R. 770.

Annotations:—*Consd.* **Lynn v. Beaver** (1823), Turn. & R. 63. *Follid.* **Oldman v. Slater** (1829), 3 Sim. 84.

5123. —.]—Bequest of £100, after the death of tenant for life, to P. who was named as one of the trustees & exors., but renounced & disclaimed:—*Held*: the presumption that it was given to him in his character of exor. was rebutted by the fact of its being payable after the death of the tenant for life, & he was entitled to the legacy.—*Re REEVE'S TRUSTS* (1877), 4 Ch. D. 841; 46 L. J. Ch. 412; 36 L. T. 906; 25 W. R. 928.

5124. Difference in nature or amounts of legacies to executors.]—*STACKPOOLE v. HOWELL*, No. 5110, *ante*.

5125. —.]—Testator, by his will, directed that all his debts should be paid by his extrix. thereafter named, & then made certain specific

bequeathed to P. are not to be considered as bequeathed to him in his character of exor.—**COCKERELL v. BARBER** (1826), 5 L. J. O. S. Ch. 77.—*IND.*

5124 i. Difference in nature or amounts of legacies to executors.]—Testatrix appointed A. & B. exors. & trustees, & bequeathed to A. a legacy of £100, & a share in the residue, & devised certain land to B. By a codicil she revoked the devise to B., the land having been sold, & bequeathed to B. £100:—*Held*: A. & B. were entitled to apply for commission without renouncing the legacies, the presumption that a legacy given to a person named as exor. is given to him in his capacity of exor. being in this case rebutted by the terms of the will.—*Re BOWLIN* (1919), 19 N. S. W. L. R. 277; 36 N. S. W. W. N. 104.—*AUS.*

h. Proof of legacy in former will—

Where legatee not appointed executor.]—Where an affidavit deposing that testatrix had on various occasions expressed her gratitude for services rendered by O. & had told him that she had not been unmindful of them, & that in a prior will she had left him a legacy, & that he was not therein appointed exor.:—*Held*: such evidence was sufficient to rebut the presumption that the legacy was given to O. in his character of exor. only, & he was entitled to the same.—**NATIONAL TRUSTEES EXECUTORS & AGENCY CO. OF AUSTRALASIA, LTD. v. DOYLE** (1898), 24 V. L. R. 626.—*AUS.*

k. Bequest of residue.]—The presumption that a legacy to an exor. is *prima facie* given to him in that character for his trouble does not arise if the gift is of residue.—*Re MAXWELL, EVERS v. CUBBY*, [1906] 1 I. R. 386.—*IR.*

devices, & gave to his wife a house & appurtenances, partly freehold & partly leasehold, for her life, & then over; & all the "rest & residue" of his real & personal estate, testator also gave to his wife, & appointed her sole extrix. —*Held*: on a deficiency of personality to pay testator's debts the residuary real estate was next liable, & before the freehold & leasehold estates specifically devised; & then the other real property specifically given to the extrix.

When a will contains a direction to the exor. to pay testator's debts, & then a devise of real estate to that exor., it is considered that testator has imposed upon the exor. the duty of paying the debts to the extent of the property given to him, & accordingly that property, is held to be charged with the debts. But an exception has been made to this rule, where there are two or more exors. to whom unequal benefits are given by the will; because, in such a case, it cannot be supposed to be testator's intention that they should be equally subjected to the burden of his debts, & therefore the property given to them is not considered to be charged.—*HARRIS v. WATKINS* (1854), Kay, 438; 23 L. J. Ch. 540; 2 W. R. 352; 60 E. R. 186.

Annotations.—**Consd.** *Re Bailey, Bailey v. Bailey* (1879), 12 Ch. D. 268. **Refd.** *Re Tanqueray-Willamau & Landau* (1882), 20 Ch. D. 465.

5126.—**J.**—Testator bequeathed to A., one of the two persons whom he named in his will as exors. a leasehold house; to B., the other, a legacy of £100; describing either of them in either gift as “one of my trustees & exors. hereinafter named.” B. died without having proved the will, but without having renounced or disclaimed:—**Held:** the inequality of the subject matter of the two bequests rebutted the presumption of the legacy being conditional on the exor. proving the will: B.’s representatives were entitled to the legacy.—**JEWIS v. LAWRENCE** (1869), L. R. 8 Eq. 345; 33 J. P. 776.

Annotation:—*Consd. Re* Appleton, Barber v. Tebbit (1885), 29 Ch. D. 893.

5127. —.]—*Re* APPLETON, BARBER *v.* TERBIT,
No. 5113, *ante*.

Bequest of residue.—See Sect. 6, *post*.

5128. Additional contingent gift.—Testator, by a codicil, gave to M. £200, & named him joint exor. with the exors. in the will; & in case testator's son should die lunatic, then he gave £200 to the said M.:—*Held*: the latter gift was not annexed to the office, & M. took, though he did not prove the will.—*WILDES v. DAVIES* (1853), 1 Sm. & G. 475; 22 L. J. Ch. 495; 21 L. T. O. S. 206; 1 W. R. 253; 65 E. R. 208.

Annotations:—*Expld. Re* Appleton, Barber v. Tebbit (1885), 29 Ch D. 893. *Reid.* Weatherall v. Thornburgh (1878), 26 W. R. 593; *Ite* Walker, Walker v. Walker (1886), 54 L. T. 792.

5129. Executor appointed guardian.]—Testator appointed A. & B. his exors. & in a subsequent part of his will, with another legacy, gave to each of them £100. & also, in certain events, a share of his residuary estate, & appointed B., on a certain contingency happening, guardian of his daughter. B. renounced probate, but was willing to act as guardian if the contingency happened:—*Held*: the legacy, was not annexed to the office of exor. & B. was entitled to the legacy.—**BRAND v. CHADDOCK** (1871), 24 L. T. 347; 19 W. R. 378.

B. Payment of Legacy.

Payment of legacies generally, *see* Sub-sect. 4, *ante*.

5130. Mode of payment—Right of executor to retain amount of legacy.—Admission of assets.]—On motion by plffs. [residuary legatees], that the exor. who was one of the pecuniary legatees under the will, should pay into ct. the amount admitted by his answer:—**Held:** the exor. was not entitled to retain the amount of his legacy before the accounts had been taken.—**HARDING v. HARDING** (1847), 16 L. J. Ch. 179; 8 L. T. O. S. 443.

Executor's right to retain for debts due from testator, see Sect. 4, *ante*.

5131. Duration of payment—Annuity given for executor's "trouble"—Institution of administration proceedings.]—BAKER v. MARTIN, No. 5157, *post*.

5132. ———.] — CLAY v. COLES, [1880]
W. N. 145.

C. Liability of Legacy to Abatement.

See Sub-sect. 6, ante.

D. Loss of Right to Legacy.

(a) *In General.*

5133. Revocation of appointment.]—A man makes his brother exor., & gives him all his real & personal estate, & afterwards marrying, by a codicil makes his wife extrix. She shall have the personal estate, & not the brother.—**WILKINSON v. WILKINSON** (1681), 1 Vern. 23; 23 E. II. 277. *Annotation:—***Reid**, Cutler v. Coxeter (1893), 2 Vern. 302.

5134. ---[j]--The revocation of the appointment as exor. & trustee carried with it the revocation of the legacy (NORTH, J.). - *WALSH v. HILL*, [1883] W. N. [71].

Annotation : — *Re Russell, Public Trustee v. Campbell* (1912), 56 Sol. Jo. 651.

5135. — [.]—Testatrix by her will, appointed "my friends F. & C. to be the exors. & trustees of this my will, to each of whom I give the legacy, or sum, of £500." By a codicil testatrix declared, "I hereby revoke the appointment of C. as exor. & in his stead appoint the Public Trustee as exor. of my will with F.":—*Held*: the legacy in the will was to C. in the character of exor. & C. was not entitled to take,—*Re RUSSELL, Public Trustee v. CAMPBELL* (1912), 56 Sol. Jo. 651.

5136. — Appointment of new executor — Direction that will to be construed as if name of new executor originally inserted.]—Testatrix appointed *pltf.* & *B.* exors. & trustees, & gave to each of her trustees a legacy of £500, & to each of her trustees for the time being £50 *per annum* so long as any of the trusts should continue. By a codicil testatrix revoked the appointment of *B.* as exor. & trustee & the legacy of £500 & the annual allowance, & appointed *W.* to be exor. & trustee, & gave him a legacy of £50 for his trouble. She further declared that her will should be construed as if the name of *W.* had been inserted instead of the name of *B.* :—*Held* : *W.* was entitled to the legacy of £50 & to the annuity of £50, but not to the legacy of £500.—*Re MELLOR, DODGSON v. ASHWORTH* (1912), 28 *T. L. R.* 473 ; 56 *Sol. Jo.* 590.

—.]—See, generally, Part I., Sect. 8, ante.

5137. **Forfeiture of appointment—By remarriage.**]

PART IV. SECT. 5, SUB-SECT. 13.—B.

1. *Mode of payment*—*Insufficient assets.*—Testator, after making a specific devise of legacies, bequeathed the residue to a brother & sister, & if the exor. named should not bequeathed

him a legacy. The personal estate was insufficient to pay debts:—*Held*: the legacy to the exor. was payable out of the residuary realty.—*Re SMITH* (1905), 1 Tas. L. R. 62.—*AUS.*

m. — — — — —, } — Where an estate

is solvent, but insufficient to pay legacies in full, the profit costs of a will, given to him by the will of the testatrix, of which he is appointed exor. & trustee, do not take priority over other legacies.—*O'Higgins v. Walsh*, (1918) 1 I. R. 120.—IR.

Sect. 5.—Legacies: Sub-sect. 13, D. (a) & (b).]

—One devised, after debts & legacies paid, the surplus of his estate to his wife & son J. equally, whom he made his exors. but if she should marry, then that she should render the right of being extrix. to testator's son R., he to be partner with his brother J. in the exorship. The wife married again, she thereby lost her right to the surplus & to the exorship.—*BARTON v. BARTON* (1693), 2 Vern. 308; 23 E. R. 800.

*Annotations:—*Reid. *Morley v. Rennoldson*, *Morley v. Linkson*, (1843), 2 Haro. 570; *Godfrey v. Hughes* (1847), 5 Notes of Cases, 499.

5138. Proving will with no intention of acting.]—Testator appointed four exors. & gave to each of them, who should prove his will & take upon themselves the execution thereof, a legacy of £1,500 & an annuity of £100. All the exors. proved the will, & soon afterwards a bill was filed to carry the trusts of it into execution. After this M., one of the exors., ran away with the infant daughter of testator from a boarding school, & went through a ceremony of marriage with her in foreign parts, which marriage was afterwards declared null in the Spiritual Cts. Although M. did prove the will; yet as he did not appear to have done it with an intention of really acting in the execution of it, he is not entitled to his legacy.—*HARFORD v. BROWNING* (1787), 1 Cox, Eq. Cas. 302; 29 E. R. 1177, L. C.

*Annotation:—*Mentd. *Shuttleworth v. Greaves* (1838), 8 L. J. Ch. 7.

5139. Refusal of office.]—Devise to trustees, as an encouragement to accept the trust, of £100 apiece, & £12 for mourning & a ring, & £10 apiece *per annum* for their trouble; one refuses, yet he shall have his mourning & ring, but not the £100 legacy & the £10 a year, which, in such case, shall not go to the acting exors., but sink into the estate.—*HUMBERSTON v. HUMBERSTON* (1716), as reported in 1 P. Wms. 332; 24 E. R. 412, L. C.

*Annotations:—*Mentd. *Papillon v. Voice* (1728), Kel. W. 27, 34; *Hopkins v. Hopkins* (1738), 1 Atk. 581; *Godolphin v. Godolphin* (1747), 1 Ves. Sen. 21; *Marlborough v. Godolphin* (1759), 1 Eden, 404; *Routledge v. Dorril* (1794), 2 Ves. 357; *Thellusson v. Woodford* (1805), 1 Bos. & P. N. R. 357; *Mortimer v. West* (1828), 2 Sim. 274; *Vanderplank v. King* (1843), 3 Haro. 1; *Williams v. Teale* (1847), 6 Haro. 239; *Monypenny v. Dering* (1852), 2 De G. M. & G. 145; *Lyddon v. Ellison* (1854), 19 Beav. 565; *Parfitt v. Hember* (1867), L. R. 4 Eq. 443; *Hampton v. Holman* (1877), 5 Ch. D. 183; *Re Richardson, Parry v. Holmes*, [1904] 1 Ch. 332; *Re Nash, Cook v. Frederick*, [1909] 2 Ch. 450; *Re Hobbs, Hobbs v. Hobbs*, [1917] 1 Ch. 569.

5140. —.]—*ABBOT v. MASSIE* (1706), 3 Ves. 148; 30 E. R. 941, L. C.

*Annotations:—*Mentd. *Clayton v. Nugent* (1844), 13 M. & W. 200; *In the Goods of De Rosaz* (1877), 2 P. D. 66.

5141. —.]—*STACKPOOLE v. HOWELL*, No. 5110, ante.

5142. —.]—Legacies to exors. "for care & trouble in the execution of the will" not to be paid to exors. refusing to act; & payment of those legacies not to be allowed to the acting exor., though charged in his accounts.—*FREEMAN v. FAIRLIE* (1812), 3 Mer. 29; 30 E. R. 12, L. C.; *subsequent proceedings* (1817), 3 Mer. 24.

*Annotations:—*Mentd. *Wood v. Downes* (1812), 1 Ves. & B. 49; *Dubless v. Flint* (1839), 4 My. & Cr. 502; *Roy v. Gibbon* (1844), 4 Haro. 65; *Alroy v. Hall* (1848), 2 De G. & Sm. 489; *Goodchap v. Weaving* (1852), 16 Jur. 586; *Macdonald v. Richardson*, *Richardson v. Marten* (1858), 1 Giff. 81; *Lazarus v. Moxley* (1859), 1 L. T. 3; *Symonds v. Jenkins* (1876), 34 L. T. 277.

5143. —.]—Testator appointed A. & B. exors. & after giving certain legacies, he gave A. £500 & B. £500. The exors. renounced:—*Held*: they were not entitled to their legacies.—*CALVERT v. SEBBON* (1841), 4 Beav. 222; 49 E. R. 324.

5144. — Withdrawal of renunciation.]—One

of two exors. to whom a legacy was bequeathed, renounced in 1853, but afterwards, in 1859, he retracted & proved his will. An administration suit was subsequently instituted against him as exor. & it appearing that the estate had not been administered when the exor. proved:—*Held*: he was entitled to his legacy, but with interest only from the time of proving.—*ANGERMANN v. FORD* (1861), 29 Beav. 349; 54 E. R. 662; *sub nom.* *ALGERMANN v. FORD*, 4 L. T. 230; 7 Jur. N. S. 668; 9 W. R. 512.

*Annotations:—*Consd. *Re Gardner*, *Long v. Gardner* (1892), 67 L. T. 552. *Reid. Lewis v. Mathews* (1869), L. R. 8 Eq. 277.

5145. Failure to prove will.]—Legacy given to a man who is appointed exor. He must prove the will in order to entitle himself to the legacy, though not made a condition by the will.—*REED v. DEVAYNES* (1791), 2 Cox, Eq. Cas. 285; 30 E. R. 132.

*Annotations:—*Dbtd. *Burgess v. Burgess* (1844), 3 L. T. O. S. 452. *Reid. Cockrell v. Barber* (1826), 2 Russ. 585; *Lewis v. Mathews* (1869), L. R. 8 Eq. 277; *Re Gardner*, *Long v. Gardner* (1892), 37 Sol. Jo. 67.

5146. — Intention of executor to act under trusts of will.]—An exor. died before probate:—*Held*: entitled to a legacy for his care & loss of time in the execution of the trusts of the will by having concurred with the other exors. in directions for the funeral & in paying some small sums on that occasion.—*HARRISON v. ROWLEY* (1798), 4 Ves. 212; 31 E. R. 110.

*Annotation:—*Reid. *Lewis v. Matthews* (1869), L. R. 8 Eq. 277.

5147. — —.]—An exor. to whom a legacy was left for his trouble, being in Australia at the death of testator, sent home a power of attorney, under which another person administered the estate, & under which the rents of the real estate were received. The exor. died without proving the will:—*Held*: the exor. had sufficiently shown his intention to act under the trusts of the will to entitle his representatives to the legacy.—*LEWIS v. MATHEWS* (1869), L. R. 8 Eq. 277; 38 L. J. Ch. 510; 20 L. T. 905; 33 J. P. 775; 17 W. R. 841.

*Annotation:—*Reid. *Re Gardner*, *Long v. Gardner* (1892), 67 L. T. 552.

5148. — —.]—Testatrix gave legacies of £100 each, to A., B. & C., & in a subsequent part of her will, she appointed them her exors. In the preceding clauses she made devises & bequests "to her exors. thereafter named," & "to her exors. & trustees." A. neither proved nor acted:—*Held*: he was not entitled to the legacy.—*PIGGOTT v. GREEN* (1833), 6 Sim. 72; 58 E. R. 522.

5149. — — Executor residuary legatee.]—*GRIFFITHS v. PRUEN*, No. 5383, *post*.

5150. — —.]—An exor. is entitled to a residue or share of a residue bequeathed to him although he has not proved the will.—*CHRISTIAN v. DEVEREUX* (1841), 12 Sim. 264; 59 E. R. 1133.

*Annotations:—*Mentd. *Lord v. Colvin* (1867), L. R. 3 Eq. 737; *Re Rowe, Jacobs v. Hind* (1889), 60 L. T. 596; *Re Smith, Prada v. Vandroy*, [1916] 1 Ch. 523; *Re Richardson, Pole v. Patten*, [1920] 1 Ch. 423.

Through physical infirmity.]—An aged exor. who was incapable by bodily & mental infirmity of proving the will:—*Held*: not entitled to a legacy given by testator's will to him as exor.—*HANBURY v. SPOONER* (1843), 5 Beav. 630; 12 L. J. Ch. 434; 49 E. R. 723.

*Annotations:—*Fold. *Re Hawkin's Trusts* (1864), 33 Beav. 570. *Reid. Lewis v. Mathews* (1869), L. R. 8 Eq. 277.

5152. — —.]—Bequest to an exor. for his trouble:—*Held*: not payable, he having been prevented by severe illness from proving the will & from ever acting.—*Re HAWKIN'S TRUSTS* (1864),

33 Beav. 570; 34 L. J. Ch. 80; 10 L. T. 557; 10 Jur. N. S. 922; 12 W. R. 945; 55 E. R. 490.

*Annotations:—***Reid.** Lewis v. Mathews (1869), L. R. 8 Eq. 277; *Re* Gardner, Long v. Gardner (1892), 67 L. T. 552.

5153. —[*Testator bequeathed certain stock to M. for life, & directed that the same should be equally divided amongst his exors., to whom he also gave a further sum of £200 apiece, as an additional acknowledgment for the trouble to which they might be put in the execution of the trusts of his will:—Held: the claim of an exor. who died without proving the will or performing the trusts, could not be sustained to either of the legacies.*—**SLANEY v. WATNEY** (1866), L. R. 2 Eq. 418; 35 L. J. Ch. 783; 14 L. T. 657; 14 W. R. 818.

5154. Failure to act as executor.—**Piggott v. GREEN**, No. 5148, *ante*.

5155. —[*Through physical infirmity.*—**Re HAWKIN'S TRUSTS**, No. 5152, *ante*.

5156. —[*—*—**SLANEY v. WATNEY**, No. 5153, *ante*.

5157. Institution of administration action.—[*Testator directed that £100 should be annually paid to one of his exors. for his trouble in superintending his concerns, until a final settlement of his affairs should take place. The exor. proved & acted. Some time after testator's death a suit was instituted for the administration of his estate; but no receiver was appointed; & some of the assets were still outstanding:—Held: the annuity did not cease on account of the institution of the suit.*—**BAKER v. MARTIN** (1836), 8 Sim. 25; 5 L. J. Ch. 205; 59 E. R. 10.

*Annotation:—***Reid.** *Re* Muffet, Jones v. Mason (1887), 56 L. J. Ch. 600.

(b) *Executor in Default to Estate.*

5158. Whether lien on executor's interest.—[*Testatrix bequeathed a leasehold estate to trustees & exors. in trust for sale, & gave one of such exors. a beneficial interest for his life in one-fourth part of the estate. The latter exor. being at the time indebted to the estate or testatrix, made an assignment of his beneficial interest by way of mtge. to secure a private debt which he owed to a creditor, & deposited the title-deeds with the creditor:—Held: on a bill by his co-exors. to recover the title-deeds, the estate of testatrix was entitled to a lien on the interest on the defaulting exor. in the premises comprised in the deeds, in priority to the lien created by his assignment to the mtgee.; & the ct. decreed the title-deeds to be delivered up, with a declaration that they belonged to the three trustees.*—**COLE v. MIDDLE** (1852), 10 Hare, 186; 22 L. J. Ch. 401; 20 L. T. O. S. 107; 16 Jur. 853; 68 E. R. 892.

*Annotation:—***Mentd.** *Re* Whistler & Richardson (1887), 57 L. T. 77.

5159. —[*Specific legacy given to executor.*—[*Specific legacy to an exor. who afterwards becomes bkpt. & commits a devastavit. The subject of the specific bequest being sold by his assignees:—Held: the produce in their hands not specifically liable to make good the devastavit, in favour of the parties beneficially entitled under the will, but that such parties are only entitled to prove to the amount of the devastavit.*—**GEARY v. BEAUMONT** (1817), 3 Mer. 431; 30 E. R. 166.

5160. —[*Derivative interest.*—[*The rule that a defaulting trustee cannot claim, as against his*

cestuis que trust, any beneficial interest in the trust estate until he has made good his default, & that his assignee is in no better position, even where the default has been committed after the assignment, applies not only to shares taken by the trustee under the instrument creating the trust, but also to derivative interests acquired by him in the trust estate.

D., an exor. & trustee entitled under a will to a life interest in a trust fund, took assignments from two of the beneficiaries of their reversionary shares in the fund, & mortgaged the two shares so acquired to F. D. was afterwards found a defaulter, & died insolvent:—Held: F. took subject to all the equities against his mtgor., & the beneficiaries under the will were entitled to have the default of D. made good out of the shares in the estate which had been acquired by her in priority to the claims of her mtgee.—**DOERING v. DOERING** (1889), 12 Ch. D. 203; 58 L. J. Ch. 553; 37 W. R. 796.

*Annotations:—***Distd.** *Re* Towndrow, Gratton v. Machen, [1911] 1 Ch. 662. **Folld.** *Re* Ducre, Whitaker v. Ducre, [1916] 1 Ch. 344.

5161. —[*—*—[*Testator, subject to a life estate to his wife, gave half his residuary estate to his son; but in case the son should at the death of his wife be "under any legal disability in consequence whereof he would be hindered in or prevented from taking the same for his own personal & conclusive benefit," testator gave the same over to the son's wife & children. Shortly before the widow's death the son, who was one of the exors. was found indebted to the estate in £5,188, & an order was made directing him to pay that sum, & declaring his interest under the will liable to make it good. He had also heavily incumbered his interest:—Held: "legal disability" meant a disability of the person arising from act of law, & neither the charge by the order nor the mtges. created such a legal disability as would cause the gift over to take effect.*

*It was argued that even without the order of the ct. there is a rule of law which prevented [the son] from taking anything under the will until his liability to the estate as a trustee or exor. was satisfied. That is quite true (KAY, L.J.).—***Re CAREW, CAREW v. CAREW**, [1896] 2 Ch. 311; 65 L. J. Ch. 680; 71 L. T. 501; 44 W. R. 700, O. A.

5162. —[*Specific legacy & residue held on distinct trusts—No default in respect of fund in which parties interested.*—[*An exor. & trustee, who was absolutely entitled to a specific legacy subject only to prior life interests therein, was also trustee of the residuary personal estate, which was settled upon trusts under which he took no beneficial interest whatever. He settled part of the legacy while still reversionary & mortgaged the other part. Several years afterwards he misappropriated part of the residue. The legacy having fallen into possession & been transferred into Ct. in the course of an action for the execution of the trusts of the will, the residuary legatees sought to attach the legacy to make good the default in respect of the residue:—Held: the rule that a defaulting trustee cannot claim any share in the trust estate until he has made good his default inasmuch as he must be treated as having by anticipation received or retained payment of his share, did not apply to the present case, because the trustee was not entitled to any*

PART IV. SECT. 5. SUB-SECT. 13.—
D. (b).

5158 l. Whether lien on executor's interest.—[*Where testator bequeathed the revenue of his estate to his wife,*

children & their issue as an alimentary allowance until the majority of the youngest grandchild, with a proviso against incumbrances & anticipation; & one son, who was exor. was indebted

to the estate:—Held: he was not bound to have the instalments of income due set off against his debt, nor to bring his debt into the common fund.—**MUIR v. MUIR** (1873), 30 L. T. 295.—**CAN.**

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share or interest in the residue; & as the specific legacy & residue were held upon entirely distinct trusts, one fund was not liable to indemnify the other, & the trustees' assignees were, therefore, entitled to the whole legacy free from any lien or equity in respect of the default.—*Re TOWNDROW, GRATTON v. MACHEN*, [1911] 1 Ch. 662; 80 L. J. Ch. 378; 104 L. T. 534.

Annotations:—Consd. Re Dacre, Whitaker v. Dacre, [1916] 1 Ch. 344. *Reid. Re Jewell's Settlement, Watts v. Public Trustee*, [1919] 2 Ch. 161.

5163. — Legacy given to executor's wife & bequeathed to husband.—W. by his will appointed D. to be one of his exors. & trustees & gave a legacy of £2,000, which had not yet been paid, to D.'s wife. She died without having received the legacy, & having bequeathed the whole of her property to her husband, whom she appointed to be her exor. D. died insolvent without having proved his wife's will. By his own will he appointed exors. to whom administration with the will annexed of his wife's estate was granted. On his death it was discovered that he had misappropriated £1,500, part of W.'s estate.—*Held*: the surviving trustee & exor. of W.'s will was entitled to retain the legacy as against D.'s liability to make good his default.—*Re DACRE, WHITAKER v. DACRE*, [1916] 1 Ch. 344; 85 L. J. Ch. 274; 114 L. T. 387; 60 Sol. Jo. 300, C. A.

Annotations:—Reid. Re Melton, Milk v. Towers (1917), 117 L. T. 679; *Re Savage, Cull v. Howard*, [1918] 2 Ch. 146; *Re Jewell's Settlement, Watts v. Public Trustee*, [1919] 2 Ch. 161; *Re Pain, Gustavson v. Haviland*, [1919] 1 Ch. 38.

5164. — Against whom lien enforceable—Assignee.—Testator bequeathed to A. & B., two of his three exors. so much money as would purchase £0,600 consols, which stock he directed should stand in their joint names, upon trust to pay the dividends to C. for life; the capital, after C.'s death, to sink into the residue. He then, out of the residue, gave several pecuniary legacies, amongst which was a legacy of £5,000 to B., & bequeathed the surplus residue to D. Upon the death of testator A. & B. purchased the consols, pursuant to the directions of the will. A. afterwards died, & then B. sold out the stock, & applied the proceeds to his own use.—*Held*: *quoad* B. no appropriation was made of the stock, so as to separate it from the residue, & consequently C. & D. were entitled to be reimbursed ratably out of B.'s legacy of £5,000 the losses which they had respectively incurred by means of B.'s breach of trust.

If an exor. assigns his reversionary legacy, the assignee takes it subject to the equities which attached to the exor.; & therefore, if the latter, though subsequently to the assignment, wastes testator's assets, the assignee cannot receive the legacy till satisfaction has been made for the breach of trust.—*MORRIS v. LAVIE* (1842), 1 Y. & C. Ch. Cas. 380; 11 L. J. Ch. 172; 62 E. R. 934.

Annotations:—Fold. Barnett v. Sheffield (1852), 1 De G. M. & G. 371. *Consd. Re Hervey, Short v. Parrott* (1889), 61 L. T. 499. *Reid. Irby v. Irby* (No. 3) (1858), 25 Beav. 632; *Wilkins v. Sibley* (1863), 4 Giff. 442; *Re Knapman, Knapman v. Wroford* (1881), 18 Ch. D. 300; *Edgar v. Plumley* (1900) A. C. 431; *Re Jewell's Settlement, Watts v. Public Trustee*, [1919] 2 Ch. 161; *Re Pain, Gustavson v. Haviland*, [1919] 1 Ch. 38.

5165. ——Testator directed his trustees to raise a sum of money, the income of which would produce a clear income of £100 *per annum*, & to invest it upon government or real securities, & pay an annuity of £100 to a legatee; & he directed them to stand possessed of the fund

so raised & the securities on which it should be invested, but subject to & charged with the annuity, on the same trusts as the residue; & he directed that, if the income of the trust fund should, from any cause or circumstance whatever, prove insufficient to answer the annuity, the deficiency should be made good out of the residue. The trustees invested a sum of £3,500 on a mtge. at 5 per cent.; & the annuitant, who was one of the trustees, assigned the annuity to a purchaser, by a deed reciting that the £3,500 was appropriated to answer it. He afterwards was permitted by his co-trustees to call it in, & to misapply it:—*Held*: first, the recital in the assignment precluded the purchaser of the annuity from being heard to say that there had not been an effectual appropriation of a fund to answer it; secondly, the provision in the will as to the insufficiency of the fund did not apply to the case. Thirdly, although the legatee of the annuity was only one of the trustees of the will, the purchaser from him could take no part of the assets till his defalcation was made good. Fourthly, on all these grounds, the purchaser of the annuity had no claim upon the residue.—*BARNETT v. SHEFFIELD* (1852), 1 De G. M. & G. 371; 21 L. J. Ch. 692; 16 Jur. 942; 42 E. R. 595, L. J.

5166. ——Under a marriage settlement a share in trust funds was appointed by will to H. He was also appointed exor. A suit was instituted to recover the trust funds, which had been lent to testator on mtge. & on covenant; & also for administration of his estate. The money lent on mtge. was produced by the sale of the mortgaged estate, & the remainder was paid out of testator's estate to the account of the settlement. H. in his father's lifetime had assigned his expectant share under the settlement to secure the payment of an annuity granted by him. After a decree for accounts A. assigned his share in the trust funds under the settlement, with notice of the suit. He was subsequently found to be indebted as exor. to testator's estate, & by an order on further directions H.'s share was declared liable to make good his debt:—*Held*: the claim in respect of the annuity was the first charge on H.'s share, but the creditors of testator were entitled to be paid their demands out of the share of H. in priority to the assignees of H. subsequent to the suit.—*IRBY v. IRBY* (No. 3) (1858), 25 Beav. 632; 32 L. T. O. S. 141; 4 Jur. N. S. 980; 6 W. R. 853; 53 E. R. 778.

Annotations:—Reid. Re Carew, Carew v. Carew, [1896] 1 Ch. 527; *Re Sewell, White v. Sewell*, [1909] 1 Ch. 806; *Re Pain, Gustavson v. Haviland*, [1919] 1 Ch. 38. *Mentd. Pile v. Pile* (1875), 23 W. R. 440; *Talbot v. Frere* (1878), 9 Ch. D. 568.

5167. ——*DOERING v. DOERING*, No. 5160, *ante*.

5168. — Discharge of lien—Acceptance of composition in bankruptcy of executor.—Two trustees of a will misappropriated & lost part of the trust funds. A receiving order was made against them under Bkpcy. Act, 1883 (c. 52), & a composition was agreed to & approved by the ct. under which a dividend of 6s. in the pound was to be accepted by the creditors in full discharge of their debts. New trustees of the will were appointed, & they received the dividend of 6s. in the pound. The estate became divisible, & the trustees claimed to retain the share of it to which one of the defaulting trustees was beneficially entitled in order to make good the loss which he had caused to the estate:—*Held*: by receiving the dividend the trustees had assented to the composition; the debt due to the estate

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The same is true even when the legatee's guardian assents to the appropriation & investment.—*Re SALOMONS, PUBLIC TRUSTEE v. WORTLEY*, [1920] 1 Ch. 290; 89 L. J. Ch. 222; 122 L. T. 670; 64 Sol. Jo. 241; *sub nom. Re SALOMONS, PUBLIC TRUSTEE v. WORTLEY*, 36 T. L. R. 212.

5181. Investment proving more than sufficient—Who entitled to profit.—*WEBB v. WEBB* (1791), 2 Dick. 746; 21 E. R. 460, L. C.

5182. ———.]—*Re HALL, FOSTER v. MITCALFE*, No. 4731, *ante*.

5183. Misapplication of investments by executor—Further assets falling in—Application.—An exor. who was also trustee, divided the assets: he paid to the adult legatees their shares, & invested the shares of the infants in his own name, but he executed no declaration of trust thereof: he afterwards applied these sums to his own use. Further assets having unexpectedly fallen in:—*Held*: they ought, in the first place, to be applied in making good the infants' legacies.—*WILMOTT v. JENKINS* (1838), 1 Beav. 401; 48 E. R. 995.
Annotation:—*Consd. Baker v. Farmer* (1867), L. R. 4 Eq. 382.

C. Payment of Legacy.

5184. To whom made—Whether to infant.—A legacy was decreed to be paid to an infant but without interest.—*BULLEN v. ALLEN* (1676), *Cas. temp. Finch*, 264; 23 E. R. 145.

5185. ———.]—*SMEE v. MARTIN & SPAKEMAN*, No. 5210, *post*.

5186. ———.]—*BILSON v. SAUNDERS* (1727), Bumb. 240; *Cas. temp. King*, 72; 145 E. R. 660.

5187. ———.]—A legacy was paid by the exors. of a will to A., a minor; some years afterwards, when A. had attained his majority, he called in the probate of this will, & opposed the validity thereof, on the ground of the incapacity of deceased, but refused to bring in the legacy:—*Held*: the payment having been made to a minor, & being consequently invalid, A. could not be compelled by the ct. to bring it in.—*GODDARD v. NORTON* (1846), 5 Notes of Cases, 76; 8 L. T. O. S. 210; 10 Jur. 1004.

5188. ———.]—**Direction in will for payment to legatee attaining eighteen.**—Where testator gives a legacy to children to be paid to them when they respectively attain the age of eighteen years, & directs that their respective receipts at that age shall be sufficient discharges for their shares notwithstanding their minority, the ct. will order payment of their shares to such children as have attained eighteen, & give liberty to those under eighteen to apply for payment of their shares when they respectively attain eighteen.—*Re DENERIN, PETERS v. TANCHEREAU* (1895), 72 L. T. 220; 13 R. 294.

5189. ———.]—**Parent.**—A child's legacy was paid to the father who failed. The payment was decreed.—*HOLLOWAY v. COLLINS* (1675), 1 *Cas.* in Ch. 245; 1 Eq. *Cas. Abr.* 300; 22 E. R. 782.
Annotation:—*Reid. Cooper v. Thornton* (1790), 3 Bro. C. C. 96.

5190. ———.]—A legacy given to an infant

ought not to be paid to the father, but if necessary the exor. should pay it under the direction of the ct. which can either require security, or see that the money is put out for the infant.—*HORRELL v. WALDRON* (1681), 1 Vern. 26; *Freem. Ch.* 83; 23 E. R. 281.

Annotation:—*Mentd. Maskell v. Lukee* (1729), 1 Barn. K. B. 208.

5191. ———.]—**Parent giving security.**—*STRICKLAND v. HUDSON*, No. 5207, *post*.

5192. ———.]—**Effect of acquiescence by legatee after coming of age.**—A legacy was devised to an infant; the exor. paid the legacy to the father & took his receipt for it. When the infant came of age the father told him he had such a legacy of his in his hands but could not pay it immediately. He would not, however, have him trouble the exor. about it because he, the father, would give it him. The son remained satisfied for about fourteen or fifteen years. In the bkpcy. of the son, the assignee brought a bill for an account against the exor.:—*Held*: notwithstanding the acquiescence of the son, the exor. was liable for the legacy.—*DOYLEY v. TOLLFERRY* (1715), 1 Eq. *Cas. Abr.* 300; 21 E. R. 1060; *sub nom. DAGLEY v. TOLFERRY*, 1 P. Wms. 285; *sub nom. DAWLEY v. BALLFREY*, Gilb. Ch. 103, L. C.

Annotations:—*Consd. Cooper v. Thornton* (1790), 3 Bro. C. C. 96; *Lee v. Brown* (1798), 4 Ves. 362. *Reid. Phillips v. Paget* (1740), 2 Atk. 80.

5193. ———.]—**Qu.**: how far acquiescence of a legatee to a payment made to the father etc. is binding after length of time & death of parties.—*COOPER v. THORNTON* (1790), 3 Bro. C. C. 96; 29 E. R. 430; *on appeal*, 3 Bro. C. C. 186, L. C.

Annotations:—*Reid. Lee v. Brown* (1798), 4 Ves. 362. *Mentd. Robinson v. Tickell* (1803), 8 Ves. 142; *Crockett v. Crockett* (1842), 1 Hare, 451; *Webb v. Woods* (1852), 2 Sim. N. S. 267.

5194. ———.]—An infant's legacy of small amount paid to the father under special circumstances.—*WALSH v. WALSH* (1852), 1 Drew. 64; 61 E. R. 375.

5195. ———.]—**Mother & guardian.**—*Re LONG, LOVEGROVE v. LONG*, [1901] W. N. 166.

5196. ———.]—**To solicitor of infant—Undertaking to discharge sum for past maintenance.**—The whole of a small legacy & its accumulations, were paid out of ct. to the solr. of an infant who had no other property, upon his undertaking to apply it in discharging a sum claimed for past maintenance & for a prospective outfit, &, after deducting the costs, to pay any remaining balance to the infant at majority.—*Re WELCH* (1854), 23 L. J. Ch. 344; 2 W. R. 310.

5197. Time for payment—On death of legatee under age—Direction in will to pay interest during minority.—If a legacy be given to an infant to be paid at his age of twenty-one years, & the exor. to pay interest for it until it became payable; if the infant die before twenty-one, it is due presently to the exor. or administrator of the infant; but if no interest was to be paid for it, then it shall not be paid until such time as the infant would have come to twenty-one in case he had lived; because there it is a benefit testator intended to the exor. by keeping it in his hands;

2 Ir. Jur. 17.—IR.

5184 iii. ———.]—Where an infant is entitled to a vested legacy payment thereof during his minority by the exor. to the testamentary guardian is valid.—*SIME v. HUME* (1901) 20 N. Z. L. R. 191.—N.Z.

n. ———.]—**To solicitor of infant.**—Moneys bequeathed directly to infant legatees & which had been invested by

PART IV. SECT. 5, SUB-SECT. 14.—C.

5184 i. To whom made—Whether to infant.—Notwithstanding a direction in a will that a legacy is to be paid to a legatee when she reaches the age of eighteen, the exor. is not bound, in the absence of a provision that the infant's discharge shall be sufficient, to pay the legacy to her upon her attaining that age; but there is no reason for applying

the rule where the legacy is in the hands of the ct., no discharge being in that case required; & in a proper case an order will be made for payment out to the infant upon her attaining that age, with the privy of the official guardian.—*Re ROBERTSON* (1908), 17 O. L. R. 568; 13 O. W. R. 208.—CAN.

5184 ii. ———.]—*McCREIGHT* (1849), 13 L. Eq. R. 314;

but in the other case it could be none, when interest was payable.—ANON. (1680), Freem. Ch. 64; 22 E. R. 1061.

5198. ———.—[CRICKETT v. DOLBY, No. 4849, ante.

5199. ———.—[Legacy given to a child payable when twenty-one, the child dies before, his administrator shall have the legacy, but shall stay for it, till such time as the child if he had lived would have come to twenty-one.—ANON. (1690), 2 Vern. 199; 23 E. R. 730.

Annotations:—**Reid**, *Crickett v. Dolby* (1795), 3 Ves. 10. **Mentd.** *Maskell v. Lukce* (1729), 1 Barn. K. B. 208.

5200. ———.—**At discretion of executrix—Delay in payment—Right of legatee to interest.**—A. gave a legacy to his granddaughter, an infant, to be paid at such time & in such manner as his wife, who was his extrix., should think fit, & best for his granddaughter. The extrix. lived near twenty years after the death of A., & died without paying the legacy. Decreed the legacy to be paid, with interest from the death of A., though no demand made in the life of extrix.—CHURCHILL v. SPEAKE (LADY) (1684), 1 Vern. 251; 23 E. R. 448.

5201. **Legacy payable on infant coming of age—Sufficiency of evidence of birth.**—Where a legacy was given to A., to be paid on her attaining the age of twenty-one years, & in case of her death before that time, was given over; the evidence on which the master made a report as to her age, with a view to allowing her a suitable maintenance, though sufficient for that purpose, may not be sufficient to establish the time of her birth so clearly, as to sustain an application for the payment of the legacy.—ANON. (1823), 1 L. J. O. S. (Ch. 77).

5202. ———.—[Bequest of a personal fund to such of the children of J. as should live to attain the age of twenty-one years. J. had three children two of whom, having attained twenty-one, applied for payment of their shares. Under the circumstances of the case the ct. declined to pay over to them any part of the capital, but allowed them to receive the interest of two-thirds without prejudice to the claim of after-born children of J.—BRANDON v. ASTON (1843), 2 Y. & C. Ch. Cas. 24; 63 E. R. 11.

Annotations:—**Consd.** *Re Jeffery, Burt v. Arnold*, [1891] 3 Ch. 671; *Re Holford, Holford v. Holford*, [1894] 3 Ch. 30. **Reid**, *Re Smith* (1862), 2 John. & H. 594. **Mentd.** *Churchill v. Marks* (1844), 1 Coll. 441; *Rochford v. Hackman* (1852), 9 Hare, 475; *Re Stultz* (1853), 22 L. J. Ch. 919, n.; *Re Catt's Trusts* (1864), 10 Jur. N. S. 538.

5203. ———.—**Legacy paid into court & invested during infancy—Transfer or sale of investments.**—*Semle:* if an infant's legacy has been paid into ct., & invested in stock, the stock will be transferred, or sold out & the proceeds paid to the party entitled, at his option.—*Ex p. BROMHEAD* (1849), 13 Jur. 113.

—**Whether legacy carries interest.**—*See* No. 4764, ante.

5204. **Recovery of legacy—Costs of proceedings—Whether payable out of legacy or assets.**—A woman may make a will at twelve, a man at fourteen. If an infant sues for a legacy, costs must be paid out of assets, & not out of the legacy.—ANON. (1726), Mos. 5; 25 E. R. 237.

5205. **Infant domiciled abroad—To whom pay-**

ment made—Payment to guardian—On proof that guardian's receipt valid discharge by lex domicilii.

—Upon a petition of an infant above the age of puberty, domiciled in Scotland, & C. her curator, praying the transfer into their joint names of a sum of stock paid into ct., to which sum the infant was entitled under a will of a testator, who died domiciled in this country:—*Held:* the stock might be transferred accordingly, upon the ct. being satisfied that the receipt of the curator was a valid discharge, according to the law of this Infant's domicil.—*Re CRICHTON'S TRUST* (1855), 24 L. T. O. S. 267.

Annotation:—**Consd.** *Re Chatard's Settlement*, [1899] 1 Ch. 712.

5206. ———.—**Time of payment.**—A legacy bequeathed to an infant domiciled abroad may be paid when the infant comes of age by the law of England, or of the place of domicil, whichever first happens; & in the meantime must be dealt with in the usual way as an infant's legacy, although by the law of the place of domicil the guardian of the infant may be entitled to receive the legacy.—*Re HELLMANN'S WILL* (1866), L. R. 2 Eq. 363; 14 W. R. 682.

Annotation:—**Consd.** *Re Chatard's Settlement*, [1899] 1 Ch. 712.

D. Maintenance of Infant.

(a) Out of Capital of Legacy.

5207. **No power to apply capital in maintenance of infant—Father.**—Legacies devised to three children decreed to be paid to the father on his entering into recognisance with S. One of the children died, the father died insolvent; the recognisance is sued against S. who, as A.'s representative, brings his bill against the other two children to have allowance for their maintenance, etc.—*STUCKLAND v. HUDSON* (1708), 3 Rep. Ch. 165; 21 E. R. 757.

5208. ———.—[A bill was brought by plff. for two legacies of £50 left to himself & his sister under their grandfather's will, & for the interest made of them; deft., who was exor. to plff.'s father, insisted on being allowed £105 for putting out plff. apprentice, & £50 for the maintenance & clothing the sister:—*Held:* a father cannot apply a legacy left by a relation to a child in the maintenance of such child, nor can he put him out an apprentice with the money arising from the legacy.—*DARLEY v. DARLEY* (1746), 3 Atk. 399; 26 E. R. 1020, L. C.

Annotations:—**Consd.** *Austin v. Austin*, *Austin v. Boyce* (1876), 46 L. J. Ch. 92. **Mentd.** *Lee v. Prieaux* (1791), 3 Bro. C. C. 381.

5209. ———.—**Mother.**—ANON. (1681), 2 Vent. 353; 86 E. R. 481.

5210. ———.—[Legacy to a son not to be paid him till he is of age, no deduction shall be allowed to his mother for his maintenance, etc.—*SMEE v. MARTIN & SPAKEMAN* (1723), Bunb. 136; 145 E. R. 623.

5211. ———.—**Stepfather.**—*SWINNOCK v. CRISP* (1681), Freem. Ch. 78; 22 E. R. 1069.

5212. ———.—**Aunt.**—A., after his brother's bkpcy., took the brother's children into his family & maintained them; after A.'s decease:—*Held:* (1) his widow & extrix. could not retain the sums expended for maintenance out of a legacy given

defts., the exors. of testatrix, were demanded of & received from them by F., a solr., who had obtained from the surrogate ct. his appointment as guardian of the infants. F. subsequently misapplied the moneys & absconded:—*Held:* defts. were not liable.—*HUGGINS v. LAW* (1887), 14 A. R. 383.—CAN.

PART IV. SECT. 5, SUB-SECT. 14.—D. (a).

o. General rule—Application will be refused.—A suit was instituted by a party asking for maintenance out of the corpus of the estate, the ct. as a check upon such suits refused to make any direction as to maintenance.—*GOODFELLOW v. RANNIE* (1873), 20

Gr. 425.—CAN.

p. ———.—[FENWICK v. FENWICK (1873), 20 Gr. 381.—CAN.

q. Discretion of executors.—Exors. have a discretion to apply part of the principal of a residuary estate to the support & education of the legatees where the interest on the residuary

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to the children by their grandfather; (2) she could retain the premium paid by A. to apprentice one of his nephews out of the legacy, to which, at the time the premium was paid, the nephew was contingently entitled.—**WORTHINGTON v. McCRAER** (1856), 23 Beav. 81; 26 L. J. Ch. 286; 28 L. T. O. S. 154; 5 W. R. 124; 53 E. R. 32.

Annotation:—As to (1) Reff. Grove v. Price (1858), 26 Beav. 103.

5213. Whether court will direct.]—Where testator directs that the income of his estate shall be applied in maintenance, & the income is insufficient for that purpose, the ct. will in some cases direct payment out of the capital of his personality.—**BRIDGE v. BROWN** (1843), 2 Y. & C. 31. Cas. 181; 63 E. R. 79.

Annotation:—Mentd. Goldstein v. Salvation Army Assce. Soc., [1917] 2 K. B. 291.

(b) Out of Income of Legacy.**i. No Directions in Will for Maintenance.**

See, generally, INFANTS.

5214. What court will consider—Obligation to support.]—**HAUGHTON v. HARRISON**, No. 5261, *post*.

5215. ———.]—*Re BREEDS' WILL*, No. 5242, *post*.

Testator not in loco parentis.]—See Nos. 5220, 5222, 5228, post.

5216. ——— Circumstances of parent.]—**BUCKWORTH v. BUCKWORTH**, No. 5230, *post*.

5217. ———.]—**GREENWELL v. GREENWELL**, No. 5232, *post*.

5218. ———.]—**ERRINGTON v. CHAPMAN**, No. 5235, *post*.

5219. Contingent legacy—Whether infant entitled to income during infancy.]—**KINNERSLEY v. PARRETT** (1664), Nels. 101; 21 E. R. 800; *sub nom.* **KENNESBY v. PARRETT**, Freem. Ch. 183; *sub nom.* **KENNESBY v. PARROT**, 1 Cas. in Ch. 60; 1 Eq. Cas. Abr. 301.

Annotations:—Consd. Crickett v. Dolby (1795), 3 Vm. 10. Reff. Harvey v. Harvey (1722), 2 P. Wms. 21.

5220. ——— Request by stranger.]—Portions devised by a father to his younger children, payable at twenty-one, or marriage, shall carry interest from his death till that time, if he made no other provision for them; but otherwise, if devised by a stranger, who is under no obligation to provide for them.—**A.-G. v. THOMPSON** (1712), Prec. Ch. 337; 1 Eq. Cas. Abr. 301, pl. 2; 24 E. R. 158.

5221. ———.]—**INCLEDON v. NORTHCOTE**, No. 5228, *post*.

5222. ———.]—Maintenance may, under 23 & 24 Vict. c. 145, s. 26, be allowed out of the income of a legacy bequeathed to an infant

estate is inadequate for their support.—**Re McDougall** (1868), 14 Gr. 609.—**CAN.**

r. ———.]—Testatrix bequeathed a sum of money to a son, with a direction that her exors. should invest the same & pay to the son half the interest, & in case of his sickness to advance to him such portion of the principal money as they should think necessary:—*Held*: in case of sickness a trust was created, which must be exercised by the exors., when called upon to do so, though they had a discretionary power to determine the amount necessary to be so applied.—**Re EVANS** (1902), 23 O. L. T. 164; 3 O. L. R. 401; 1 O. W. N. 92.—**CAN.**

PART IV. SECT. 5, SUB-SECT. 14.—D. (b) i.**a. Contingent legacy—Whether in-**

fant entitled to interest during infancy.]

—Testator by his will appointed M. exor. & trustee, & bequeathed to him all his real & personal estate upon trust for conversion, & then declared that the trustee should stand & be possessed of the moneys upon trust to pay debts, etc., & subject thereto to stand possessed of £1,000 for E. & to stand also possessed of £4,000 other part of such moneys, in trust for four infants upon their attaining their respective ages of twenty-one years, & to stand possessed of the residue, in trust for others:—*Held*: inasmuch as £4,000 was set apart by the will for the purpose of distribution, & was not severed for the sole benefit of the infants, interest on the same was payable, to them from the time of their attaining twenty-one, & the bequest did not carry interest in the meantime.—**Re CARFRAE**, [1905] V. L. R. 641.—**AUS.**

by a stranger contingently on its attaining the age of twenty-one years.—**Re COTTON** (1875), 1 Ch. D. 232; 45 L. J. Ch. 201; 33 L. T. 720; 24 W. R. 243.

Annotations:—Apld. Re George (1877), 5 Ch. D. 837. Consd. Re Dickson, Hill v. Grant (1884), 28 Ch. D. 291. Reff. Re Bowlby, Bowlby v. Bowlby, [1904] 2 Ch. 685. Mentd. Re Judkin's Trusts (1884), 25 Ch. D. 743.

5223. ———.]—**HARVEY v. HARVEY** (1722), 2 P. Wms. 21; 2 Eq. Cas. Abr. 566, pl. 10; 24 E. R. 625.

Annotation:—Reff. Re Bowlby, Bowlby v. Bowlby, [1904] 2 Ch. 685.

5224. ———.]—A. by will devises £500 to his infant grandson without appointing any time for payment, with proviso, that if the grandson dies before twenty-one, then the legacy to go over to B.:—*Held*: the grandson should have the interest of the legacy during his infancy.—**TAYLOR v. JOHNSON** (1728), 2 P. Wms. 504; 2 Eq. Cas. Abr. 566, pl. 16; 24 E. R. 836; *sub nom.* **TAYLOR v. GERST**, Mos. 98.

Annotation:—Reff. Stone v. Harrison (1846), 2 Coll. 715.

5225. ———.]—If estate of a married woman is settled subject to a power for her to appoint £1,500 by deed from her decease, & she appoints to A. at twenty-one or marriage, & dies during A.'s infancy, the money is raisable immediately after her decease & carries the interest for the benefit of A.—**MANSSELL v. PRICE** (1736), 2 Eq. Cas. Abr. 532; 22 E. R. 449.

Annotation:—Reff. Hoare v. Osborne (1864), 33 L. J. Ch. 586.

5226. ———.]—**HOUGHTON v. PRICE** (1741), 2 Coop. temp. Cott. 534; 47 E. R. 1291, L. C.

5227. ———.]—**HEATH v. PERRY**, No. 5170, *ante*.

5228. ———.]—Where legacies are given to a stranger, either payable at twenty-one, or not till twenty-one, they can have no interest in the mean time, but where given to children, in either of these cases, they shall have interest immediately.—**INCLEDON v. NORTHCOTE** (1746), 3 Atk. 430; 20 E. R. 1048, L. C.

Annotations:—Folld. Brown v. Temperley (1827), 3 Russ. 263. Reff. Mole v. Mole (1758), 1 Dick. 310; Re George (1877), 5 Ch. D. 837. Mentd. Lewis v. Freke (1794), 2 Ves. 507.

5229. ———.]—Testator gave to A., B., C., D., & E. £500 each to be paid to them at their respective ages of twenty-three years; & if they should die before that time, then their respective legacies were to sink into the residue of his personal estate. These legacies do not carry interest, & no maintenance can be allowed to the legatees.—**DESCRAMBES v. TOMKINS** (1784), 1 Cox, Eq. Cas. 133; 4 Bro. C. C. 149, n.; 20 E. R. 1095, L. C.

Annotation:—Apld. Shawe v. Cunliffe (1792), 4 Bro. C. C. 144.

t. ———.]—Testator bequeathed a legacy to an infant daughter, payable on her attaining twenty-one years, & charged the same on the shares of two of the devisees; but the will was silent as to interest:—*Held*: the infant was entitled to maintenance out of the estate of testator, during her minority, to the extent of the interest on the legacy.—**BINKLEY v. BINKLEY** (1869), 15 Gr. 649.—**CAN.**

u. ———.]—Interest from the death of testator allowed upon legacies payable at a future period to infant grand-nephews upon the intention of testator that they should be maintained out of the property bequeathed to them.—**LESLIE v. LESLIE** (1835), L. & G. temp. Sugd. 1.—**IR.**

x. ———.]—*Whether infans entitled to accumulated rents.*—Testator bequeathed to J. his farm of land "when he shall be of age, i.e. twenty-one."

5230. ———.]—In order to entitle the father of an infant legatee to maintenance it is not necessary that he should be absolutely insolvent, but that he should not be in sufficient circumstances to maintain his child suitably to his expectation. The ct. will not allow maintenance to a grandchild legatee out of a fund not vested.—*BUCKWORTH v. BUCKWORTH* (1781), 1 Cox, Eq. Cas. 80; 29 E. R. 1072, L. C.

5231. ———.]—The general rule, that a legacy payable in future shall not carry interest before the time of payment, applies to a legacy to infants payable at twenty-one: the exceptions are the case of parent & child, the case of a residue, & where from other special circumstances an intention to give interest clearly appears.—*TYRRELL v. TYRRELL* (1798), 4 Ves. 1; 31 E. R. 1.

5232. ———.]—Devise to an infant grandson at twenty-one with accumulation in the meantime; with similar limitations in case of his death under twenty-one to his sisters. Their father being dead, having left all his property, which was inconsiderable, to his wife, who married a person in low circumstances, maintenance was decreed, without an inquiry, whether it was for the benefit of the infants; the ct. judging of that.—*GREENWELL v. GREENWELL* (1800), 5 Ves. 194; 31 E. R. 541, L. C.

*Annotations:—**Fold. Collis v. Blackburn* (1801), 9 Ves. 470. *Distd. Errington v. Chapman* (1806), 12 Ves. 20. *Refd. Ex p. Kebble* (1805), 11 Ves. 604; *Errat v. Barlow* (1807), 14 Ves. 202; *Turner v. Turner* (1831), 4 Sim. 430; *Havelock v. Havelock*, *Re Allan* (1881), 17 Ch. D. 807.

5233. ———.]—Maintenance allowed in the case of children & grandchildren, though the interests were contingent, with reference to the case of survivorship, accumulation directed, & no express authority for any application during minority, except for the younger children, surviving the eldest, in the event of his death under twenty-one without issue.—*FAIRMAN v. GREEN* (1804), 10 Ves. 45; 32 E. R. 760.

*Annotation:—**Consd. Ex p. Kebble* (1805), 11 Ves. 604.

5234. ———.]—Maintenance decreed to grand-children out of the fortune bequeathed to them by their grandfather, though no direction for it in the will.—*COLLIS v. BLACKBURN* (1801), 9 Ves. 470; 32 E. R. 684.

5235. ———.]—Maintenance not allowed upon legacies by a grandfather to his grandchildren at twenty-one, with interest, though the father was not of ability to maintain them; the legacies with the interest being given over in the event of death under twenty-one.—*ERRINGTON v. CHAPMAN* (1806), 12 Ves. 20; 33 E. R. 8.

*Annotation:—**Refd. Evans v. Masey* (1826), 1 Y. & J. 196.

5236. ———.]—Maintenance out of interest of a legacy to grandchildren, when the youngest should attain twenty-one, refused.—*LOMAX v. LOMAX* (1805), 11 Ves. 48; 32 E. R. 1005, L. C.

5237. ———.]—Maintenance allowed, against a direction for accumulation, only where it is for the benefit of the infants: the chance by surviving being equal; & no other interest, to take effect upon any contingency, will be defeated.—*ERRAT v. BARLOW* (1807), 14 Ves. 202; 33 E. R. 498.

*Annotations:—**Consd. Haley v. Bannister* (1819), 4 Madd. 275. *Refd. Turner v. Turner* (1831), 4 Sim. 430.

5238. ———.]—Maintenance ordered, upon the fair inference of intention, where legacy is given to children "when" & "as" they attain twenty-one, with survivorship in case of any

dying under that age & if all die the legacy to cease.—*LAMBERT v. PARKER* (1815), Coop. G. 143; 35 E. R. 509.

*Annotation:—**Refd. Re Cranc, Adams v. Crane* (1907), 77 L. J. Ch. 212.

5239. ———.]—Maintenance allowed to infants out of a fund in which they had only contingent interests.—*PRATER v. PRATER* (1827), 6 L. J. O. S. Ch. 90.

5240. ———.]—& for three years after—Consent of next of kin.]—The shares of children in a legacy, were contingent on the sons attaining twenty-four, or dying under that age leaving issue, & on the daughters attaining twenty-four or marrying; but the legacy was not given over in the event of no child acquiring a vested interest. The ct. refused to order maintenance for the children, unless testator's next of kin would consent.—*CANNINGS v. FLOWER* (1835), 7 Sim. 523; 5 L. J. Ch. 8; 58 E. R. 938.

5241. ———.]—Where an infant was entitled to a fund & accumulations of interest contingently upon her attaining twenty-one, & the fund went over if she died before attaining that age, & there was no direction for maintenance in the instrument creating the interest of the infant, the ct. refused to allow maintenance out of the accumulations, but directed a reference to chambers in order that an insurance might be effected which should secure as far as possible the desired object.—*Re ARBUCKLE* (1806), 11 L. T. 538; 14 W. R. 535.

*Annotations:—**Apld. Re Colgan* (1881), 19 Ch. D. 305; *Re Bruce* (1882), 30 W. R. 922. *Refd. Re Tanner* (1884), 53 L. J. Ch. 1108.

5242. ———.]—The doctrine whereby interest on a contingent legacy or share of residue is given for the purpose of maintenance depends upon the natural obligation which the father would be under, if living, to maintain the child during infancy, & is not applicable to a case where that obligation would not arise.

Therefore, where testator by his will provided maintenance for his daughters until they should attain the age of twenty-one years, & bequeathed them a share of residue contingently on their attaining twenty-five:—*Held*: maintenance could not be granted by the trustees to daughters who had attained their majority. *Re BUCKEN'S WILL* (1875), 1 Ch. D. 226; 45 L. J. Ch. 191; 21 W. R. 200.

5243. ———.]—Where an infant was contingently entitled to property on her attaining the age of twenty-one years or being married, the ct. sanctioned a scheme for the payment of past & future premiums on a policy payable in case the infant died before twenty-one or marriage, & for the payment of past & future maintenance of the infant, such payments to be secured by a mtge. on the policy, & a charge upon the infant's contingent interest, the charge not to affect the interest of any persons other than the infant.—*Re BRUCE* (1882), 30 W. R. 922.

5244. ———.]—*Conveyancing Act, 1881 (c. 41), s. 43.*—*Re JUDKIN'S TRUSTS*, No. 4805, ante.

5245. ———.]—Direction in will for accumulation.]—Testator gave property to trustees, upon trust for all the children of A., who being sons should attain twenty-one, or being daughters should attain that age or marry, & he directed his trustees to accumulate the income of the shares of such children, & to pay the same to them as &

No other provision was made for J. by way of maintenance or otherwise, & the will contained no residuary clause. An agreement for the purchase of the farm had been signed by testator, &

the purchase was completed by his execs. Testator died on Nov. 15, 1905, & from that time until J. attained age in Oct. 1914, the rents & profits of the farm were accumulated by the execs.

Testator, having no family, took J. when a boy to reside with him & he was supported & maintained on the farm until testator's death. Upon the question arising whether J. or

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the child out of the income of the legacy, or out of the income of a share of residue given to him equally with the other children. The provisions of Conveyancing Act, 1881 (c. 41), s. 43, as to the maintenance of infant legatees must, for the purpose of determining whether a legacy to an infant carries interest, be treated as incorporated into any will to which they are applicable. A testator bequeathed a legacy to his infant son payable at twenty-one, & legacies to his daughters, one of whom was an infant, & gave his residuary real & personal estate to trustees upon trusts in favour of his children equally. He declared that his trustees might at their discretion raise any part not exceeding one moiety of the expectant share of any child, & apply the same for his or her advancement, preferment, or benefit. The will contained no express provision for the maintenance of infant children out of income or otherwise, but the provisions contained in above sect. were applicable:—*Held*: above sect. ought to be read as part of the will, but though it were so read, yet there was nothing in the will to displace the application of the general rule applicable to legacies to infant children, & accordingly the legacies to the infant son & daughter respectively carried interest as from the death of testator.—*Re MOODY, WOODROFFE v. MOODY*, [1895] 1 Ch. 101; 64 L. J. Ch. 174; 72 L. T. 190; 43 W. R. 462; 13 R. 13.

Annotations:—*Distd. Re Abrahams, Abrahams v. Bendon*, [1911] 1 Ch. 108; *Re Stewart, Stewart v. Bosanquet* (1913), 57 Sol. Jo. 646. *Re Bowlby, Bowlby v. Bowlby* (1904), 73 L. J. Ch. 810.

5274. Legacy to infant en ventre sa mère.]—*RAWLINS v. RAWLINS*, No. 4708, *ante*.

5275. Testator not in loco parentis to infant.—Legacy to cousin.]—Legacies to infants payable at twenty-one, with benefit of survivorship in the event of death under that age, & a power to the exors. to apply any part of the legacies towards the maintenance of the legatees, bear interest from the death of testatrix, the infants being her cousins, & destitute of other provision.—*PETT v. FELLOWS* (1733), 1 Swan. 561; 36 E. R. 505, L. C.

Annotations:—*Distd. Re Crane, Adams v. Crane*, [1908] 1 Ch. 379. *Consd. Re Churchill, Hiscock v. Lodder*, [1909] 2 Ch. 431. *Distd. Re West, Westhead v. Aspland*, [1913] 2 Ch. 345. *Reid. Cusack v. Jellico* (1873), 22 W. R. 344; *Re Bowlby, Bowlby v. Bowlby*, [1904] 2 Ch. 685.

5276. — Infant illegitimate.]—*BECKFORD v. TOBIN* (1740), 1 Ves. Sen. 308; 27 E. R. 1040, L. C.

Annotations:—*Distd. Lowndes v. Lowndes* (1808), 15 Ves. 301. *Apld. Hill v. Hill* (1814), 3 Ves. & B. 183. *Expld. & Distd. Raven v. Waite* (1818), 1 Swan. 553. *Apld. Re Richards* (1869), L. R. 8 Eq. 119. *Reid. Re Bowlby, Bowlby v. Bowlby*, [1904] 2 Ch. 685.

5277. — — —.]—On legacies to a natural child of testator, with directions to apply a competent part of the interest for maintenance, interest is payable from testator's death.—*NEWMAN v. BATESON* (1780), 3 Swan. 689; 36 E. R. 1024.

Annotation:—*Apld. Re Richards* (1869), L. R. 8 Eq. 119.

5278. — — —.]—Interest upon a legacy to a wife or a natural child not allowed from testator's death, as it is in favour of a legitimate child by way of maintenance.—*LOWNDES v. LOWNDES* (1808), 15 Ves. 301; 33 E. R. 768.

Annotations:—*Apld. Raven v. Waite* (1818), 1 Swan. 553; *Re Richards* (1869), L. R. 8 Eq. 119.

5279. — — —.]—Interest from testator's death upon legacies to his grandchildren by implication: the object being a provision & maintenance for the legatees, described as infant orphans, & some of

them illegitimate.—*HILL v. HILL* (1814), 3 Ves. & B. 183; 35 E. R. 448.

Annotation:—*Reid. Raven v. Waite* (1818), 1 Swan. 553.

5280. — — —.]—Testator gave legacies to illegitimate children, provided they attained twenty-one; with a bequest over, if they died under that age; & appointed trustees & guardians of the children, earnestly requesting those trustees & guardians to take care of the education of the children:—*Held*: the children were entitled to interest on their legacies during their minority.—*MILLS v. ROBERTS* (1830), 1 Russ. & M. 555; *Taml. 470*; 8 L. J. O. S. Ch. 141; 39 E. R. 213.

5281. — — —.]—Where a legacy is given to a natural child with direction to apply the interest for his maintenance, the interest is payable from the death of testator.—*DOWLING v. TYRELL* (1831), 2 Russ. & M. 343; 39 E. R. 425.

Annotation:—*Apld. Re Richards* (1869), L. R. 8 Eq. 119.

5282. — Legacy to grandchild.]—*HILL v. HILL*, No. 5279, *ante*.

5283. — — —.]—Devise of real estates to testator's daughter for her life, with remainder to his two sons in fee; & in case the daughter should leave any child or children living at her death, then he directed that the two sons or their heirs should pay to such child or children £200 equally between them, as they should severally attain the age of twenty-one & interest for the same, until the said legacy should become due, toward their maintenance & bringing up. The daughter left one child surviving her, which lived for several years, but died an infant, no interest having been paid on the legacy during its lifetime. On a bill, filed by the father as personal representative of the child:—*Held*: he was entitled to recover the interest on £200 from the death of the mother to the death of the child & the interest was a charge on the real estates.—*HARRIS v. FINCH* (1824), *M'Cle. 141*; 148 E. R. 59.

5284. — Legacy to nephew.]—A testator directed his trustees, as soon as convenient after the decease of his wife, to raise £10,000 for his nephew, an infant, & to invest it & apply the income towards his maintenance. Testator had previously given his wife an annuity of £1,000 a year, payable quarterly. The wife predeceased testator:—*Held*: the infant was entitled to interest on his legacy from testator's decease.—*PICKWICK v. GIBBES* (1839), 1 Beav. 271; 3 Jur. 101; 48 E. R. 944.

Annotation:—*Expld. & Distd. Re Palfreeman, Public Trustee v. Palfreeman*, [1914] 1 Ch. 877.

5285. — Legacy to adopted children.]—A testator by his will bequeathed as follows: "I give to A. together with her little girl L. & two little boys F. & O. my adopted children, & for their joint maintenance, their mother A. having the care of bringing them up to the best of her power till they are able to do for themselves, £30 a year from the interest of my funded property in the Bank of England, to be paid the said mother half-yearly, or as may best suit as her conduct deserves. I also give £100 to each of the before-mentioned children towards their education & instruction:—*Held*: A. & her three children were entitled for their joint lives & for the lives & life of the survivors & survivor of them, to an annuity of £30 charged on testator's funded property, & the three children were also entitled to a legacy of £100 each, with interest at 4 per cent. *per annum* from the day of testator's death.—*WILSON v. MADDISON* (1843), 2 Y. & C. Ch. Cas. 372; 12 L. J. Ch. 420; 1 L. T. O. S. 336; 7 Jur. 572; 63 E. R. 164.

Annotations:—*Reid. Kerr v. Middlesex Hospital* (1852), 22 L. J. Ch. 355; *Hedges v. Harpur, Hedges v. Blick* (1858), 3 De G. & J. 139.

5286. —.]—*Re* RICHARDS, No. 5271, *ante*.

5287. —.]—**Legacy to grand-nephew.**—Testatrix by her will devised & bequeathed the residue of her real & personal estate to trustees upon trust to sell & convert & out of the proceeds to pay certain pecuniary legacies, including a legacy of £200 to her grand-nephew C., & she directed that the interest of males under her will should vest at twenty-one years & of females at that age or marriage. Testatrix empowered her trustees at their discretion "to apply the whole or any part of the share to which any beneficiary hereunder may be contingently entitled in or towards the advancement in life or otherwise for the benefit of such beneficiary whether male or female & whether under the age of twenty-one years or not." Testatrix died in 1908. At the date of her will & the date of her death C. was an infant:—*Held*: interest was payable on the legacy from the death of testatrix & the trustees were entitled to apply the interest in or towards the maintenance of C. during his infancy.—*Re* CHURCHILL, HISCOCK v. LODDER, [1909] 2 Ch. 431; 79 L. J. Ch. 10; 101 L. T. 380; 53 Sol. Jo. 697.

Annotation:—*Distd.* *Re* West, Westhead v. Aspland, [1913] 2 Ch. 345.

5288. **Legacy to adult subject to obligation to maintain infants.**—A sum being bequeathed on trust, to apply the interest towards the maintenance & support of F., separated from her husband, testator's nephew, with separate allowance on condition of maintaining her children, & assisted by a voluntary annuity from testator during his life, & the maintenance & education of her children until the youngest should attain twenty-one, & after that event to F. so long as she remained the wife or widow of her present husband, with a direction, in case of her death or marriage before that event, to the trustees, to take the children under their care, F. is not entitled to interest from the death of testator, the exception to the general rule, in case of legacies by persons *in loco parentis*, not extending in favour of an adult legatee, & the will expressly directing payment to certain annuitants within a year from testator's death.—*RAVEN v. WAITE* (1818), 1 Swan. 553; 1 Wils. Ch. 201; 36 E. R. 502.

Annotations:—*Fold.* *Re* Crane, Adams v. Crane, [1903] 1 Ch. 379. *Reid.* Wall v. Wall (1847), 15 Sim. 513.

5289. —.]—A testator bequeathed the income of a trust legacy to his daughter-in-law during her widowhood, subject to the obligation of maintaining her deceased husband's children while minors & unmarried:—*Held*: the legacy did not carry interest from testator's death.—*Re* CRANE, ADAMS v. CRANE, [1908] 1 Ch. 379; 77 L. J. Ch. 212; 98 L. T. 314.

Annotation:—*Distd.* *Re* Ramsay, Thorpe v. Ramsay, [1917] 2 Ch. 64.

5290. —.]—A testator directed that the income of a trust legacy should so long as his wife remained his widow be paid to her until his children respectively attained the age of twenty-one years or, being daughters or a daughter, married under that age, to be wholly applied by his wife for the maintenance of herself & the maintenance of & education of his children, with a gift of three-fifths of the corpus of the legacy to his children at twenty-one or marriage, & of the remaining two-fifths of the corpus for his wife during widowhood with reversion to his children:—*Held*: the legacy carried interest from the death of testator.—*Re* RAMSAY, THORPE v. RAMSAY, [1917] 2 Ch. 64; 86 L. J. Ch. 514; 117 L. T. 117.

5291. **Petition for maintenance—Reference as to father's ability to maintain infant.**—In a case in

which a legacy was given, in events which happened, to two infants, to be paid to them at twenty-one, with a direction for maintenance out of the income during their respective minorities, & an ultimate limitation over in case they should both die under twenty-one without issue, the ct., upon a petition for maintenance out of the income of the fund, refused to dispense with the usual reference as to the father's ability to maintain the infants.—*LUCKNOW v. BROWN* (1848), 12 Jur. 1017.

5292. **Marriage of infant before coming of age.**—Testator directed maintenance for his sons during minority, & for his daughter till twenty-one, or marriage, & gave her a legacy, in case she should attain twenty-one, payable at, & to carry interest from, that time. Having married at eighteen, she was allowed maintenance for the interval, until twenty-one.—*CHAMBERS v. GOLDWIN* (1805), 11 Ves. 1; cited in [1904] 2 Ch. at p. 693; 32 E. R. 987, L. C.

Annotations:—*Consd.* Martin v. Martin (1866), L. R. 1 Eq. 369; *Re* Breed (1875), 24 W. R. 200; *Re* George (1877), 5 Ch. D. 837. *Expld.* *Re* Bowly, Bowly v. Bowly, [1904] 2 Ch. 685. *Reid.* Casack v. Jellico (1873), 22 W. R. 344; *Re* Cotton (1875), 1 Ch. D. 232.

5293. —.]—Where a testator by his will provided for application of income for maintenance of beneficiaries who should be under the age of twenty-one years, or, being female, should be unmarried, & for accumulation of the surplus:—*Held*: this clause did not show a "contrary intention" so as to exclude the operation of Conveyancing Act, 1881 (c. 41), s. 43, & accordingly the trustees had power under that sect. to apply the income for a daughter's maintenance from the date of marriage until she attained twenty-one.—*Re* COOPER, COOPER v. COOPER, [1913] 1 Ch. 350; 82 L. J. Ch. 222; 108 L. T. 203; 57 Sol. Jo. 389.

Annotation:—*Reid.* *Re* Boulter, Capital & Counties Bank v. Boulter, [1918] 2 Ch. 40.

iii. **Provision in Will for Maintenance out of Another Fund.**

See, generally, INFANTS.

5294. **Whether infant entitled to income during infancy—Legacy payable at future day.**—Where a father gives a legacy to a child payable at a future day, & makes an express provision for maintenance out of another fund, the legacy shall not carry interest until the time of payment.—*WYNCH v. WYNCH* (1788), 1 Cox, Eq. Cas. 433; 20 E. R. 1236.

Annotations:—*Fold.* Donovan v. Needham (1846), 9 Beav. 164. *Consd.* *Re* Rouse's Estate (1852), 9 Hare. 619. *Reid.* *Re* George's Estate, George v. Turnell (1876), 25 W. R. 182; May v. Potter (1877), 25 W. R. 507; *Re* Moody, Woodroffe v. Moody, [1885] 1 Ch. 101; *Re* Bowly, Bowly v. Bowly, [1904] 2 Ch. 685.

5295. —.]—*DONOVAN v. NEEDHAM*, No. 4834, *ante*.

5296. —.]—A bequest of a legacy, upon trust to apply so much of the interest as the trustees should think proper in the maintenance of testator's grandson until twenty-one; & upon his attaining that age, to pay the whole of the interest of the legacy to the grandson for his life; & a direction that, after the decease of the grandson, the trustees were to stand possessed of the legacy & interest, & all accumulations, in trust for the grandson's children, with remainder, in default of such issue, over:—*Held*: the provision for the maintenance of the grandson during his minority, out of the interest of the legacy, showed that the interest was intended for him; the legacy vested in interest, although not in enjoyment, before the grandson attained twenty-one; & the grandson

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was therefore entitled to the interest which accrued during his minority, & was not applied in his maintenance.

A legacy to a child carries interest on the ground of the presumed intention of the parent to fulfil his moral duty of providing for the maintenance of his child; but, if he has discharged that duty by providing for the maintenance of the child out of another fund, the legacy does not necessarily carry interest.—*Re ROUSE'S ESTATE* (1852), 9 Hare, 649; 68 E. R. 673.

Annotation:—Reid. May v. Potter (1877), 25 W. R. 507.

5297. —.—.]—Testator gave legacy without interest & directed the exor. to maintain the legatee, & put him out in the world. The exor. apprenticed the legatee as a veterinary surgeon, & expended considerable sums in preparing him & educating him for that profession. On a claim being filed for the legacy:—*Held*: the exor. had no right to an inquiry as to the sum so paid.—*HAWES v. PORTER* (1852), 1 W. R. 178.

5298. —.—.]—*Re MOODY, WOODROFFE v. MOODY*, No. 5273, *ante*.

5299. —.—.]—*Contingent legacy.*—Upon the ground of an express maintenance other indications of the intention the Lord Chancellor inclined to the opinion, that the rule for interest upon a legacy, given by a parent to a child, till the time of payment was not applicable.—*MITCHELL v. BOWER* (1796), 3 Ves. 283; 30 E. R. 1012, L. C.

Annotation:—Reid. Re Breed (1875), 24 W. R. 200.

5300. —.—.]—L., an infant, was, under his father's will, entitled to £6,000, if, & as, & when he should attain twenty-one. The will contained also a bequest of £8,000 to the trustees, payable in the events which happened when L. attained twenty-one, the income thereof to be paid to testator's wife for life, or during widowhood, for her own use. Testator bequeathed the ultimate surplus of his residuary estate upon trust out of the income until L. should attain fifteen, to permit testator's wife to receive such annual sum as might be sufficient for maintaining herself & such of his children as should for the time being be under twenty-one, & subject thereto & to another gift, he directed the annual income of the residue to be accumulated till L. should attain twenty-one, & that the aggregate fund of residue & accumulations should be in trust for all or such of his three sons, H., E., & L., as should attain twenty-one, when, & as, & if they should respectively attain twenty-one, & if more than one, equally as tenants in common:—*Held*: L. was entitled to interest on the £6,000 by way of maintenance, from the time when he attained fifteen.—*MARTIN v. MARTIN* (1806), L. R. 1 Eq. 369; cited in [1904] 2 Ch. at p. 693; 35 L. J. Ch. 281; 14 L. T. 129; 14 W. R. 421.

Annotations:—Consd. Re Bowlby, Bowlby v. Bowlby, [1904] 2 Ch. 685. *Reid. Cusack v. Jellico* (1873), 22 W. R. 344; *Re Breed* (1875), 24 W. R. 300.

5301. —.—.]—*Effect of 23 & 24 Vict., c. 145.*—*Sect. 26* of above Act empowering trustees to apply towards the maintenance of an infant the income to which such infant may be entitled in respect of a legacy payable contingently on his attaining twenty-one, does not apply to a case where the infant on attaining twenty-one would not be entitled to interest on his legacy till the time of payment. A testator declared that his personal estate should be held upon trust out of the annual produce to raise for every daughter who should be under age & unmarried the yearly sum of £50 for their maintenance & education & to accumulate

the surplus income as part of his residuary personal estate, & he bequeathed to each of his daughters a legacy of £4,000 if & when they should respectively attain twenty-one or be married, & gave his residuary personal estate to his eldest son:—*Held*: the legacies to the daughters did not carry interest until the time of payment, & the ct. had no power under above sect. to apply any part of the income of the expectant legacies to the maintenance of the daughters.—*Re GEORGE* (1877), 5 Ch. D. 837; 47 L. J. Ch. 118; 37 L. T. 204; 26 W. R. 65, C. A.

Annotations:—Consd. Re Judkin's Trusts (1884), 25 Ch. D. 743; *Re Dickson, Hill v. Grant* (1885), 54 L. J. Ch. 510; *Re Bowlby, Bowlby v. Bowlby*, [1904] 2 Ch. 685. *Apld. Re Stewart, Stewart v. Bosanquet* (1913), 57 Sol. Jo. 646. *Reid. Re Moody, Woodroffe v. Moody*, [1895] 1 Ch. 101; *Re Abrahams, Abrahams v. Bendon*, [1911] 1 Ch. 108; *Re Boulter, Capital & Counties Bank v. Boulter*, [1918] 2 Ch. 40.

5302. —.—.]—Testator left a fund in trust for his grandson, absolutely, when he should attain twenty-five years, with a gift over if he should die without issue under that age, & provided that a sum "not exceeding" £200 *per annum* might be applied for his maintenance. On an application that such sum might be increased to £500 out of the interest of the fund:—*Held*: the presumption that the infant was entitled to interest on the fund was rebutted, & testator having fixed a definite sum for maintenance, the ct. would not exceed it.

Where a testator is *in loco parentis* towards a legatee the rule is that where there is a gift of a legacy as a provision payable at a future time, it does not necessarily carry interest, but the ct. has refused to believe that the child was intended to starve in the interval, & has given the child the income for maintenance, on the theory that the words "payable at twenty-one" were used by testator in order to fix the date of payment, & not to make the legacy a contingent legacy in the ordinary sense of the word. In other words where a legacy is given to a child to be paid at a future date, the presumption is that the child is entitled to it in interest at once, although he cannot take it in enjoyment until that date. But this presumption is rebutted in cases like the present where testator has given maintenance out of another fund (*JESSEL, M.R.*).—*MAY v. POTTER* (1877), 25 W. R. 507.

5303. —.—.]—A testator left specific legacies to his children on their attaining the age of twenty-one. He also left certain funds to trustees to be applied for their benefit. In a certain contingency, which had not happened, this trust would determine:—*Held*: so long as this trust was in operation, there was in existence a fund other than the contingent legacy, which precluded the infant from being entitled to the interest on that legacy as maintenance.—*Re STEWART, STEWART v. BOSANQUET* (1913), 57 Sol. Jo. 646.

5304. —.—.]—Testatrix, by her will as altered by a first codicil thereto, bequeathed a legacy of £900 to her grand-niece A., if she should attain the age of twenty-one years, but so that the trustees should be at liberty in their absolute discretion to apply the whole or any portion of it in or towards her maintenance & education. Testatrix also by her will made provision for the maintenance & education of A., out of other funds, & by a fourth codicil thereto she bequeathed to her all the money standing to the credit of her current or deposit account & devised to her a freehold house. A. was an infant of the age of thirteen years:—*Held*: testatrix having made

provision for the maintenance & education of A. out of other funds, the legacy of £900 only carried interest from the time when she attained the age of twenty-one years.—*Re WEST, WESTHEAD v. ASPLAND*, [1913] 2 Ch. 345; 82 L. J. Ch. 488; 109 L. T. 39.

5305. What amounts to provision for maintenance out of another fund.]—*Re ABRAHAM, ABRAHAM v. BENDON*, No. 5256, *ante*.

iv. Residuary Gifts.

See, generally, INFANTS.

5306. Contingent gift—Whether infant entitled to income during infancy—Direction in will to accumulate interest during minority.]—Maintenance allowed an infant out of the produce of the residue of personal estate, bequeathed to him by his father, where the will directed the interest to accumulate, till he attained twenty-one; & if he died before, the whole given over, & the will was silent as to maintenance.—*MOLE v. MOLE* (1758), 1 Dick. 310; 21 E. R. 288.

*Annotations:—***Consd.** *Turner v. Turner* (1831), 4 Sim. 430. **Refd.** *Re Bowlby, Bowlby v. Bowlby*, [1904] 2 Ch. 685.

5307. ————.]—Residuary bequest to a very large amount in favour of infant grandchildren, payable at twenty-one or marriage, with survivorship, the interest to accumulate & be paid with the capital; & in case of the death of all before the time of payment, over to their mother absolutely. The father's income, though considerable, bearing no proportion to the fortune bequeathed, & there being several children, the ct. directed maintenance, taking the consent of the mother.—*CAVENDISH v. MERCER* (1776), 5 Ves. 195, n.; 31 E. R. 543, L. C.

*Annotations:—***Consd.** *Greenwell v. Greenwell* (1800), 5 Ves. 191; *Errat v. Barlow* (1807), 14 Ves. 202; *Turner v. Turner* (1831), 4 Sim. 430. **Refd.** *Haley v. Bannister* (1819), 4 Madd. 275; *Re Allan, Havelock v. Havelock* (1881), 17 Ch. D. 807.

5308. ————.]—Residuary bequest in favour of infant grandchildren, payable at twenty-one or marriage, or to the issue of those dead, with survivorship & accumulation till the time of payment, & a limitation over absolutely, in case of death of all without issue before that time. The father in consequence of bkpcy. being wholly unable to maintain his children, maintenance was directed by the ct. taking the consent of the persons, to whom the property was given over.—*FENDALL v. NASH* (1779), 5 Ves. 197, n.; 31 E. R. 545, L. C.

*Annotations:—***Dtd.** *Errat v. Barlow* (1807), 14 Ves. 202. **N.F.** *Turner v. Turner* (1831), 4 Sim. 430. **Refd.** *Re Allan, Havelock v. Havelock* (1881), 50 L. J. Ch. 778.

5309. ———— Application for increase of maintenance directed by will.]—Testator devised his real & personal estates, to trustees, in trust to pay certain annual sums for the maintenance of his grandchildren, till they attained twenty-five, & to accumulate the surplus income of his estates, which was to form part of his residuary personal estate; & to divide the income of his estates amongst his grandchildren when they attained twenty-five, with benefit of survivorship on any of them dying under twenty-one, without leaving a child that should attain twenty-one; & on the death of each of them leaving such child, to convey the parent's share to such child; & he empowered his trustees, after the death of the father of his grandchildren, to convey, to his grandsons, absolutely, the shares of his estates, to which, under the previous trusts, they would be entitled for their lives. A petition, by one of the grandsons for

an increase of the maintenance provided by testator, was dismissed, the disposition of the property not being such as that the grandchildren must, of necessity, take the whole fund.—*TURNER v. TURNER* (1831), 4 Sim. 430; 58 E. R. 161.

*Annotation:—***Apld.** *Cannings v. Flower* (1835), 7 Sim. 523.

5310. ————.]—Testator gave the residue of his estate to trustees, upon trust out of the income to pay an annuity of £220 to his widow, & then to pay to his daughter two yearly sums of £100 for the maintenance & education of her infant son & daughter respectively, by a former marriage, as regarded the son so long as he should be under twenty-five, & as regarded the daughter so long as she should be under twenty-one or unmarried. The residue of the income was to be accumulated during the life of the widow, & on her death testator, after certain provisions for his son & daughter, directed his trustees to pay £10,000 to his daughter's son on his attaining twenty-five; & to pay to her daughter £10,000 on her attaining twenty-one, or marrying under that age, & in the event of her dying before she should have attained twenty-one or married, the £10,000 was to fall into the residue; & testator gave the residue of the trust estate equally between his daughter & her two children. Upon a summons taken out after testator's death in the matter of & on behalf of the infants, with the consent of testator's widow, who was seventy-seven years of age, & of their mother & her second husband, so far as they were able to consent, an order was made increasing the allowances for the maintenance & education of the infant son & daughter by £150 & £120 *per annum* respectively, to be paid out of the income of the estate & the accumulations thereof. But it was ordered that the trustees should hold the interests of the infants respectively under testator's will as a security for the purpose of recouping to any person entitled thereto such sums of money as would be equivalent to the sums which would have arisen from such part of the income as should be applied in payment of the increased allowances, in case the same, instead of having been so applied had been accumulated as directed by the will.—*Re COLOAN* (1881), 10 Ch. D. 305; 51 L. J. Ch. 180; 46 L. T. 152; 30 W. R. 266.

*Annotation:—***Consd.** *Re Tanner* (1884), 53 L. J. Ch. 1.

5311. ———— Infants also devisees of freeholds.]—Testator, in 1853, devised freeholds to trustees, upon trust to pay the rents, after satisfying certain premiums & repairs, to & for the use of his grandson, C., for life, & after his decease, "to & for the use of all & every the child or children of C., equally as tenants in common, who should attain the age of twenty-one years being sons, or being daughters, should attain that age or marry" & if but one such child, to him or her absolutely. Testator devised & bequeathed the residue of his estates to his trustees, upon trust to convert, invest, & hold the same, & the accumulations thereof, upon similar trusts for his grandchildren & their issue. He then directed his trustees to apply a competent part of the income of the investments for the maintenance & education of such "grandchildren & their issue;" & to accumulate the residue, as in his will was mentioned. C. attained twenty-one, & died in 1869 leaving three children, still infants.—*Held:* they were entitled to maintenance out of the *interim* rents & profits of the specifically devised freeholds.—*BEST v. DONMALL* (1871), 40 L. J. Ch. 160; 24 L. T. 217; 19 W. R. 400.

Sect. 5.—Legacies: Sub-sect. 14, D. (b) iv. & E. Sect. 6: sub-sect. 1, A.]

5312. ———.]—Devise of residue to an infant payable at twenty-one, remainder over; the infant died under age, the interest from the death of testator to that of the infant shall go to her representative, not to the remainderman.—*CHAWORTH v. HOOPER* (1780), 1 Bro. C. C. 82; 28 E. R. 999.

5313. ———.]—Residue bequeathed to infants, with survivorship among them in the event of death under the age of twenty-one. Maintenance, not being directed by the will, was not ordered by the ct.; there being a limitation over upon the death of all under twenty-one to their sister; having no other interest in that fund; though a distinct legatee by the same will.

The case, in which the ct. has given, maintenance has been, where, the fund being given to the children with survivorship among them, their interests, & the chance of taking the whole, as survivor, was equal; & no other person interested.—*Ex p. KEBBLE* (1805), 11 Ves. 604; 32 E. R. 1223, 1 L. C.

Annotations:—Consd. Turner v. Turner (1831), 4 Sim. 430. *Distd. Best v. Donnell* (1871), 40 L. J. Ch. 160.

5314. ———.]—An allowance out of a residue, which was directed to be accumulated, made for the support of a legatee, in the interval between the time when the legatee attained his full age, & the time fixed for the distribution of the accumulated fund.—*M'DERMOTT v. KEALY* (1826), 3 Russ. 204, n.; 4 L. J. O. S. Ch. 102; 38 E. R. 575.

5315. ———.]—Testator devised the residue of his real & personal estate to such of his children as should attain twenty-one, or marry under that age, with consent. All the children are entitled, although their interests are contingent, to have allowances, out of the residue, for their maintenance during their minorities.—*BROWN v. TEMPERLEY* (1827), 3 Russ. 263; 38 E. R. 575. *Annotation:—Reid. Re George* (1877), 5 Ch. D. 837.

5316. ———.]—Testator directed the interest of his residue to be paid, to his wife, for the maintenance of herself & her children, until the death of her father, when it was to cease, & to be accumulated for the children, testator having understood that his wife's father had made ample provision, by his will, for testator's wife & children & testator directed his residue, & the accumulations, to be transferred to his children when the youngest attained twenty-one, with benefit of survivorship on their dying under twenty-one, & without issue, but if having issue then the issue to take the deceased parent's share with a bequest over in case all the children died under twenty-one, & without issue. Testator died in the lifetime of his wife's father, who died shortly afterwards, without having made any provision for the wife or children. The ct. refused to allow maintenance out of the residue, to testator's infant children, although the legatees over consented to the application.—*KIME WELFITT* (1830), 3 Sim. 533; 57 E. R. 1098. *Annotation:—Consd. Martin v. Martin* (1866), L. R. 1 Eq. 369.

5317. ———.]—Court not bound by direction in will as to amount.]—Testator gave his residuary estate to an infant, & directed £60 a year to be

allowed for his maintenance. The residue was of large amount & the ct., from time to time, considerably increased the maintenance.—*JOSELYN v. JOSELYN* (1837), 9 Sim. 63; 59 E. R. 281.

Annotation:—Mentd. Re Colson's Trusts (1853), Kay, 133.

5318. ———.]—Testator directed, that, in the event of either of his daughters marrying, the sum of £6,000 should be settled upon each; & he directed his trustees to set apart £6,000 for each of his daughters so marrying, on trusts for investment, & to pay the income to the daughter's separate use for her life; & after her death, on trust for such of her children as should attain the age of 21; & if no child should attain a vested interest in the legacy, it was to fall into the residue. One daughter did so marry, & died leaving a child:—*Held*: the child was not entitled to maintenance out of the income of the £6,000 & until the child attained the age of twenty-one the income was to be treated as income of residue.—*FULLERTON v. MARTIN* (1860), 1 Drew. & Sm. 31; 29 L. J. Ch. 469; 1 L. T. 531; 6 Jur. N. S. 265; 8 W. R. 289; 62 E. R. 290.

Annotations:—Consd. Re Hawkins, White v. White, [1916] 2 Ch. 570. *Reid. Allhusen v. Whittell* (1867), 36 L. J. Ch. 520.

5319. ———.]—*Conveyancing Act, 1881 (c. 41), s. 43.*—Testatrix bequeathed "the residue of my money" to an infant:—*Held*: the estate being cleared & the residue ascertained, the exor. would hold the residue in trust for the infant within the meaning of above sect., & would be entitled to apply the income for the infant's maintenance, education, or benefit, as provided by that sect.—*Re SMITH, HENDERSON-ROE v. HITCHINS* (1889), 42 Ch. D. 302; 58 L. J. Ch. 860; 61 L. T. 363; 37 W. R. 705.

Annotations:—Apd. Re Ponder, Ponder v. Ponder, [1921] 2 Ch. 59. *Reid. A.-G. v. Smith* (1892), 66 L. T. 857. *Mentd. Attenborough v. Solomon*, [1913] A. C. 76.

5320. ———.]—Testator gave his residuary estate to trustees in trust for sale, conversion, & investment, & out of the income of the investments to pay certain life annuities, & subject thereto the fund was to be held upon trust for all & every the present & future-born children of his two daughters respectively, except a specified son of one of them, who, whether in testator's lifetime or after his death, being a son or sons, should have attained or should attain the age of twenty-one years, or, being a daughter or daughters, should have attained or should attain that age or should have married or should marry:—*Held*: the whole surplus income belonged to those grandchildren who had attained twenty-one at the time it accrued, & above sect. empowering trustees to apply for the maintenance of an infant the income of property held in trust for him contingently on attaining twenty-one, was not applicable to the case.—*Re JEFFERY, BURT v. ARNOLD*, [1891] 1 Ch. 671; 60 L. J. Ch. 470; 64 L. T. 622; 39 W. R. 234.

Annotations:—Distd. Re Burton's Will, Banks v. Heaven, [1892] 2 Ch. 38. *Distd. Re Adams, Adams v. Adams*, [1893] 1 Ch. 329. *Overd. Re Holford, Holford v. Holford*, [1894] 3 Ch. 30. *Reid. Re Humphreys, Humphreys v. Levett*, [1893] 3 Ch. 1; *Re Averil, Salisbury v. Buckle*, [1898] 1 Ch. 523.

5321. ———.]—*Re BURTON'S WILL, BANKS v. HEAVEN*, No. 5247, ante.

5322. ———.]—Testator bequeathed the residue of his personal estate on trust to be

PART IV. SECT. 5, SUB-SECT. 14.— D. (b) iv.

5321. *Contingent gift.—Whether infant entitled to income during infancy.*—Testator, after giving certain personal estate to his wife, & devising his lands to his two sons & his daughter, all

minors, subject to a life estate to his wife, directed the residue of his personal estate to be equally divided between his two sons on their attaining twenty-one:—*Held*: the two sons were entitled to the interest on the residuary personal estate for their maintenance during

minority.—*SPARK v. PERRIN* (1870), 17 Gr. 519.—*CAN.*

a. — Whether mother of infants entitled to interest on residue.—For maintenance of infants.—Testatrix gave the residue of her estate to be divided amongst her four grandchildren, all

divided amongst the children of T. H. living at testator's death who should attain the age of twenty-one years:—*Held*: the eldest child on attaining twenty-one years took a vested interest in, & was entitled to receive, the income of a share only of the trust fund according to the number of the children then living; & the trustees were authorised by above sect. to apply the income of the other shares for the maintenance of the infant children contingently entitled thereto.—*Re HOLFORD, HOLFORD v. HOLFORD*, [1894] 3 Ch. 30; 63 L. J. Ch. 637; 70 L. T. 777; 42 W. R. 563; 10 T. L. R. 496; 38 Sol. Jo. 512; 7 R. 304, C. A.

Annotations:—*Follid. Re Jeffery, Arnold v. Burt*, [1895] 2 Ch. 577. *Apld. Re Faux, Taylor v. Faux* (1915), 59 Sol. Jo. 457. *Reid. Re Averill, Salisbury v. Buckle*, [1898] 1 Ch. 523; *Re Williams' Settlement*, *Williams v. Williams*, [1911] 1 Ch. 441; *Re Stevens, Stevens v. Stevens*, [1915] 1 Ch. 429.

5323. ————*]*—Testator gave his residuary real & personal estate upon trust for all & every the present & future-born children of his son & two daughters, who being sons should attain twenty-one, or being daughters should attain that age or marry, in equal shares, & settled the shares of those born in his lifetime upon them for life, with remainder to their children. Some of the beneficiaries had attained twenty-one, & others were infants; & the class was capable of increase by the birth of other members:—*Held*: the accumulated income of the estate was divisible into as many shares as there were members of the class in existence, one such share was payable to each adult member, & the share of each infant member was applicable towards its maintenance under above sect.—*Re JEFFERY, ARNOLD v. BURT*, [1895] 2 Ch. 577; 64 L. J. Ch. 830; 73 L. T. 332; 44 W. R. 61; 13 R. 857.

5324. ————*]*—*Re ADAMS, VERRIER v. HASKINS* (1906), 51 Sol. Jo. 113.

Annotation:—*Apld. Re Ponder, Ponder v. Ponder*, [1921] 2 Ch. 59.

See, now, Trustee Act, 1925 (c. 20), s. 31.

5325. ————*]*—Maintenance can be allowed for children out of the income of a share of residue bequeathed in trust for such of them as shall attain twenty-one or being daughters, marry, until such time as the interest of one of them becomes vested.

Semle:—The whole income would belong to children who had attained a vested interest.—*Re ADAMS, ADAMS v. ADAMS*, [1893] 1 Ch. 329; 62 L. J. Ch. 266; 68 L. T. 376; 41 W. R. 329; 37 Sol. Jo. 131; 3 R. 222.

Annotations:—*Apprvd. Re Holford, Holford v. Holford*, [1894] 3 Ch. 30. *Reid. Re Jeffery, Arnold v. Burt*, [1895] 2 Ch. 577. *Re Woodin, Woodin v. Glass*, [1895] 2 Ch. 309.

5326. Gift for life—Whether infant entitled to income during infancy—Conveyancing Act, 1881 (c. 41), s. 43.—*Re LONG, LOVEGROVE v. LONG*, [1901] W. N. 166.

See, now, Trustee Act, 1925 (c. 20), s. 31.

still infants, their shares to be paid them when the youngest should come of age, subject to certain contingencies in case any should die before that date. A question submitted for the advice of the Ct. whether the exors. could pay some part of the residue or the interest thereon to the mother of the infants for their support & maintenance:—*Held*: as it was not at all certain that the infants named in the will would ultimately take, & as the next of kin, being infants, could not consent, no payment could be made to the mother of the infants out of the funds in the hands of the exors.—*Re RICHARDSON* (1912), 22 O. W. R. 605; 3 O. W. N. 1473; 5 D. L. R. 449.—**CAN.**

E. Repudiation of Legacy.

5327. Effect of—On liability attaching to bequest.]

—Testator gave certain real estate & some shares in a banking co. to his exors. in trust for an infant, but soon after testator's death, the bank became insolvent, & its affairs were wound up, & in a suit by the official manager a large debt was established as due from testator's estate, in respect of the shares. The exors. had assented to the bequest of the shares to the infant, & received dividends:—*Held*: the infant on coming of age having repudiated the bequest of the shares, the debt in respect of them was not to be thrown on the real estate devised to the infant, but was to be borne by the residuary estate.—*MOFFETT v. BATES* (1857), 3 Sm. & G. 468; 26 L. J. Ch. 465; 28 L. T. O. S. 352; 3 Jur. N. S. 200; 5 W. R. 338; 65 E. R. 710.

Annotations:—*Consd. Warren v. Rudall, Ex p. Godfrey* (1860), 1 John. & H. 1. *Reid. Aston v. Wood* (1874), 43 L. J. Ch. 715.

SECT. 6.—DISTRIBUTION OF RESIDUE.

See Administration of Estates Act, 1925 (c. 23), ss. 45–52.

SUB-SECT. 1.—RESIDUE ABSOLUTELY DISPOSED OF.

A. What Residuary Gift comprises.

See Wills Act, 1837 (c. 20), s. 25.

5328. General rule.—“Testamentary appointment by a wife of £13,000 to her husband “absolutely,” followed thus; “but it is my request, that, after reserving for his own absolute use & benefit” £2,000, part of that sum, “& applying all the interest, etc., arising from the above settled property to his own sole use & benefit during his life, he will make such disposition of the remainder by will, deed, or settlement, as he may deem most desirable to carry out my wishes, often expressed to him by word.” Testatrix had never expressed to her husband, by word or otherwise, any intention or wish as to the disposition of the remainder:—*Held*: the property in question passed to the husband under a subsequent bequest to him in the will of “all & singular other the testatrix's property,” notwithstanding the clear intention to except it from the earlier appointment in his favour.

The question in such cases is, whether the property is excepted in order to take it away, under all circumstances & for all purposes, from the person to whom the rest is given, or whether merely for the purpose of giving it to some one else.—*BERNARD v. MINSHULL* (1859), John. 276; 28 L. J. Ch. 649; 5 Jur. N. S. 931; 70 E. R. 427.

Annotations:—*Reid. Re Bagot, Paton v. Ormerod*, [1893] 3 Ch. 348. *Mentd. Thomas v. Jones* (1862), 2 John. & H. 475; *Irvine v. Sullivan* (1869), L. R. 8 Eq. 673; *Noble v. Willock* (1873), 42 L. J. Ch. 321; *Re Eyre, Eyre v. Eyre* (1883), 49 L. T. 259.

PART IV. SECT. 6, SUB-SECT. 1.—A.

b. *Lapsed legacies—& shares of residue.*—V., by will, gave his personal, & a portion of his real, estate, to trustees directing that they should convert them into money. Out of the fund so to be realised he bequeathed two legacies, among others, to persons named in his will, & after other bequests directed that the residue of this fund, after payment of his debts & the legacies bequeathed, should be divided into twelve equal portions, & paid to persons named among whom were the above-mentioned legatees & V.'s heir-at-law. The proceeds of the sale of V.'s personal estate, & of the portion of his real estate so directed to be sold, left a surplus fund after payment of the

debts & legacies created in the will, with the exception of the two above-mentioned legacies; the persons, who would have been entitled to the latter, having died in the lifetime of V. & their legacies having thereby lapsed. Questions arose as to the proper disposition of these lapsed legacies, as also of the portions of the residuary fund to which those legatees would have been entitled in case they had survived V. A reference to the master having been directed, he found by his report that the two lapsed legacies formed a part of the residuary fund that remained after payment of the bequests created by the will, composed of the real & personal estate directed to be sold in the proportion of the proceeds of the

Sect. 6.—Distribution of residue: Sub-sect. 1, A.]

5329. —[—Where the will of testator contains a general residuary gift, then, in order to exclude from that gift a particular property belonging to testator, & not otherwise disposed of by the will, it is necessary to find a plain & unequivocal intention on the part of testator not to include that property in the residuary gift, even if it is his to dispose of.

Testatrix, by mistake, recited in her will that she had settled upon B. a particular property, which, in fact, was still at her disposition. The will contained other recitals & bequests of other properties, & also a residuary bequest in favour of X. —*Held*: the property mentioned in the recital passed under the residuary gift to X.—*Re BAGOT, LATON v. ORMEROD*, [1893] 3 Ch. 348; 62 L. J. Ch. 1006; 69 L. T. 399; 37 Sol. Jo. 730, C. A.

Annotations:—*Apld. Re Maher, Armsby v. Maher* (1896), 12 T. L. R. 267. *Mentd. Hounsell v. Dunning*, [1902] 1 Ch. 512.

Exclusion of general rule—Erroneous recital.—*See* No. 5329, *ante*, Nos. 5345, 5346, *post*.

5330. Lapsed legacies.—[Residue under particular circumstances will not take in lapsed legacies; the residue being given as a small remainder of about £100 & the lapsed legacies amounting to £20,000.

The rule is that the residue takes in lapsed legacies; the rule as to real estates is otherwise. But the residuary legatee must be a general legatee to take everything that does not pass by the will (*LORD CAMDEN, C.*)—*A.-(i. v. JOHNSTONE* (1769), *Amb.* 577; 27 E. R. 373, L. C.

Annotations:—*Consd. Easum v. Appleford* (1840), 5 My. & Cr. 56. *Reid. Bridge v. Abbot* (1791), 3 Bro. C. C. 224; *Page v. Leapingwell* (1812), 18 Ves. 463; *Bland v. Lamb* (1820), 2 Jac. & W. 399; *Boys v. Morgan* (1838), 9 Sim. 289; *Wainman v. Field* (1854), Kay, 507; *Kilvington v. Parker* (1872), 21 W. R. 121.

5331. — Legacy given out of share of residue.—[A testator having, by his will, directed his execs. to transfer £500, part of his residuary estate, to N., & made a specific disposition of the other parts, & having afterwards drawn a pen through the name of N., & by a codicil declared that he razed her name out of his will with his own hand; the £500 belongs, as undisposed of, to his next of kin.—*SKRYMSHER v. NORTHCOTE* (1818), 1 Swan. 500; 1 Wils. Ch. 248; 36 E. R. 507.

Annotations:—*Fold. Lloyd v. Lloyd* (1841), 4 Beav. 231. *Distd. Re Parker, Stephenson v. Parker*, [1901] 1 Ch. 408. *Reid. Kyre v. Marsden* (1839), 4 My. & Cr. 231; *Green v. Portwo* (1846), 5 Hare, 249; *Hodgson v. Bective* (1863), 1 Hem. & M. 376; *Re Judkin's Trusts* (1884), 25 Ch. D. 743.

5332. — Effect of gift over.—[Testator gave a share of residue to trustees upon the following trusts, viz. as to the sum of £4,500 part thereof, the sum of £2,250 to be held in trust for each of two persons A. & B. who should attain the age of twenty-one, & as to the remaining part of the

share, in trust for such of four persons, A., B., C., & D., who should attain the age of twenty-one, with a gift over of the share in default of such persons. The residuary legacy to A. having lapsed by his death under twenty-one, & the remaining beneficiaries having attained that age:—*Held*: having regard to the gift over, which being intended to operate on the share as a whole was inconsistent with any partial failure of the trusts thereof, the gift of the remaining part of the share carried the lapsed residuary legacy to the remaining beneficiaries.—*Re PARKER, STEPHENSON v. PARKER*, [1901] 1 Ch. 408; 70 L. J. Ch. 170; 84 L. T. 116; 49 W. R. 215; 45 Sol. Jo. 210.

5333. —[—A wife having power to appoint £1,000 to any of her kin; & for want of appointment, to go according to the statute, appoints it by will to her nephew, "upon condition" that he paid his mother an annuity of £100. She then bequeathed to her niece S. all the rest & residue of what she had power to dispose of. The nephew dying in her lifetime, the appointment as to him was void, but not so as to the annuitant & the remainder was held to pass by the above residuary bequest.—*OKE v. HEATH* (1748), 1 Ves. Sen. 135; 27 E. R. 940, L. C.

Annotations:—*Consd. Bernard v. Minshull* (1859), John. 276; *Re Meredith's Trusts* (1876), 3 Ch. D. 757. *Reid. Marlborough v. Godolphin* (1750), 2 Ves. Sen. 61; *Easum v. Appleford* (1840), 5 My. & Cr. 56; *Re Harries' Trust* (1859), John. 199; *Re Marten, Shaw v. Marten*, [1902] 1 Ch. 314. *Mentd. Taylor v. George* (1814), 2 Ves. & R. 378; *Cowper v. Mantell* (1856), 22 Beav. 223; *Re Moses, Boddington v. Boddington*, [1902] 1 Ch. 100.

5334. ——[Power to appoint among nephews & nieces does not extend to great nephews, etc., & if part be appointed not pursuant to the power, the money so appointed lapses into, & passes under, the appointment of the residue which was properly appointed.—*FALKNER v. BUTLER* (1765), *Amb.* 514; 27 E. R. 332.

Annotations:—*Apld. Re Harries' Trust* (1859), John. 199. *Reid. Easum v. Appleford* (1840), 5 My. & Cr. 56; *Carter v. Taggart* (1848), 16 Sim. 423; *Lakin v. Lakin* (1865), 34 Beav. 443; *Re Meredith's Trusts* (1876), 3 Ch. D. 757; *Champney v. Davy* (1879), 11 Ch. D. 949.

5335. ——[Testator directed that in case of one of his daughters having no child, his trustees should stand possessed of a sum of £3,000 & the stock upon which it should be invested, including the accumulations of the surplus dividends which should not have been applied in manner in the will mentioned, during the daughter's minority, upon such trusts as the daughter should by will appoint, & in default of appointment or in case of appointment, as to such parts of the £3,000 as should not be effectually comprised therein, or whereof the trusts to be thereby limited should either never take effect, or should determine, upon the trusts by his will declared of his own residuary estate. The daughter, having no child, by her will, after reciting that the £3,000 & the accumu-

personally to that of the estate; that the lapsed shares in the residuary estate, to which the above-mentioned two legatees would have been entitled in case they had survived V., were to be divided between the heir-at-law of V. & his other next-of-kin, in the proportion that the residue of the personal estate bore to that of the real estate; that the two lapsed legacies formed part of the general residue of the fund composed of the real & personal estate, & were divisible among the surviving residuary legatees in the will named. Exceptions were taken by the heir-at-law, that the Master should have found that the lapsed legacies formed portion of V.'s real estate as to which he died intestate, & as such should go to the heirs-at-law in equal proportions; &

that the same rule should be applied to the lapsed shares of the residuary estate:—*Held*: the exceptions must be overruled.—*O'KELLY v. CHAMBERLAIN* (1855), 7 Ir. Jur. 310.—*IR.*

c. — Part of fund payable to named persons in equal shares.—[When a legacy is given to a plurality of persons, named or sufficiently described for identification, "equally among them" or "in equal shares" or "share & share alike," or in any other language of the same import, there is (in the absence of the expressions by the testator importing a contrary intention) no room for accretion in the event of the pre-decease of one or more of the legatees, & this whether the gift is in *lieu* or in *fee* to the whole equally, or whether the subject of the gift be

residue or a sum of fixed amount, or corporeal movables.—*PAXTON'S TRUSTEES v. COWIE* (1886), 13 Ir. (Cl. of Sess.) 1191; 23 Sc. L. R. 830.—*SCOT.*

d. — Part of fund held in *lieu*.—[Truster directed his trustees to hold the residue of his estate for behoof of his whole children equally in *lieu* for their *lieu* alimentary allowance, & for behoof of their respective issue in *fee*; declaring that the issue of any of his children who might die should succeed always to the share the *lieu* of which is hereby provided to their parent:—*Held*: the share *lieu*ed by a child who died without issue did not accrete to the other shares, but fell to be dealt with as intestate succession of testator.—*WILSON'S TRUSTEES v. WILSON'S*

lated dividends had been blended with funds to which she was absolutely entitled in a sum of £6,700 consols, standing in the names of trustees, proceeded, in express execution of the power, to direct that the £3,000 & the stock upon which that sum or the surplus dividends should have been invested, should be transferred to certain trustees named in her will, upon trust, as to £2,700 consols, for her mother, &, as to £250 consols, for another person, &, as to the residue, upon the trusts after declared of her residuary estate. She then proceeded to give what she described as "all the residue of my stock in the public funds, & all my monies, & securities for money, & all the residue of my estate & effects," to the same trustees, upon trust to convert & to invest in the funds such part as should not already be so invested, & to stand possessed of all such funds, & also of the residue of the said trust funds which should remain after paying & satisfying the several legacies of stock before directed to be paid or transferred thereout to her mother & the other person referred to, upon certain trusts which she proceeded to declare. The mother died in the daughter's lifetime:—*Held*: the £2,700 consols was not well appointed, & it was subject to the trusts declared by testator of his residuary estate.

The general rule that a residuary clause passes a lapsed legacy is because the residuary clause is understood to be intended to embrace everything not otherwise effectually given; because testator is supposed to give it away from the residuary legatee only for the sake of the particular legatee; so that, upon failure of the particular intent the ct. gives effect to the general intent. When, therefore, from the construction of the will, the presumption in favour of such general intent is negatived, the rule does not apply, & the lapsed bequest is undisposed of (LORD COTTENHAM, C.).—*EASUM v. APPLEFORD* (1840), 5 My. & Cr. 56; 10 L. J. Ch. 81; 4 Jur. 981; 41 E. R. 202, L. C.

Annotations:—*Consd.* Lefevre v. Freeland (1857), 24 Beav. 403; *Consd.* Bernard v. Minshull (1859), John. 276. *Distd.* *Re Harries' Trust* (1859), John. 199. *Consd.* Brickenden v. Williams (1869), L. R. 7 Eq. 310; *Re Van Hagan, Sperling v. Rochfort* (1880), 16 Ch. D. 18. *Distd.* *Re Elen, Thomas v. McKechnie* (1893), 68 L. T. 816. *Reid.* *Re Jeffereson's Trusts* (1866), L. R. 2 Eq. 276; *Swete v. Tindal* (1874), 31 L. T. 223; *Champney v. Davy* (1879), 11 Ch. D. 949; *Re Currie, Bjorkman v. Kimberley* (1888), 36 W. R. 752; *Re Bagot, Paton v. Ormerod* (1893) 3 Ch. 348; *Re Cruddas, Re Smith, Cruddas v. Smith* (1900), 69 L. J. Ch. 355. *Mentd.* *Tatham v. Drummond* (1864), 2 Hem. & M. 262.

5336. —[.]—Testatrix having a general power of appointment over a sum of stock under the will of S., appointed the stock to her sons, Joseph & John & her other children, equally: & she left any other sum of money or property to which she then was or might thereafter become entitled under the will of S., to be divided amongst such of her children as might be living at her death: & she constituted Joseph her residuary legatee. John

died before her:—*Held*: Joseph was entitled to the share of the stock intended for John.—*Re SPOONER'S TRUST. Ex p. MOURITZ* (1851), 2 Sim. N. S. 129; 21 L. J. Ch. 151; 18 L. T. O. S. 269; 61 E. R. 289.

Annotations:—*Apld.* *Re Elen, Thomas v. McKechnie* (1893), 68 L. T. 816. *Reid.* *Bush v. Cowan* (1863), 9 L. T. 161. *Mentd.* *Gale v. Gale* (1856), 21 Beav. 349; *Hawthorn v. Shedden* (1856), 3 Sm. & G. 293; *Re Moses, Beddington v. Beddington* (1901), 85 L. T. 596.

5337. —[.]—Where a definite fund is subject to a power of appointment by will, &, by a will purporting to be made in exercise of the power, one sum, part of the fund, is appointed to one person, & another sum, other part of it, to another: & "all the rest," or "all the remainder," of the fund to a third; the third appointee cannot claim a share which may lapse in consequence of the death of either of the former appointees in the lifetime of the testator.

But if there is upon the will a plain indication of an intention to appoint the whole that may remain strictly in the shape of residue, or to appoint the entire fund charged only with the sums specified in the preceding appointments, then the residuary clause will be read as an appointment, not of the mere balance of the fund after the sums so previously appointed have been deducted from it, but of the entire fund subject to the preceding appointments, the ct. acting upon the manifest intention of testator to dispose of the entire fund over which he has a power of appointment.

Appointment by will of "the residue & remainder of the said moneys," meaning thereby the sums secured by certain policies of assurance & all bonuses & other sums of money which had accrued or should accrue by virtue of the same, "after payment of" certain sums specified in previous appointments contained in the will:—*Held*: upon the whole of the will, to pass a sum which had lapsed by reason of the death of an appointee in the lifetime of testator. *Re HARRIES' TRUST* (1859), John. 199; 70 E. R. 305.

Annotations:—*Apld.* *Swete v. Tindal* (1874), 31 L. T. 223. *Reid.* *Tatham v. Drummond* (1864), 2 Hem. & M. 262; *Lakin v. Lakin* (1865), 34 Beav. 443; *Re Meredith's Trusts* (1876), 3 Ch. D. 757; *Champney v. Davy* (1879), 11 Ch. D. 949; *Re Currie, Bjorkman v. Kimberley* (1888), 36 W. R. 752.

5338. —[.]—By a settlement of 1835, £16,000 was vested in trustees, upon trust for A. for life: &, after her decease, upon trust for her children as she should appoint.

By a settlement of 1847, £5,000 Consols was vested in trustees, upon trust for A. for life: &, after her decease, upon trust for her children or grandchildren, such grandchildren to be born in her lifetime, as she should appoint.

A. by her will, after referring generally to these settlements, appointed "all such real or personal estate as she should have power to appoint or otherwise dispose of" to trustees, upon trust

TRUSTEES (1894), 22 R. (Cl. of Sess.) 62; 32 Sc. L. R. 54.—*SCOT.*

e. —[.]—Truster directed his trustees to hold the whole residue of his estate for behoof of his three daughters A., B. & C. & the survivors & survivor of them equally, for their life interest use alienably & their issue in fee, & declared that in the event of any of his daughters predeceasing him leaving issue, such issue should succeed to the share of his means & estate that their parent would have been entitled to had she survived, & that no right of fees should vest in any one taking benefit under those presents until they had reached majority:—*Held*: the share life interest by a daughter who survived testator & died without issue did not accrete to the other shares,

but fell to be divided as at the date of her death as intestate estate of testator.—*HUNTER'S TRUSTEES v. DUNN* (1904), 6 F. (Cl. of Sess.) 318; 41 Sc. L. R. 251; 11 S. L. T. 647.—*SCOT.*

1. Specific bequest of mortgage—Mortgage money called in—& invested in land.—[.]—Testatrix by her will, after giving to her two sons a certain mtge., & after sundry other specific directed that the balance of property, consisting of notes & other securities for money, should be given to her two sons, & that if there were any effects possessed by her, at the time of her decease, that the same should be divided equally in value amongst her grandchildren share & share alike. Testatrix had no real estate at the date of the will, but she afterwards in her

lifetime collected the money due on the mtge., & invested it & other funds in the purchase of land of which she died seized:—*Held*: the grandchildren were entitled to the lands, as well as to the personal estate, of which testatrix died seized & possessed not specifically disposed of by the will.—*HAMMILL v. HAMMILL* (1884), 9 O. R. 530.—*CAN.*

2. Protected policy money.—[.]—Testator by his will bequeathed certain specific & general legacies, but there was no residuary bequest. Part of the property left by policy of insurance on his life for a sum within the amount protected by Life Assurance Policies Act, 1884, s. 33, & as to which his will contained no specific directions within the meaning of that sect.:—*Held*: such policy money

Sect. 8.—Distribution of residue: Sub-sect. 1, A. & B.]

to sell, & out of the proceeds of sale to invest a sum of £3,500, & to pay the income thereof to her daughter B. for life, & after her death, for her children as therein mentioned: & "as to the residue of the proceeds of the said sale" she devised & bequeathed the same to C.

At the death of A., her daughter B. was unmarried:—*Held*: subject to B.'s life interest, the £3,500 remained unappointed, & did not pass to C. under the residuary gift.—*SWETE v. TINDAL* (1874), 31 L. T. 223.

5339. —[—]—Testatrix gave to H. all her personal property except a certain wharf which she bequeathed to other persons charged with certain debts & annuities. The bequest of the wharf failed for remoteness:—*Held*: the wharf fell into the residue & belonged to H.—*Re BLIGHT, BLIGHT v. HAITNOLL* (1883), 23 Ch. D. 218; 52 L. J. Ch. 672; 48 L. T. 543; 31 W. R. 535, C. A. Annotations:—*Apld. Re Bagot, Paton v. Ormerod*, [1893] 3 Ch. 348. *Distd. Re Fraser, Lowther v. Fraser*, [1904] 1 Ch. 726.

5340. —[—]—By a settlement a general power of appointment over certain stocks, funds, & securities was given to E., & it was provided that in default of appointment the settled property should go to the next of kin of E. By his will, dated in 1800, E., after making an appointment of part of the property, appointed the residue to J. & R. upon trust to convert & pay certain legacies, & to pay the ultimate residue to T., if she should be living at the death of C., & he constituted S. his residuary legatee. T. survived E., but predeceased C.:—*Held*: S., the residuary legatee, was entitled to the ultimate residue of the settled property.—*ELEN, THOMAS v. MCKECHNIE* (1893), 68 L. T. 816. Annotation:—*Reid. Re Andrews, Public Trustee v. Vincent* (1922), 66 Sol. Jo. 284.

5341. Lapse of gift of residue.]—Where a gift of a portion of a residue fails, it belongs to the next of kin, & not to the other residuary legatees.

Where testatrix gave one-third of the residue to A., & another one-third to B., & as to the other one-third thereof, gave £500 to C., & the remainder thereof to D., & C. died in the lifetime of testatrix:—*Held*: the £500 belonged to the next of kin, as undisposed of.—*LLOYD v. LLOYD* (1841), 4 Beav. 231; 10 L. J. Ch. 327; 5 Jur. 673; 40 E. R. 328.

Annotations:—*Distd. Re Judkin's Trusts* (1884), 25 Ch. D. 743. *Reid. Green v. Pertwee* (1846), 5 Hare, 249.

5342. —[—]—Testator gave his real & personal estate to his exors., upon trust, after conversion & payment thereof of his debts, funeral & testamentary expenses & legacies, to stand possessed of the residue, & divide the same into ten equal parts or shares, which he bequeathed to ten persons named in his will, & he declared that if the net residue of his property, after payment of

the debts, etc., should exceed £10,000 then £10,000 only should be applicable to the said trusts, £1,000 to each share; & in that case testator gave the residue of his said property beyond the sum of £10,000 to his nephews & nieces in equal shares. The net residue after the payment of debts, etc., exceeded £10,000. One of the tenth shares of the £10,000 lapsed by the death, in testator's lifetime, of one of the ten legatees:—*Held*: the lapsed share of £1,000 did not pass as residue to the nephew & nieces, but was undisposed of.—*GREEN v. PERTWEE* (1846), 5 Hare, 249; 15 L. J. Ch. 372; 7 L. T. O. S. 405; 10 Jur. 538; 67 E. R. 905.

5343. —[—]—By her will, testatrix gave her residue to R. & nine others as tenants in common, but if R. died, she gave £300, part of the residue, to his children. R. died, & testatrix made a codicil giving his children £500 out of his share of the residue, & she confirmed her will, except as to any legacy which had lapsed by reason of the death of the legatees:—*Held*: there was an intestacy as to one-tenth of the residue beyond the £500.—*Re WOOD'S WILL* (1861), 29 Beav. 236; 54 E. R. 617.

Annotation:—*Distd. Sykes v. Sykes* (1868), 3 Ch. App. 301.

5344. Legacy void for perpetuity.]—A testator, by his will, gave to A. a sum of £1,000 in trust to invest & accumulate, & pay the accumulated fund to any son he might have named John who should attain twenty-two years of age, & if the first son he should have & call John should die before twenty-two, then to the next son called John, & if no son called John should attain twenty-two years, then A. was to retain the £1,000 for his own use. Testator then declared that his residuary estate should be divided among his pecuniary & particular legatees in proportion to the particular legacies. A. claimed to retain the £1,000 on the ground that the legacy was void as being too remote; & the residuary legatees claimed it according to their shares of the residue:—*Held*: (1) the legacy was void, as given upon a trust which might continue for more than a life in being & twenty-one years; (2) the residuary legatees were entitled, & not A.—*JOY v. ASPINWALL* (1854), 23 L. T. O. S. 206.

See, generally, PERPETUITIES.

5345. Omission to dispose of part of estate — Erroneous recital.]—A. bequeathed all his real & personal estate to C. but he stated that on his death his father's property would under his father's will devolve on his nephews. This was not the fact for it formed part of A.'s estate:—*Held*: the father's property did not pass under A.'s will.—*CIRCUITT v. PERRY* (1856), 23 Beav. 275; 28 L. T. O. S. 115; 2 Jur. N. S. 1157; 5 W. R. 15; 53 E. R. 108.

Annotations:—*Consd. Bernard v. Minshull* (1859), John. 276. *Follid. Harris v. Harris* (1869), 17 W. R. 790; *Hawks v. Longridge* (1873), 29 L. T. 449. *N.F. Re Bagot, Paton v. Ormerod*, [1893] 3 Ch. 348.

would not pass under a general bequest of the residue.—*HENDERSON v. HENDERSON* (1896), 15 N. Z. L. R. 239.—N.Z.

h. — Debts exceeding personal estate & policy money.]—Testator died leaving a policy on his life & a small amount of other personal property, & debts which, if payable out of the policy moneys, were more than sufficient to absorb the whole estate. The material parts of his will were as follows: "After payment of all my just debts, funeral & testamentary expenses I give, devise & bequeath unto T. the sum of £80 also to P. all books belonging to me & to G. my watch & chain & to H. all my clothing, boxes, letters & other per-

sonal effects & as to the residue & remainder of all my real & personal estate I give, devise & bequeath same unto C."—*Held*: the prefatory words amounted to no more than a more general direction by testator that his debts should be paid out of such part of his property as should be by law applicable for that purpose, & in any case they did not apply to the gift of the residue; & C. was, by virtue of Life Assurance Policies Act, 1884, s. 33, entitled to the policy moneys as part of the residue free from any liability for the debts.—*COOKSON v. PRERKIN* (1898), 17 N. Z. L. R. 60.—N.Z.

k. Lapsed life interest.—Beneficiary repudiating settlement made by will.]

—Testator directed his trustees to pay the interest on a heritable bond for £2,000 to his wife during her life & at her death to pay over the sum to certain special legatees; he also made other provisions in favour of certain residuary legatees. After his death his widow repudiated the settlement & claimed her legal provisions, whereby she lost right to two-thirds of the interest during her life:—*Held*: (1) such lapsed interest did not accrue to the special legatees, as they would receive the whole legacy designated to them, when they should get payment of the £2,000 after the widow's death, (2) it accrued to the residuary legatees, being the parties whose legacy, as

5346. ———.]—The wife of A., being entitled in fee, devised to him the B. property. A., under a wrong impression that his wife had no power of testamentary disposition, made his will containing this clause: " & I am wishful here to observe that my son R., as heir-at-law of his mother will inherit the B. property, & is therefore further provided for." A. then devised his residuary estate to other persons:—*Held*: A. had died intestate as to the B. property, notwithstanding the residuary devise.—*HAWKS v. LONGRIDGE* (1873), 29 L. T. 449.

Annotation:—*Consd. Re Bagot, Paton v. Ormerod*, [1893] 3 Ch. 348.

5347. ———.]—*Re BAGOT, PATON v. ORMEROD*, No. 5329, *ante*.

5348. ———.]—A testator, having been compelled to perform a contract for the purchase of certain realty, stated in his will that the property had never been his & directed his exors. not to receive the deeds relating to, or take possession of, the property in any shape or form whatever. The will contained a complete residuary disposition, clear in all other respects:—*Held*: there was not in the will any indication of an intention to exclude the purchased property from the operation of the residuary disposition.—*Re MABER, ARMSBY v. MABER* (1890), 12 T. L. R. 267.

5349. ——— *Money due under policy—Provision for distribution in rules of insurance society.*—Testator in his will made no reference to a policy on his life or the moneys thereby insured:—*Held*: the moneys did not pass under a general residuary bequest in the will, but were distributable in accordance with the rules of the insurance society, which provided for cases where the assured had made no disposition of the policy moneys.—*Re DAVIES, DAVIES v. DAVIES*, [1892] 3 Ch. 63; 61 L. J. Ch. 595; 67 L. T. 518; 41 W. R. 13; 8 T. L. R. 673; 36 Sol. Jo. 627.

5350. *Proceeds of real estate directed to be sold.*—Testator, by his will, made in 1872, after certain legacies, devised his real estate & bequeathed the residue of his personal estate to trustees upon trust to sell, & to dispose of the net moneys to arise from such real & residuary personal estate (after payment of his debts, funeral & testamentary expenses, & legacies), "according to the trusts thereafter declared concerning the same," with a discretionary power for the trustees to postpone the sale, & let & manage his unsold real estate, & with a declaration that the unsold real estate & outstanding personal estate should be subject to the trusts thereafter declared concerning the said net moneys, & that the rents thereof should be annual income for the purpose of the same trusts, & such real estate should be considered as converted in equity. He directed his trustees to stand possessed of the net moneys to arise as aforesaid upon trust to pay an annuity, & subject thereto, & to the payment of his debts, legacies, funeral & testamentary expenses, to stand possessed of his "residuary personal estate" upon trust as to one moiety for his son absolutely, & as to the other moiety, for his daughter for her life,

with remainder for her children:—*Held*: though there was no express direction as to the proceeds of the sale of the real estate, they did not go to the heir-at-law, but were included in the trusts of the residuary personal estate.—*COURT v. HUCKLAND* (1876), 1 Ch. D. 605; 45 L. J. Ch. 214.

Gift revoked by codicil.—*See WILLS.*

B. Rights of Residuary Legatees.

5351. *Right to have residue ascertained & paid over—Bequest of residue after payment of gross sums.*—When stock is left to pay the interest to pttf. for life, & then after payment of gross sums, the residue to him, the ct. will not permit the security to be lessened by laying out a certain sum to secure the legacies, & paying the residue immediately to pttf.—*SOUNDY v. BINYON* (1791), 3 Bro. C. C. 258; 29 E. R. 522.

5352. ——— *Admission by executor that testator's debts paid.*—If an exor. admits that all testator's debts, etc., have been paid, the ct. will, on motion, order the income of a balance paid in by the exor. to be paid to the person entitled to the residue.—*DANDO v. DANDO* (1827), 1 Sim. 510; 57 E. R. 669.

5353. ——— *Within what time.*—A person having a charge for life on residue has to the extent of that charge the rights of a residuary legatee & is entitled to have the residue ascertained & secured within if possible one year after the death of testator. It is the duty of the exor. to do all in his power to effect that object.—*WRIGHTWICK v. LORD* (1857), 6 H. L. Cas. 217; 26 L. J. Ch. 825; 29 L. T. O. S. 303; 3 Jur. N. S. 699; 5 W. R. 713; 10 E. R. 1278, H. L.; *affg.* S. C. *sub nom.* *LORD v. WRIGHTWICK* (1853), 1 De G. M. & G. 803, L. J.J.

5354. ——— *No right to any particular asset of testator.*—Testator, who died domiciled in England, by his will, after bequeathing legacies, gave the residue of his real personal estate to his exors. in trust for his wife, & by a codicil gave one-fourth of his "said residuary real & personal estate" to his wife absolutely. His will was proved in England by his exors. domiciled in England. His estate included mtges. on real property in New Zealand. His wife afterwards died & her will was proved in England. At her death her husband's estate had not been fully administered, the clear residue had not been ascertained, & no appropriation had been made of the New Zealand mtges. or of any securities to particular shares of the ultimate residue:—*Held*: the right of the wife's exors. was, not to one-fourth or any part of the mtges. in specie, but to require her husband's exors. to administer his personal estate & to receive from them one-fourth part of the clear residue.

The whole fallacy of the argument on behalf of applts. rests on the assumption that [the wife], or they as her exors., were entitled to any part of these New Zealand mtges. as an asset, she in her own right, or they as exors. of their testatrix. I do not think that they have any estate, right, or interest, legal or equitable, in these New Zealand

designated for them by testator, was injured & impaired by the reprobatory act of the widow.—*PEAT v. PEAT* (1839), 1 Durl. (Cl. of Sess.) 508; 14 Fac. Coll. 563.—*SCOT.*

1. ———.]—Testator, in a codicil forming part of his general settlement, directed the trustees, to whom his personal estate was conveyed, annually to pay over the free rents of his un-entailed lands to his two daughters,

equally between them, while both should be in life, & to the survivor, & should continue to do the same as long as both or either of them should be alive. Upon the decease of testator, one of these daughters successfully claimed her legitim, contrary to the purpose & scope of the general settlement, & thereby forfeited her interest in the above bequest:—*Held*: the interest of the other daughter in the rents in question was not enlarged by

such forfeiture, but it operated during the lifetime of her sister in favour of the trustees holding the personal estate.—*BREKIDALHANE'S TRUSTEES v. PRINGLE* (1841), 3 Durl. (Cl. of Sess.) 357.—*SCOT.*

PART IV. SECT. 6, SUB-SECT. 1.—B.
m. Pro rata distribution—In proportion to amount of legacies.—Where the residue of an estate is directed to be divided *pro rata* among prior legatees,

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intges. so as to make them an asset of her estate. What she had a right to, what they as her exors. had a right to, was one-fourth of the clear residue of [testator's] estate, that is to say, what remains of his estate after satisfying debts & legacies; & a bequest to them of one-fourth part of his residuary estate does not seem to me to vest in them or in her a fourth part of each asset of which that estate consists, as contended for on the part of aplts. (LORD HERSCHELL).—SUDELEY (LORD) v. A.-G., [1897] A. C. 11; 66 L. J. Q. B. 21; 75 L. T. 398; 61 J. P. 420; 45 W. R. 305; 13 T. L. R. 38, H. L.; affy. S. C. sub nom. A.-G. v. SUDELEY (LORD), [1896] 1 Q. B. 354, C. A.

Annotations:—*Apld.* *Re Smyth, Leach v. Leach*, [1898] 1 Ch. 89. *Folld.* *Vanneck v. Benham*, [1917] 1 Ch. 60. *Apld.* *Barnardo's Homes v. Income Tax Special Comrs.*, [1921] 2 A. C. 1. *Reid.* *A.-G. v. Johnson*, [1907] 2 K. B. 885. *Mentd.* *New York Life Insce. v. Public Trustee*, [1924] 2 Ch. 101.

5355. Dividends declared after testator's death — In respect of anterior period.]—Partnership articles provided that meetings of the partners should be held, & the profits should be divided annually. The partners, when reduced to two, testator being one of them, met & resolved that the accounts should be made up half-yearly, in Mar. & Sept. The meetings of the partners were held very irregularly, but when they took place it was the practice of the partners to examine the accounts, & to pass a resolution disposing of the profits, & until the passing of such resolution the profits were not carried to the separate credits. Testator, who died in Aug. 1869, by will declared that from the day of his decease the annual income arising from his residuary personal estate should belong, in effect, to B. for life, & that for that purpose the clear profits arising from his partnership should be considered as annual income, & be paid to B. for life.

In Dec. 1869, at a meeting of the surviving partner & an exor. of testator they resolved that the profits for the year ending Mar. 1869, should be divided; & testator's share was carried to the credit of his account under date Sept. 30, 1869, & it was, in Dec. 1869, paid to his exors. At a meeting of the same two persons in Mar. 1870, they ordered the profits for the half-year ending Sept. 1869, to be divided, & testator's share was paid to his exors. In taking the account in chambers a question arose whether these shares of testator should be distinguished as capital or as income, & B. presented a petition, under Court of Chancery Act, 1852 (c. 80), asking for the opinion of the ct. — *Held*: the profits for the year ending Mar. 1869, were capital, & belonged to testator's estate; & the profits for the half-year ending Sept. 1869, were income, & belonged to B. — *BROWNE v. COLLINS* (1871), L. R. 12 Eq. 586.

Annotations:—*Reid.* *Shaw v. Brown* (1881), 44 L. T. 339; *Re Bouch, Sproule v. Bouch* (1885), 29 Ch. D. 635.

Right to interest on balances in executors' hands.]—See Part VI., Sect. 6, sub-sect. 6, *post*.

5356. Who are residuary legatees—Person having charge for life on residue.]—WIGHTWICK v. LORD, No. 5353, *ante*.

5357. Position of executor—Trustee for residuary legatees.]—An administrator who has paid all

expenses & debts & cleared the intestate's estate stands in the same position towards the next of kin as that which an exor. who has cleared the estate stands in towards the residuary legatees; he ceases to be an administrator & becomes a trustee, & the ct. can appoint a new trustee to act jointly with him.—*Re PONDER, PONDER v. PONDER*, [1921] 2 Ch. 59; 90 L. J. Ch. 426; 125 L. T. 568; 65 Sol. Jo. 455.

SUB-SECT. 2.—RESIDUE SETTLED.

See, further, SETTLEMENTS; TRUSTS & TRUSTEES.

5358. How income of residue ascertained—General rule.]—Where a testator has bequeathed legacies, & given his residue to a tenant for life, with remainder over, exors., though, as between themselves & the persons interested in the residue, they are at liberty to have recourse to any funds they please in order to pay debts & legacies, yet will be treated by the ct., in adjusting the accounts between tenants for life & remainderman, as having paid the debts & legacies not out of capital only, nor out of income only, but with such portion of the capital as, together with the income of that portion for one year, was sufficient for the purpose. Testator A., having bequeathed legacies, which his estate was amply sufficient to pay, gave the residue of his estate to B. absolutely. B. died within six months after the death of A., having by his will bequeathed legacies, & given the residue of his estate to a tenant for life, with remainder over. B.'s personal estate, other than that bequeathed to him by A., was insignificant in amount:—*Held*: (1) whatever remained of A.'s estate, after taking such portion of the capital as, together with the income of such portion for one year, was required to pay A.'s debts & legacies, became the property of B.; & the tenant for life was entitled from the death of B. to the income of the residue of B.'s estate, after deducting such portion of the capital as, together with the income of such portion for one year, was required to pay B.'s debts & legacies; (2) he was entitled to the income of such portion of B.'s residue as was in a proper state of investment, in specie; & as to the rest, of so much consols as would have been produced by conversion at B.'s death.

(3) B. gave some legacies to legatees, contingent on their attaining twenty-one:—*Held*: the tenant for life was entitled to the intermediate income of the fund set apart to meet the contingent legacies.—*ALLHUSEN v. WHITTELL* (1867), L. R. 4 Eq. 295; 36 L. J. Ch. 929; 16 L. T. 695.

Annotations:—*As to* (1) *Apld.* *Lambert v. Lambert* (1873), L. R. 16 Eq. 320; *Marshall v. Crowther* (1874), 2 Ch. D. 199. *Distd.* *Re Harrison, Townson v. Harrison* (1889), 43 Ch. D. 55. *Consd.* *Re Dawson, Arathoon v. Dawson*, [1906] 2 Ch. 211. *Apld.* *Re Perkins, Brown v. Perkins*, [1907] 2 Ch. 596. *Distd.* *Re Hanbury, Comiskey v. Hanbury* (1909), 101 L. T. 32. *Apld.* *Re Poyser, London v. Poyser*, [1910] 2 Ch. 444. *Expld.* *Re McEuen, McEuen v. Phelps*, [1913] 2 Ch. 704. *Apld.* *Re Wills, Wills v. Hamilton*, [1915] 1 Ch. 769. *Consd.* *Barnardo's Homes v. Income Tax Special Comrs.*, [1921] 2 A. C. 1. *Reid.* *Re Hall, Foster v. Metcalfe*, [1903] 2 Ch. 226. *As to* (3) *Consd.* *Re Bacon, Grissell v. Leathes* (1893), 62 L. J. Ch. 445; *Re Whitehead, Peacock v. Lucas*, [1894] 1 Ch. 678. *Reid.* *Re Hawkins, White v. White*, [1916] 2 Ch. 570.

5359. — Application of rule.]—(1) The rule laid down in *Allhusen v. Whittell*, No. 5358,

they take such residue in proportion to the amount of their prior legacies.—*KENNEDY v. PROTESTANT ORPHANS' HOME* (1894), 25 O. R. 235.—*CAN.*

PART IV. SECT. 6, SUB-SECT. 2.

n. Retention of unauthorised invest-

ment—Rights of tenant for life.]—Testator directed that the residue of his real & personal estate should be converted into money as soon after his decease as conveniently might be, & that his exor. should divide the same into two equal shares, & invest such two shares, in or upon the first mtge. of

freehold Govt. debentures, stocks, funds or securities, & pay the income arising from one share to his daughter L. for her life, & from the other to his daughter E., for her life, & then upon the trusts therein declared. Part of testator's real estate consisted of valuable hotel property. It appeared that the time

ante, that in adjusting the accounts between the tenant for life, of the residuary estate of a testator & the remainderman the exors. must be taken to have paid the debts & legacies not out of capital only or out of income only, but with such portion of the capital as, together with the income of that portion for one year from testator's death, was sufficient for the purpose, although it worked perfectly in that case & works equally well in any case where the capital substracted from the gross estate before the ascertainment of the residue is not substracted before the end of the first year from testator's death, is not to be slavishly followed in every administration where residue is settled, & is inapplicable in hard & fast terms to a case where the subtractions from the estate occur at periods substantially anterior to the close of the first year.

Testator died on Feb. 6, 1911, having by his will given legacies to be paid free of all duty, & given his residuary estate as to each of four-fifths thereof in trust for one of certain persons for life, with remainder to his or her children. The exors. paid the estates duty, legacy duty, legacies & debts at various dates during the year immediately succeeding testator's death, *e.g.*, over £17,000 for estate duty on Apr. 1, 1911, legacy duty of £1,370 on July 1, 1911, legacies of about £14,000 in June & July, & debts & funeral expenses amounting to nearly £800 in May, 1911 :—*Held* : (2) the equitable bookkeeping or mode of adjustment to be adopted, on taking the account of the share of income during the year succeeding testator's death due to the tenants for life, was that there should be charged against them, in respect of the payments for estate duty, debts, funeral & testamentary expenses, & duty on legacies given free of duty, interest upon the capital sum which would, with such interest make up the sums paid in respect of estate duty, etc., such interest being calculated only during the respective periods from the death of testator until the respective times when the sums paid for estate duty, etc., were in fact paid ; (3) the method of adjustment adopted in this particular case was not the only method available, & extremely elaborate & minute calculations need not be gone through in every case.—*Re McEuen, McEuen v. Phelps*, [1913] 2 Ch. 701 ; 83 L. J. Ch. 66 ; 30 T. L. R. 44 ; *sub nom.* *Re McEwen, McEwen v. Phelps*, 109 L. T. 701 ; 58 Sol. Jo. 82, C. A.

Annotation :—*As to* (1) *Apld. Re Wills, Wills v. Hamilton*, [1915] 1 Ch. 769.

5360. ————]—*Deft. H.* was entitled, under the will of her former husband, to his real & residuary personal estate absolutely, subject to an executory gift of the same at her death to testator's nieces, so far as she had not left it to them by will. Testator's estate was liable for debts, which had been paid, & the question arose whether a proportion of the first year's income produced by testator's estate was applicable to recoup the amount paid out of capital for debts in accordance with the rule in *Allhusen v. Whittell*, No. 5358, *ante* :—*Held* : the rule was inapplicable to such a case, & the exors. were not entitled to treat any portion of the testator's debts as borne by income.—*Re Hanbury, Comiskey v. Hanbury* (1909), 101 L. T. 32 ; 25 T. L. R. 654 ; 53 Sol. Jo. 616.

5361. ———— **Debts & legacies paid**

was most inopportune for the
tion of hotel property at all, & in any
event such property could only be
realised with advantage if long terms
were given for the payment of the

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purchase-money & that it was
impossible to let the property advan-
tageously except upon a lease of not
less than five years' duration :—*Held* :
(1) the ct. should not sanction the

before expiry of year.]—The rule laid down in *Allhusen v. Whittell*, No. 5358, *ante*, that in adjusting the accounts of a testator's estate between tenant for life & remainderman, the debts & legacies are to be taken as having been paid, not out of capital only, but with such portion of the capital as together with the income of that portion for one year is sufficient for the purpose, is not affected by the circumstance that the debts & legacies have been paid before the expiration of a year from testator's death, & that the income from the continuance of the estate in the business carried on by testator has greatly exceeded 5 per cent., so that the rule operates unfavourably to the tenant for life.—*LAMBERT v. LAMBERT* (1873), L. R. 16 Eq. 320 ; 43 L. J. Ch. 100 ; 21 W. R. 748. *Annotation* :—*Consd. Re McEuen, McEuen v. Phelps*, [1913] 2 Ch. 701.

5362. ———— **To realty.** A tenant for life of real estate, upon which the debts of testator have been ascertained to be a charge, must keep down all the interest which accrues due.

The principle laid down in *Allhusen v. Whittell*, No. 5358, *ante*, applied to real estate. *MARSHALL v. CROWTHER* (1874), 2 Ch. D. 199 ; 23 W. R. 210.

5363. ———— **Whether excluded.** Testator gave his real & personal estate not thereby otherwise disposed of, therein called his residuary estate, to his trustees in trust to sell, & out of the proceeds pay or provide for debts, funeral & testamentary expenses, legacies & annuities, & duties, & to divide the residue into nine equal shares, & to invest & pay the income of one-ninth share to each of his three daughters during her life with remainders over, & by clause 15 testator empowered his trustees to postpone the sale & conversion of all or any part of his real & personal estate as long as they should think proper, & directed that the income from his estate however invested should after his death be treated as income, & no part thereof should be added to capital. Testator died in 1909, leaving an estate of great value. The payments required to be made out of his residuary estate in respect of debts, legacies, duties, etc., were not concluded till the expiration of five years from the date of testator's death. The average rate of interest earned by the estate in each of these five years varied considerably. On an originating summons raising the question how the accounts ought to be adjusted between the tenants for life & the remaindermen of the daughters' settled shares of residue :—*Held* : (1) the direction contained in clause 15 of the will did not displace the rule in *Allhusen v. Whittell*, No. 5358, *ante*, & *Re McEuen, McEuen v. Phelps*, No. 5359, *ante* ; (2) the true principle was to deprive the tenant for life of the income of such a sum as together with interest thereon from the date of testator's death down to the date of payment was sufficient to satisfy the liabilities ; (3) the principle was not limited to the payments made during the first year from testator's death, but applied equally to payments made during the subsequent years ; (4) the average rate of interest earned by the estate in each year ought to be adopted for the purpose of this calculation.—*Re Wills, Wills v. Hamilton*, [1915] 1 Ch. 769 ; 84 L. J. Ch. 580 ; 113 L. T. 138 ; 59 Sol. Jo. 477. *Annotation* :—*Generally, Mend. Re Waller, Margalison v. Waller*, [1916] 1 Ch. 153.

5364. Adjustment of liability in respect of

postponement of the sale of the hotel
property for any definite period, nor
sanction the granting of any lease,
but that the exor. might carry on the
business of the hotel until the sale ;

H H

Sect. 6.—Distribution of residue: Sub-sect. 2.]

annuities.]—(1) Testator devised estates in trust for his wife for life, & he gave the trustees a discretionary power of sale. Part of his estate consisted of unproductive building ground, which remained unsold for some years:—*Held*: the tenant for life was only entitled to the actual rents of the property until sold; but she would have been entitled to interest on the value, if the trust for sale had been absolute.

(2) One of the liabilities of testator's estate was a life annuity:—*Held*: in the administration of the estate, the annuitant was not entitled to the value of the annuity in a gross sum.

(3) The periodical payments of an annuity, for which testator was liable, held payable by the tenant for life & remainderman under his will, in proportion to the values of their respective interests in the estate; the property having, for some years, been unproductive.—*YATES v. YATES* (1860), 28 Beav. 637; 20 L. J. Ch. 872; 3 L. T. 9; 6 Jur. N. S. 1023; 54 E. R. 511.

Annotations:—As to (3) Apld. Re Muffett, Jones v. Mason (1888), 39 Ch. D. 534. *Consd. Re Searle, Searle v. Baker*, [1900] 2 Ch. 829. *Fold. Re Dawson, Arathoon v. Dawson*, [1906] 2 Ch. 211. *Reid. Re Bacon, Grissel v. Leathes* (1893), 62 L. J. Ch. 445.

5365. —.]—Freeholds were granted to trustees to the use that the grantor & his wife should during their joint lives & the life of the survivor receive thereout an annuity or yearly rentcharge, & subject thereto the use of M. in fee. M. entered into a covenant with the grantor & his wife for payment of the annuity:—*Held*: as between the tenants for life & remaindermen under the will of M., the annuity must be capitalised, & the burden borne in proportion to the value of their respective interests.—*Re MUFFETT, JONES v. MASON* (1888), 39 Ch. D. 534; 57 L. J. Ch. 1017; 59 L. T. 409; 37 W. R. 9; 4 T. L. R. 738.

Annotations:—Apld. Re Bacon, Grissel v. Leathes (1893), 62 L. J. Ch. 445. *Consd. Re Dawson, Arathoon v. Dawson*, [1906] 2 Ch. 211. *Reid. Re Henry, Gordon v. Gordon*, [1907] 1 Ch. 30; *Re Popham, Buller v. Popham* (1914), 58 Sol. Jo. 673.

5366. —.]—Testator devised all his real estate, except two specified estates, to trustees in fee, in trust for his son for life, with remainder in trust for the son's first & other sons successively in tail male, with remainders over, & he devised the two specified estates upon similar trusts for the benefit of his two daughters respectively for life, with remainders to their respective issue. Testator had upon the marriage of his son entered into a covenant for himself his heirs, exors. & administrators with the son, to pay, during the joint lives of the son & his wife, an annuity of £700 to the son or his wife. After payment of testator's debts & testamentary expenses his personal estate was insufficient to provide for the annuity:—*Held*: the annuity must be treated as a debt of testator; it must be apportioned between the three devised estates according to their respective values; & each tenant for life on paying his proportion of the annuity would be entitled in respect of each payment of the annuity, to a charge upon the corpus of the estate but must keep down the interest upon the amount so charged.—*Re HARRISON, TOWNSON v. HARRISON* (1889), 43 Ch. D. 55; 59 L. J. Ch. 169; 61 L. T. 762; 38 W. R. 205.

Annotations:—Consd. Re Bacon, Grissel v. Leathes (1893),

62 L. J. Ch. 445. *Reid. Re Perkins, Brown v. Perkins*, [1907] 2 Ch. 596.

5367. —.]—Testatrix by will gave her residuary estate, which was subject to the payment of certain life annuities secured by bonds, in trust to pay the income to one for life, with remainders over. The question being raised how the annuities ought to be provided for as between tenant for life & remainderman:—*Held*: any sums paid to the annuitants, out of the income of testatrix's estate, & all future payments, or the sums necessary to purchase the annuities, ought to be raised or provided by a sale or mtge. of a sufficient part of testatrix's estate, & the respective interests of tenant for life & remainderman worked out on this footing.—*Re BACON, GRISSEL v. LEATHES* (1893), 62 L. J. Ch. 445; 68 L. T. 522; 41 W. R. 478; 37 Sol. Jo. 340; 3 R. 459.

Annotations:—Apld. Re Henry, Gordon v. Gordon, [1907] 1 Ch. 30. *Consd. Re Perkins, Brown v. Perkins*, [1907] 2 Ch. 596; *Re Poyser, Landon v. Poyser*, [1910] 2 Ch. 444.

5368. —.]—Testator who had covenanted to pay life annuities bequeathed the proceeds of sale of his residuary real & personal estate upon successive trusts for a life tenant & remainderman:—*Held*: the successive instalments of the annuities must be borne by income & capital in proportion to the actuarial values of the life estate & reversion at testator's death.—*Re DAWSON, ARATHOON v. DAWSON*, [1906] 2 Ch. 211; 75 L. J. Ch. 604; 94 L. T. 817; 54 W. R. 556.

Annotations:—Consd. Re Henry, Gordon v. Gordon, [1907] 1 Ch. 30; *Re Poyser, Landon v. Poyser*, [1910] 2 Ch. 444. *Reid. Re Perkins, Brown v. Perkins* (1907), 77 L. J. Ch. 16.

5369. —.]—Testator who had covenanted to pay a life annuity gave half his residue to trustees upon trust for his daughter for life, if & when she attained twenty-five, with remainders over.

Until the daughter attained twenty-five the income, subject to maintenance up to a specified amount, was to be added to capital. The daughter attained twenty-five on Oct. 8, 1907. The residue was earning 3 per cent. interest:—*Held*: each future instalment of the moiety of the annuity payable out of the daughter's share must as it accrued be apportioned between capital & income, as follows, viz., calculate what sum with 3 per cent. simple interest from Oct. 8, 1907, to the day of payment would have met the particular instalment. Charge that sum to capital, the balance to income.—*Re PERKINS, BROWN v. PERKINS*, [1907] 2 Ch. 596; 77 L. J. Ch. 16; 97 L. T. 706.

Annotations:—Fold. Re Thompson, Thompson v. Watkins, [1908] W. N. 195; *Re Poyser, Landon v. Poyser*, [1910] 2 Ch. 444. *Reid. Re Popham, Buller v. Popham* (1914), 58 Sol. Jo. 673.

5370. —.]—*Re THOMPSON, THOMPSON v. WATKINS*, [1908] W. N. 195.

Annotations:—Fold. Re Poyser, Landon v. Poyser, [1910] 2 Ch. 444. *Reid. Re Popham, Buller v. Popham* (1914), 58 Sol. Jo. 673.

5371. —.]—P. by his will left his residuary real & personal estate to trustees upon trust for sale & conversion & to pay debts & legacies, & then for his eight children, of whom one was to have one-fifteenth & the others two-fifteenths each, & he settled all the shares wholly or partially upon trust for the son or daughter for life with remainders over. By a settlement made on the marriage of one of his sons before the date of his will testator had covenanted to pay to that son at annuity of £250 a year. Testator died in 1901 leaving a very large estate. His widow & all his children were living, & owing to a mistaken view

(2) it was the exor.'s duty to sell the hotel as soon as possible, but not to sell at a sacrifice, & the sale might be postponed until such time as a good sale could be made; (3) the exor.

might in his discretion sell the property for cash, or on such conditions as to payment of a deposit & extended terms for payment of the balance of the purchase-money with interest, as

were usual in the sale of this class of property; (4) the tenants for life were entitled, for one year at least, from testator's death, to the net income of the estate, including the net profit

of the construction of the will the son's annuity had not been paid. The trustees had sufficient funds, representing capital, in hand to pay the arrears, but a question was raised whether, as between the tenants for life & remaindermen of the settled shares, part of the burden of paying the past & future instalments of the annuity ought not to be borne by the tenants for life:—*Held*: each instalment of the annuity must be apportioned between capital & income by calculating what sum if set aside at testator's death would, with simple interest at 3½ per cent. to the day of payment, have met the particular instalment; & the sum so ascertained ought to be chargeable to capital & the balance to income, having regard to the number of shares into which the estate was divisible.—*Re POYSER, LONDON v. POYSER*, [1910] 2 Ch. 444; 79 L. J. Ch. 748; 103 L. T. 131.

Annotations:—*Consd.* *Re Forster-Brown, Barry v. Forster-Brown*, [1914] 2 Ch. 584. *Apld.* *Re Tod, Bradshaw v. Turner*, [1916] 1 Ch. 569. *Consd.* *Re Hall, Hope v. Hall*, [1918] 1 Ch. 562. *Reid.* *Re Hart, Hart v. Arnold* (1912), 107 L. T. 757; *Re Craven, Watson v. Craven*, [1914] 1 Ch. 358; *Re Cooke, Randall v. Cooke*, [1916] 1 Ch. 480; *Re Foster, Hunt v. Foster*, [1920] 1 Ch. 391.

—*See, further, RENTCHARGES & ANNUITIES.*

5372. Adjustment of liability in respect of uncertain periodical payment.—The estate of testator was liable for a periodical payment of an uncertain amount, & by a deed of compromise this payment was commuted for a lump sum of £7,000 & the estate released from the liability.

Pltf., who was entitled to a settled share of testator's estate for her life, with remainder to her children, provided £3,500 out of her own moneys to get rid of this liability on the estate: *Held*: she was entitled to be repaid this sum out of testator's estate; & the proper mode of apportioning the burden between herself, as tenant for life, & the remaindermen was for the trustees of the will to raise it out of her settled share of the estate.—*Re HENRY, GORDON v. GORDON*, [1907] 1 Ch. 30; 76 L. J. Ch. 74; 95 L. T. 776.

Annotation:—*Reid.* *Re Poyser, London v. Poyser*, [1910] 2 Ch. 444.

5373. Conversion of wasting property—General rule.—General rule, that where personal property is bequeathed for life with remainders over, & not specifically, it is to be converted into the 3 per cents. subject in the case of a real security to an inquiry, whether it will be for the benefit of all parties; & the tenant for life is entitled only upon that principle.—*HOWE v. DARTMOUTH (EARL)*, *HOWE v. AYLESBURY (COUNTESS)* (1802), 7 Ves. 137; 32 E. R. 50, L. C.

Annotations:—*Apld.* *Holland v. Hughes* (1809), 16 Ves. 111; *Dimes v. Scott* (1828), 4 Russ. 195. *Consd.* *Alcock v. Slopier* (1833), 2 My. & K. 690. *Distd.* *Pickering v. Pickering* (1839), 4 My. & Cr. 289; *Hinves v. Hinves* (1814), 3 Hare, 609. *Expld.* *Cafe v. Bent* (1845), 5 Hare, 24. *Apld.* *Chambers v. Chambers* (1846), 15 Sim. 183. *Consd.* *House v. Way* (1848), 18 L. J. Ch. 22; *Cotton v. Cotton* (1850), 14 Jur. 950. *Apld.* *Morgan v. Morgan* (1851), 14 Beav. 72; *Blann v. Bell* (1852), 2 De G. M. & G. 775. *Consd.* *Meyer v. Simonsen* (1852), 5 De G. & Sm. 723; *Gurney v. Gurney* (1855), 3 W. R. 353. *Distd.* *Simpson v. Lester* (1858), 33 L. T. O. S. 6. *Apld.* *Craig v. Wheeler* (1860), 29 L. J. Ch. 374. *Consd.* *Stroud v. Gwyer* (1860), 28 Beave. 130. *Apld.* *Pidgen v. Spencer* (1867), 16 L. T. 83. *Consd.* *Craven v. Craddock* (1869), 20 L. T. 638. *Distd.* *Re Sewell's Estate* (1870), L. R. 11 Eq. 80; *Groaves v. Smith* (1874), 29 L. T. 798. *Consd.* *Tickner v. Old* (1874), L. R. 16 Eq. 422; *Lean v. Lean* (1875), 32 L. T. 305; *Thursby v. Thursby* (1875), L. R. 19 Eq. 395. *Apld.* *Macdonald v. Irvine* (1878), 8 Ch. D. 101. *Distd.* *Gray v. Siggers* (1880), 15 Ch. D. 74; *Re Leonard, Theobald v. King* (1880), 43 L. T. 664. *Consd.* *Re Pitcairn, Brandreth v. Colvin*, [1898] 2 Ch. 199. *Apld.* *Re Game, Game v. Young*, [1897] 1 Ch. 881. *Consd.* *Re Bland, Miller v. Bland*, [1899] 2 Ch. 338; *Re Hammersley, Heasman v.*

Hammersley (1899), 81 L. T. 150; *Pardoe v. Pardoe* (1900), 82 L. T. 547; *Rowlis v. Bebb, Re Rowlis, Walters v. Treasury Solicitor*, [1900] 3 Ch. 107; *Re Van Straubenzee, Boustead v. Cooper*, [1901] 2 Ch. 779; *Stanley v. Hodgkinson* (1903), 73 L. J. Ch. 179; *Re Bentham, Pearce v. Bentham* (1908), 94 L. T. 307; *Re Bates, Hodgson v. Bates*, [1907] 1 Ch. 22. *Distd.* *Re Nicholson, Eade v. Nicholson*, [1909] 2 Ch. 111. *Apld.* *Re Wareham, Wareham v. Brewin*, [1912] 2 Ch. 312; *Re Evans' Will Trusts, Pickering v. Evans*, [1921] 2 Ch. 309. *Reid.* *Mills v. Mills* (1835), 7 Sim. 501; *Clough v. Bond* (1838), 3 My. & Cr. 490; *Sutherland v. Cooke* (1844), 1 Coll. 498; *Pickup v. Atkinson* (1846), 4 Hare, 624; *Simpson v. Earles* (1847), 11 Jur. 921; *Milne v. Parker* (1848), 17 L. J. Ch. 194; *Prendergast v. Prendergast* (1850), 3 H. L. Cas. 195; *Bate v. Hooper* (1855), 5 De G. M. & G. 338; *Baud v. Fardoll* (1855), 7 De G. M. & G. 628; *Cranley v. Dixon* (1857), 23 Beav. 512; *Johnston v. Moore* (1858), 27 L. J. Ch. 453; *Bulkeley v. Stephens* (1863), 10 L. T. 225; *Re Bagshaw's Trusts* (1877), 46 L. J. Ch. 567; *Re Smith's Estate, Clifford v. Washington* (1879), 48 L. J. Ch. 205; *Robertson v. Broadbent* (1883), 8 App. Cas. 812; *Re Armitage, Armitage v. Garnett*, [1893] 3 Ch. 337; *Re Whitehead, Peacock v. Lewis*, [1894] 1 Ch. 678; *Re Nicholson, Nicholson v. Nicholson*, [1895] W. N. 106; *Re Hubbuck, Hart v. Stone*, [1896] 1 Ch. 754; *Re Woods, Gabellini v. Woods*, [1904] 2 Ch. 4; *Re Chaytor, Chaytor v. Horn*, [1905] 1 Ch. 233; *Slade v. Chalmers*, [1908] 1 Ch. 522; *Re Chertovia, Chertovia v. Biddulph*, [1917] 2 Ch. 379. *Reid.* *Spong v. Spong* (1827), 1 Y. & J. 300; *Hope v. Hope* (1855), 1 Jur. N. S. 771; *Morris v. Hodges* (1860), 27 Beav. 625; *Ibbotson v. Klam* (1863), L. R. 1 Eq. 188; *Re Chancellor, Chancellor v. Brown* (1881), 53 L. J. Ch. 443; *Re Thomas, Wood v. Thomas*, [1881] 3 Ch. 482; *Re Gasquoine, Gasquoine v. Gasquoine*, [1884] 1 Ch. 470; *L. R. Comrs. v. Blott, L. R. Comrs. v. Greenwood*, [1921] 2 A. C. 171; *Re Toddlie, Holt v. Croker* (1922), 91 L. J. Ch. 316.

—*See, further, TRUSTS & TRUSTEES; WILLS.*

5374. Adjustment where income-bearing property retained.—Testator directed his exors. to convert his personal estate when & in such manner as they should think fit, & gave them power to sail his ships for the benefit of his estate, till they could be satisfactorily sold. He gave his residuary estate to tenants for life, with remainders over, & gave his exors. power to invest at their discretion, or allow to remain as then invested, all his funds in certain specified shares & securities. His ships gained considerable earnings after his death; & he had, at his decease, large sums invested in such shares & securities as he had specified & large sums invested in shares & securities of other descriptions, & not proper for the investment of trust moneys:—*Held*: (1) the tenants for life were not entitled to the earnings of the ships as income; (2) they were entitled to interest at 4 per cent. on the value of the ships from testator's death; (3) they were entitled to the actual income of so much of the estate as was invested in such shares & securities as were mentioned by the will as proper investments; (1) as regarded the unauthorised investments, they were entitled only to an income from testator's death equal to the dividends of the consols which would have been produced by a sale & investment in consols at a year from the death, & not to an income equal to interest at 4 per cent. on their value. *BROWN v. GELLATLY* (1867), 2 Ch. App. 751; 17 L. T. 131; 15 W. R. 1188, L. J.

Annotations:—*As to (1) Consd.* *Cooper v. Laroche* (1869), 34 L. J. Ch. 591; *Thursby v. Thursby* (1875), L. R. 19 Eq. 395; *Re Leonard, Theobald v. King* (1880), 43 L. T. 664; *Re Thomas, Wood v. Thomas*, [1891] 3 Ch. 482. *Reid.* *Lambert v. Lambert* (1872), 27 L. T. 59; *Lean v. Lean* (1875), 32 L. T. 305; *Porter v. Baddeley* (1877), 5 Ch. D. 542; *Re Chancellor, Chancellor v. Brown* (1884), 28 Ch. D. 42; *Re Crowther, Midgley v. Crowther* (1895), 43 W. R. 571; *Re Darnley, Clifton v. Darnley*, [1907] 1 Ch. 159. *As to (2) Consd.* *Thursby v. Thursby* (1875), L. R. 19 Eq. 395; *Re Woods, Gabellini v. Woods*, [1904] 2 Ch. 4. *Reid.* *Wentworth v. Wentworth*, [1900] A. C. 163; *Re Oliver, Wilson v. Oliver*, [1908] 2 Ch. 74; *Re Beech, Baint v. Beech*, [1920] 1 Ch. 40. *As to (3) Reid.* *Re Thomas,*

made by carrying on the hotel business, as these profits were in effect derived from real estate; (5) in the event of sale on conditions of extended terms

for payment of the balance of the purchase-money, the tenants for life were entitled to interest on the unpaid balance up to 20 per cent. per annum.—

Re KERRIGAN, NATIONAL TRUSTEES, EXECUTORS & AGENCY CO. OF AUSTRALASIA, LTD. v. KERRIGAN, [1916] V. L. R. 516.—AUS.

Sect. 6.—Distribution of residue: Sub-sects. 2, 3 & 4, A. (a) & (b).]

Wood v. Thomas, [1891] 3 Ch. 482. *As to (1) Consd.* Anderson v. Read (1874), 22 W. R. 527; *Re Nicholson*, Nicholson v. Nicholson, [1895] W. N. 106; *Re Woods*, Gabbell v. Woods, [1904] 2 Ch. 4. *Reid.* Fisher v. Gilpin (1869), 38 L. J. Ch. 230; Hichens v. Hichens (1876), 36 L. T. 8. *Generally, Mentd.* Gow v. Forster (1884), 26 Ch. D. 672; *Re Chaytor*, Chaytor v. Horn, [1905] 1 Ch. 233.

SUB-SECT. 3.—RESIDUE UNDISPOSED OF.

See Administration of Estates Act, 1925 (c. 23), s. 46.

5375. Interest of next of kin.]—The rule of the Statute of Distributions, 1671 (c. 10), which requires the conversion of intestate's estate into money, is introduced simply for the benefit of creditors, & the facility of division among the next of kin. But, as regards the substantial title to property, the right of the next of kin, subject only to the claims of creditors is complete.

A residuary legatee under a will has a clear & tangible interest in the residue, & the Statute of Distributions, 1671 (c. 10), being nothing but a will made by the legislature for an intestate, his next of kin stand, with regard to his personal estate, in the same condition as does a residuary legatee under a will.—*COOPER v. COOPER* (1874), L. R. 7 H. L. 53; 44 L. J. Ch. 6; 30 L. T. 409; 22 W. R. 713, H. L.

Annotations:—Consd. *Re Barber*, Dardler v. Chapman (1879), 11 Ch. D. 442; *Re Jones*, Christmas v. Jones, [1897] 2 Ch. 190; *Blake v. Bayne*, [1908] A. C. 371; *Vannock v. Benham*, [1917] 1 Ch. 60. *Reid.* *Re Hole*, Davies v. Wills, [1906] 1 Ch. 673. *Mentd.* *Codrington v. Codrington* (1875), L. R. 7 H. L. 854; *Bate v. Willats* (1877), 37 L. T. 221; *Re Vardon's Trusts* (1885), 31 Ch. D. 275; *Re Choshum*, Cavendish v. Dacre (1886), 31 Ch. D. 466; *Re Bradshaw*, Bradshaw v. Bradshaw, [1902] 1 Ch. 436; *Pitman v. Crum Ewing*, [1911] A. C. 217; *Re Hargrove*, Hargrove v. Pain, [1915] 1 Ch. 398; *Re Williams*, Cunliffe v. Williams, [1915] 1 Ch. 450; *Brown v. Gregson*, [1920] A. C. 860.

5376. — No right to individual asset.]—The decisions in *Cooper v. Cooper*, No. 5375, *ante*, & *Studeley (Lord) v. A.-G.*, No. 5354, *ante*, are reconcilable on the ground that the interest of one of the next of kin in an intestate's estate, although sufficiently specific to raise a case of election, representing as that interest does all the money's worth of the property comprised therein, is not sufficiently specific, apart from agreement with the other next of kin, where there are more than one, to enable any one of them to claim as his own any particular article from the administrator.—*VANNECK v. BENHAM*, [1917] 1 Ch. 60; 86 L. J. Ch. 7; 115 L. T. 588.

Interest of executor.]—*See* Sub-sect. 4, B., *post*.

SUB-SECT. 4.—RIGHT OF EXECUTOR TO RESIDUE.

A. Where Next of Kin.

(a) Before Executors Act, 1830.

NOTE.—*Having regard to Executors Act, 1830 (c. 40), the cases decided before that Act are set out in the form in which they appear below.*

5377. Former law.]—ANON. (1602), Cary, 21; *BRERETON v. ROBERTS* (1608), Toth. 87; *COCK v. BURRISH* (1680), 1 Vern. 425; *FOSTER v. MUNT* (1687), 1 Vern. 473; *HILLS v. BREWER* (1689), 2 Vern. 104; ANON. (1689), Freem. Ch. 105; *CORDELL v. NODEN* (1690), 2 Vern. 148; *CUNNINGHAM v. MELLISH* (1691), 2 Vern. 247; ANON. (1696), Freem. Ch. 212; *BRISTOL (COUNTESS) v.*

HUNGERFORD (1709), 2 Vern. 645; *BAYLY v. POWELL* (1698), Freem. Ch. 225; *MATHEWS v. COURTHOPE* (1696), 3 Salk. 82; *PAWLETT v. MORLEY (LADY)* (1702), Freem. Ch. 263; *COOKE v. WALTER* (1704), Freem. Ch. 276; *DARWELL v. BENNETT* (1708), cited in 2 Vern. at p. 676; *BEAUFORT (DOWAGER DUCHESS) v. GRANVILLE (LADY DOWAGER)* (1710), 3 Bro. Parl. Cas. 37; *COLESWORTH v. BRANGWIN* (1711), Prec. Ch. 323; *BUCKLEY v. LITTLEBURY* (1711), 3 Bro. Parl. Cas. 43; *BALL v. SMITH* (1711), 2 Vern. 675; *BACHELOR v. SEARL* (1716), 2 Vern. 736; *STARKEY v. BROOKS* (1717), 1 P. Wms. 390; *FARRINGTON v. KNIGHTLY* (1721), 1 P. Wms. 544; *JOSLIN v. BREWET* (1722), Bunb. 112; *HUTCHINSON v. VINCENT* (1723), 9 Mod. Rep. 27; *RACHFIELD v. CARELESS* (1723), 2 P. Wms. 158; *RUTLAND (DUKE) v. RUTLAND (DUCHESS)* (1723), 2 P. Wms. 209; *A.-G. v. HOOKER* (1725), 2 P. Wms. 338; *KNEWELL v. GARDINER* (1726), Gilb. Ch. 184; *PAGE v. PAGE* (1728), 2 P. Wms. 480; *MASON v. HAWKINS* (1729), 4 Bro. Parl. Cas. 7; *MAN v. MAN* (1731), 2 Stra. 905; *ROGERS v. ROGERS* (1733), 3 P. Wms. 193; *PAINTER v. SALISBURY* (1734), cited in 1 Ves. at p. 66; *GOBSALL v. SOUNDEN* (1736), 2 Eq. Cas. Abr. 444; *OWEN v. OWEN* (1738), 1 Atk. 494; *BRASBRIDGE v. WOODROFFE* (1740), 2 Atk. 68; *ULRICH v. LITCHFIELD* (1742), 2 Atk. 372; *SOUTHCOT v. WATSON* (1745), 3 Atk. 226; *BLINKHORN v. FEAST* (1750), 2 Ves. Sen. 27; *WILSON v. IVAT* (1750), 2 Ves. Sen. 166; *CLOYNE (BP.) v. YOUNG* (1750), 2 Ves. Sen. 91; *ANDREW v. CLARK* (1751), 2 Ves. Sen. 162; *KENNEDY v. STAINSBY* (1755), 1 Ves. 60, n.; *WILSON v. WOMBWELL* (1773), 2 Dick. 477; *LAWSON v. LAWSON* (1777), 4 Bro. Parl. Cas. 21; *NICHOLLS v. CRISP* (1777), Amb. 708; *MARTIN v. REBOW* (1782), 1 Bro. C. C. 154; *BOWKER v. HUNTER* (1783), 1 Bro. C. C. 328; *OLIVER v. FREWEN* (1785), 1 Bro. C. C. 590; *FREWEN v. RELFE* (1787), 2 Bro. C. C. 220; *BENNETT v. BATCHELOR* (1789), 1 Ves. 63; *ROBINSON v. TAYLOR* (1789), 1 Ves. 44; *DEAN v. DALTON* (1789), 2 Bro. C. C. 634; *CAREY v. GOODINGE* (1790), 3 Bro. C. C. 110; *CLINTON v. HOOPER* (1791), 1 Hov. Supp. 65; *HORNBY v. FINCH* (1793), 2 Ves. 78; *ZOUCH v. LAMBERT* (1793), 4 Bro. C. C. 326; *OLDHAM v. CARLETON* (1794), 2 Cox, Eq. Cas. 309; *CLENNELL v. LEWTHWAITE* (1795), 2 Ves. 644; *HOLFORD v. WOOD* (1798), 4 Ves. 76; *WHITE v. EVANS* (1798), 4 Ves. 21; *DE MAZAR v. PYBUS* (1799), 4 Ves. 644; *DICKS v. LAMBERT* (1799), 4 Ves. 725; *ABBOTT v. ABBOTT* (1801), 6 Ves. 343; *MUCKLESTON v. BROWN* (1801), 6 Ves. 52; *URQUHART v. KING* (1802), 7 Ves. 225; *SELEY v. WOOD* (1804), 10 Ves. 71; *WILLIAMS v. JONES* (1804), 10 Ves. 77; *CRANLEY (LORD) v. HALE* (1807), 14 Ves. 307; *DAWSON v. CLARKE* (1811), 18 Ves. 247; *KING v. DENISON* (1813), 1 Ves. & B. 260; *SOUTHHOUSE v. BATE* (1814), 2 Ves. & B. 396; *WHITE v. WILLIAMS* (1814), 3 Ves. & B. 72; *KELLETT v. KELLETT* (1815), 3 Dow. 248; *LANGHAM v. SANFORD* (1816), 10 Ves. 641; *BULL v. KINGSTON* (1816), 1 Mer. 314; *GIRAUD v. HANBURY* (1817), 3 Mer. 150; *GLADDING v. YAPP* (1820), 5 Madd. 56; *PARSONS v. SAFFERY* (1821), 9 Price, 578; *VEZEY v. JAMSON* (1822), 1 Sim. & St. 69; *OMMANNEY v. BUTCHER* (1823), Turn. & R. 260; *LYNN v. BEAVER* (1823), Turn. & R. 63; *MADGIN v. LUMLEY* (1823), 1 L. J. O. S. Ch. 236; *GASCOIGNE v. LYNDE* (1825), 4 L. J. O. S. Ch. 54; *BRADDON v. FARRAND* (1827), 4 Russ. 87; *COLLIER v. SQUIRE* (1827), 3 Russ. 467; *OLDMAN v. SLATER* (1829), 3 Sim. 84; *WHITAKER v. TATHAM* (1831), 7 Bing. 628; *MULLEN v. BOWMAN* (1844), 1 Coll. 197; *ELCOCK*

5385. ———, ———, ———. — Upon the construction of a will:—*Held*: the exors. were not entitled to a beneficial interest in testator's residuary personal estate.—*ANDREW v. ANDREW* (1845), 1 Coll. 686; 63 E. R. 598.

5386. ——— “Well knowing” executor
“will dispose of it in accordance with my views & wishes.”—Testatrix by her will gave to S., whom she appointed her sole extrix., £3,000 & a like sum of £3,000 in addition for the trouble she would have in acting as extrix. : & she gave all the residue of her personal estate to S., her exors., administrators & assigns “well knowing that she will make a good use & dispose of it in a manner in accordance with my views & wishes.” Among the papers of testatrix were found some memoranda in writing made since Executors Act, 1830 (c. 40), & unattested, specifying certain charitable & other bequests which testatrix desired to be made, one of which, was addressed to S. S. by her answer denied all knowledge of the “views & wishes” of testatrix previously to her death:—*Held*: upon the words of the will S. did not take the residue beneficially but she was a trustee, for the next of kin.—BRIGGS v. PENNY (1851), 3 Mac. & G. 546; 21 L. J. Ch. 265; 18 L. T. O. S. 101; 16 Jur. 93; 42 E. R. 371, L. C.

Annotations.—**Distd.** Cowman v. Harrison (1852), 10 *Hare*, 234. **Consd.** Brenchley v. Lynn (1852), 2 *Rob. Eccl.* 441; *Peace v. Hains* (1853), 11 *Hare*, 151. **Expld.** (Sawood v. Thompson (1853), 17 *Jur.* 798. **Distd.** Reynolds v. Kortright (1854), 18 *Beav.* 417. **Consd.** Bernard v. Minshull (1859), *John.* 276; *Irvine v. Sullivan* (1869), 1 *L. R.* 8 *Eq.* 673. **Distd.** Stead v. Mellor (1877), 5 *Ch. D.* 225. **Apld.** *Re Boyes*, *Boyes v. Carritt* (1884), 26 *Ch. D.* 531. **Retd.** *Shepherd v. Nottidge* (1862), 2 *John. & H.* 766; *Re Eyre*, *Eyre v. Eyre* (1883), 49 *L. T.* 259. **Mentd.** *Johnson v. Ball* (1851), 5 *De G. & Sm.* 85; *Langdale v. Bridges* (1857), 26 *L. J. Ch.* 27; *Topham v. Portland* (1863), 1 *De G. G. & Sm.* 517; *Barrs v. Fewkes* (1865), 6 *New Rep.* 35; *Greene v. Greene* (1869), 17 *W. IL.* 487; *Re Fleetwood*, *Sidgreaves v. Brower* (1880), 15 *Ch. D.* 504.

5387. [-----] Testator by his will directed his exors. to pay over his residuary property to his sister F. & in case of F.'s death, "to the exors. or extrixes, whom F. by her will, might appoint." F. died before testator, having by her will given the residue of her estate to W. & appointed L. her extrix. L. the extrix. of F. filed her bill against W. the residuary legatee of F. claiming to be beneficially entitled to the residue under F.'s brother's will:—*Held*: L. did not take beneficially, but only on the trusts of F.'s will.—*LONG v. WATKINSON, LONG v. LONG* (1852), 17 Beav. 471; 21 L. J. Ch. 844; 10 L. T. O. S. 309; 16 Jur. 235; 51 E. R. 1110.

Annotations: — **Consd.** Webb v. Sadler (1873), 8 Ch. App. 419; *Re* Clay, Clay v. Clay (1885), 54 L. J. Ch. 648; **Folds.** *Re* Bosanquet, Unwin v. Petro (1915), 85 L. J. Ch. 14; **Reid.** Dixon v. Dixon (1857), 24 Beav. 129; **King** v. Cleaveland (No. 2) (1858), 26 Beav. 166; *Re* Seymour's Trusts (1859), John. 478; *Re* Wilder's Trusts (1859), 27 Beav. 418; **Juler** v. **Juler** (1860), 30 L. J. Ch. 142; **Leak** v. **MacDowall** (No. 2) (1863), 33 Beav. 238; *Re* **Thompson**, **Macdell** v. **Newman** (1886), 55 L. T. 85; **Mentd.** **Holloway** v. **Radclyffe** (1857), 23 Beav. 163.

5388. — [—] — A domiciled Englishman made his will in a Spanish colony, in the Spanish language & form, & empowered K., whom he appointed his universal heir, to make his, testator's, will, making therein the declaration, etc., & other matters which had been, & would be, communicated to him. The will was admitted to probate : — *Held* : (1) the will was an English will, & in construing it, the Spanish language was only to be looked to, in order to ascertain the equivalent expressions in English ; (2) K. being appointed universal heir, the beneficial interest, after performing the trusts, if any there were, belonged to K., & not to testator's next of kin. — **REYNOLDS v. KORTWRIGHT** (1854), 18 Beav. 417 ; 2 Eq. Rep. 784 ; 24 L. T. O. S. 40 ; 2 W. R. 445 ; 52 E. R. 104.

Annotation:—*As to (1) Folld. Re Manners, Manners v. Manners, [1923] 1 Ch. 220.*

5389. — — — —.]—Testator gave & bequeathed all his residuary estate to his wife, "upon trust" to pay thereout an annuity, & "upon further trusts" to pay certain legacies, which did not exhaust the personal estate. He referred to his wife as his *extrix*. in the will; but the will did not contain any express appointment of her as *extrix*. :—*Held*: upon the construction of the will, she was entitled beneficially to the surplus estate. —**WILLIAMS v. ROBERTS** (1857), 27 L. J. Ch. 177; 30 L. T. O. S. 364; 4 Jur. N. S. 18; 6 W. R. 33. *Annotation*:—**Consd. Re West, George v. Grose**, [1900] 1 Ch. 84.

5391. ——— Bequest of residue to executors “absolutely.”—Testator gave legacies of nineteen guineas to each of his exors., & he bequeathed his residue to them “absolutely,” charged with certain legacies. He also authorised them to deduct their costs, charges & expenses out of any part of his estate:—*Held*: the exors. were trustees of the residue for the next of kin.—**SALTMARSH v. BARRETT** (1861), 3 De G. F. & J. 279; 29 Beav. 474; 30 L. J. Ch. 853; 4 L. T. 690; 7 Jur. N. S. 813; 45 E. R. 885, L. J.J.; *subsequent proceedings* (1862), 31 Beav. 349.

Annotations:—*Consd. Barrs v. Fewkes* (1864), 2 Hem. & M. 60; *Re Henshaw* (1864), 34 L. J. Ch. 98; *Williams v. Arkle* (1875), L. R. 7 H. L. 606. **Refd.** *Re Glukman, A.-G. v. Joffreys*, [1907] 1 Ch. 171.

5392. ——— “In confidence that” executors “will dispose of same as I may direct.”]—Testatrix bequeathed to her exors. all her plate, linen, etc., & other personal effects, in confidence that they would dispose of the same as she might by memorandum or otherwise direct. By a duly attested codicil she gave a life interest in an additional legacy, observing that the bequest would make little difference, as it would eventually fall into the residue; & adding words to show that the bequest would only affect the interest of her exors. :—*Held*: the exors. took the entire residue of the personal estate for their own benefit.—*SHEPHERD v. NOTTINGE* (1802), 2 John. & H. 766; 1 New Rep. 15; 7 L. T. 399; 70 E. R. 1288.

5393. — [J.—]—Testator bequeathed an annuity to his wife to be paid out of his effects, the exors. of his will to give security for the same. He then made bequests to three of his nine children, & stated why he did not provide for three others; he then appointed certain strangers to be trustees & his three remaining children to be exors. The will contained no gift of residue:—*Held*: there was sufficient on the face of the will to show that the exors. were intended to take beneficially.—**HARRISON v. HARRISON** (1864), 2 Hem. & M. 237; 4 New Rep. 224; 33 L. J. Ch. 647; 10 L. T. 569; 10 Jur. N. S. 611; 12 W. R. 854; 71 E. R. 454.

1034. — **Bequest coupled with trust void for uncertainty.**—Testator gave real & personal property to exors. & trustees upon trust, to convert & hold upon such trusts as he might appoint, & “in default of appointment, then for the same to be expended & appropriated within three years after his decease in such way & manner & for such purposes as they or the majority of them in their judgment or discretion should agree upon.” By codicil testator gave certain pecuniary legacies to the exors. “irrespective of any interest they might ultimately take in the residue of his estate”:—**Held:** the exors. were trustees for the heiress-at-law & next of kin.—**BUCKLE v. BRISTOW** (1864), 5 New Rep. 7; 11 L. T. 285; 10 Jur. N. S. 1095; 13 W. R. 68.

Annotations:—*Raid, Yeap Cheah Neo v. Ong Cheng Neo* (1875), L. R. 6 P. C. 381; *Re Howell, Re Buckingham, Liggins v. Buckingham*, [1914] 2 Ch. 173.

5395. ——— **To the persons hereinafter appointed executors.]**—Where testatrix gave all the residue of her real & personal estate to the persons thereafter appointed her exors., to be divided among them in equal shares, for their absolute benefit, & one died in the lifetime of testatrix, & another attested the will, their shares lapse, it being a gift to them as individuals, & not as a class.—*HOARE v. OSBORNE* (1864), 33 L. J. Ch. 586; 10 L. T. 20; 10 Jur. N. S. 383; 12 W. R. 397.

Annotations:—Dtd. Re Penedis' Settlement Trusts (1879), 48 L. J. Ch. 741. I cannot understand *Hoare v. Osborne* (JESSEL, M.R.). *Refd. Coxen v. Rowland*, [1894] 1 Ch. 406. *Mentd. Willoughby Osborne v. Holyoake* (1882), 22 Ch. D. 238.

5396. ——— **"To enable" executor "to carry into effect purposes of will."**—Extrinsic evidence is inadmissible to assist in explaining the construction of a will, though admissible to rebut presumptions of law contrary to the actual words. Therefore where testator, after certain specific devises & bequests, devised the residue of his real & personal estate to the exor., "to enable him to carry into effect the purposes of the will":—*Held*: a resulting trust for the heir arose by the rules of construction, & not by mere implication or presumption of law, & consequently extrinsic evidence was inadmissible to show that testator intended the exor. to take beneficially.—*BARRS v. FEWKES* (1865), 6 New Rep. 355; 34 L. J. Ch. 522; 12 L. T. 727; 11 Jur. N. S. 669; 13 W. R. 987.

5397. ——— **Testator gave several legacies of considerable amount to his children, to be paid out of his real & personal estate; & he gave £10 each to his two exors., in case they accepted & acted in the exorship, of his will. He then made various specific bequests; & as to the rest, residue & remainder of his real & personal estate, not thereinbefore otherwise disposed of, he gave, devised & bequeathed the same to A. & C., & made them sole exors. of his will. By a codicil, testator devised to his exors. a particular house, not before mentioned, in trust for sale, & the proceeds to be divided between all his children:—***Held*: the facts of the exors. having equal legacies given them, & taking the residue in joint-tenancy, though sufficient to have prevented them from taking the residuary personal estate beneficially by virtue of their office, were insufficient to prevent the operation of the clear gift to them as individuals, & they took the residue under the will beneficially.—*Re HENSHAW* (1864), 34 L. J. Ch. 98; 11 L. T. 17; 10 Jur. N. S. 837; 12 W. R. 1139.

Annotation:—Consd. Williams v. Arkle (1875), L. R. 7 H. L. 606.

5398. ——— **"In consideration of" paying income to wife for life.]**—Testator bequeathed all his property to two persons whom he appointed exors. "in & for the consideration of" paying over the rents & profits to his wife for life:—*Held*: the exors. did not take beneficially, but the estate, subject to the widow's life interest, was undisposed of.—*BIRD v. HARRIS* (1870), L. R. 9 Eq. 204; 39 L. J. Ch. 226; 23 L. T. 213; 18 W. R. 374.

5399. ——— **Effect of subsequent codicil.]**—Testator appointed two of his sons exors., & gave various legacies, but made no residuary bequest. By a codicil he directed his two exors. & three of his principal legatees to pay all expenses attending the proving of his will, & administration & winding-up of his estate, in equal proportions, according to the nature of the property they derived under his will & codicil, it being his

express desire that no part of such expenses should be borne by the residuary legatees, but that they should receive the residue free of all deductions for expenses:—*Held*: the appointment of exors. had no operation as to the beneficial disposition of the residue; & being undisposed of by the will, the codicil left the matter in the same position, & there was an intestacy as to the residue.—*TRAVERS v. TRAVERS* (1872), L. R. 14 Eq. 275.

5400. ——— **"For paying off" debt.]**—Testator, owing to his mother £300, "towards liquidating this" bequeathed to her some chattels, & also "for paying off this debt" bequeathed to her "all & everything not otherwise mentioned" in his will, & appointed his mother extrix.:—*Held*: the extrix. was not made beneficial residuary legatee.—*WRIGHT v. REVELL* (1872), 27 L. J. 439.

5401. ——— **—D., by his will, gave all his property to his exor. upon trust for the purposes of his will, & after gifts of £300 to a daughter, & 5s. a week to his son, J., bequeathed the remainder of his property " & any other property of which I may die possessed, & I nominate & appoint my son R., sole exor.; but testator omitted to say to whom he bequeathed the remainder:—***Held*: testator had failed to express his intention, & there was an intestacy as to the residuary real & personal estate.—*DRIVER v. DRIVER* (1871), 43 L. J. Ch. 279.

5402. ——— **"At discretion of" executor " & at his own disposal."]**—Testatrix by her will appointed G. her exor., & directed him to pay her debts & funeral & testamentary expenses. She then bequeathed various pecuniary legacies, including a legacy to G. "my exor." & concluded her will in the following terms:—"After the aforesaid legacies have been duly paid the remainder or residue of my property, if any, shall be at the discretion of my exor. & at his own disposal":—*Held*: G. took the residuary estate of testatrix as a beneficiary & not as trustee for the next of kin of testatrix.—*Re HOWELL, Re BUCKINGHAM, LUGGINS v. BUCKINGHAM*, [1915] 1 Ch. 241; 84 L. J. Ch. 209; 112 L. T. 188, C. A. *Annotations:—Dtd. Re Booth, Hattersley v. Cowgill* (1917), 86 L. J. Ch. 270; *Re Chapman, Hales v. A.G.*, [1922] 2 Ch. 479.

5403. ——— **—Where testator gives the ultimate remainder of a fund, after the termination of a life interest, to be disposed of at the discretion of the trustees of his will, & makes a general gift of all his residue, a trustee by representation of the last surviving trustee named in the will is not entitled to take the fund beneficially, & it will pass under the general gift of residue.—***Re BOOTH, HATTERSLEY v. —* (1917), 86 L. J. Ch. 270; 116 L. T. 465.

5404. ——— **—By his will prepared & executed in India, testator, domiciled in Ireland, declared that his "solr. in Ireland" should deal with his "Irish property only." He appointed two named exors. "with regard to all my property in this country." He declared that "all my personal effects, ponies, saddlery, etc., except such as my exors. desire to dispose of otherwise, to be sold." There were personal effects in England:—***Held*: the two named exors. were residuary legatees under the will, & as such entitled to a grant of administration of the estate in England.—*In the Estate of MILLAR, IRWIN v. CARUTH* (1915), as reported in 114 L. T. 373; 32 T. L. R. 193.

5405. ——— **"To be at his own disposal" —No direct gift to executor.]**—Testatrix by her will appointed an exor., & after giving various

Sect. 6.—Distribution of residue: Sub-sect. 4, A. (b) & (c) & B. Sect. 7: Sub-sect. 1, A. (a).]

pecuniary legacies, including two for charitable purposes, & £100 to her exor., she left in blank the name of her residuary legatee. By a codicil testatrix desired that her residue should be "applied for charitable purposes as I may in writing direct, or to be retained by my exor. for such objects & such purposes as he may in his discretion select, & to be at his own disposal." She left no written directions as to the charities to be benefited:—*Held*: there being no direct gift to the exor., the added words "to be at his own disposal" were not sufficient to enable the ct. to hold that the exor. took the residue beneficially. He held it therefore as trustee for the next of kin.—*Re CHAPMAN, HALES v. A.-G.*, [1922] 2 Ch. 479; 91 L. J. Ch. 527; 127 L. T. 616; 66 Sol. Jo. 522, C. A.

5406. Admissibility of evidence to show intention of testator.]—*LOVE v. GAZE*, No. 5378, *ante*.

5407. Executor taking as trustee for next of kin—Whether express trustee.]—The trusteeship of exors. created by Executors Act, 1830 (c. 40), was not intended to be different in its nature from that which existed previously under the rule established in ct.s. of equity, viz. that in the absence of special circumstances exors. were not to be regarded as express trustees.

Testator, who died in 1873, gave all his property charged with certain annuities to the trustees of a charity, & appointed K. to be his exor. & gave him a legacy. The estate included freehold & leasehold property. K. entered into possession, & received the income of testator's estate on behalf of the charity for a period of twenty years. Soon after testator's death he read over the will to testator's only son, who was his heir-at-law & sole next of kin, but gave him no information as to his rights under the will, having regard to the gift being to a charity. The son died in 1895 without ever having claimed the estate. In an action by the trustees of the charity for a declaration who was entitled to testator's estate:—*Held*: K. was not an express trustee for the next of kin. *Re LACY, ROYAL GENERAL THEATRICAL FUND ASSOCN. v. KYDD*, [1899] 2 Ch. 149; 68 L. J. Ch. 488; 80 L. T. 706; 47 W. R. 664.

Annotations:—Reid. Re Blow, St. Bartholomew's Hospital v. Camden, [1914] 1 Ch. 233. *Mentd. Re Richardson, Pole v. Pattenden*, [1919] 2 Ch. 50.

5408. Fund set aside Declarations of executor.] Part of the estate of testator upon the deaths of two sons without issue in 1861 & 1867 respectively became undisposed of, & devolved upon his next of kin, among whom were B. & J. The exors. of testator distributed the undisposed of fund so far as they were able, but retained the shares of B. & J., who were then dead, & whose representatives were not known or not constituted, & invested them, & from time to time added the dividends to the principal. They also kept books relating to the estate of testator, in which they made entries to the effect that these funds belonged to the estates of B. & J. respectively, & were held on behalf of the persons who were entitled when they had established their claims. No payment & no acknowledgment had been made by the exors. in respect of the funds so retained:—*Held*: the executors of testator had become express trustees of the undisposed of funds in question, & therefore the case did not come within Law of Property Amendment Act, 1860 (c. 38), s. 13, & the legal personal representatives of B. & J. were not barred by the statute, but were entitled to the funds.—*Re*

GOMPERTZ, PARKEN v. GOMPERTZ (1911), 105 L. T. 664; 56 Sol. Jo. 11.

(c) *After 1925.*

See Administration of Estates Act, 1925 (c. 23), s. 49 (b).

B. Where No Next of Kin.

See, Law of Property Act, 1922 (c. 16), s. 150 (1); Administration of Estates Act, 1925 (c. 23), ss. 40, 49 (b).

5409. General rule—Effect of Executors Act, 1830 (c. 40).]—(1) The above Act, as to the right of exors. to the undisposed-of residue, merely shifts the burden of proof from the next of kin to the exor.

(2) Devise & bequest of residue of testator's property to A., B. & C., "upon trust" to convert & pay debts & certain legacies. Testator, in a subsequent clause, appointed A., B. & C. his exors., & he die without next of kin:—*Held*: the Crown, as against the exors., was entitled to the undisposed-of residue.—*READ v. STEDMAN* (1859), 26 Beav. 495; 28 L. J. Ch. 481; 33 L. T. O. S. 115; 53 E. R. 989.

Annotation:—As to (2) Reid. Re Higginson & Dean, Ex p. A.-G., [1899] 1 Q. B. 325.

5410. ———.]—The title of an exor., as against the Crown, to the undisposed-of residue of testator's personal estate, is not affected by above Act. Therefore, where a testator dies, leaving no next of kin, & having appointed an exor., & no presumption arises from the will that testator meant to give only the offices of exor., & not the beneficial interest, the exor. is entitled as against the Crown.

Testator, who died after above Act came into operation, by his will directed that his debts & funeral & testamentary expenses should be paid by his exors. thereafter named, & appointed his friend R. & his friend C. exors., gave unequal legacies to R. & C. by name, & gave other legacies, & died without leaving any next of kin:—*Held*: the exors. were entitled, as against the Crown to the undisposed-of residue of personal estate, in equal shares.—*Re KNOWLES, ROOSE v. CHALK* (1880), 40 L. J. Ch. 625; 43 L. T. 152; 28 W. R. 975.

Annotation:—Reid. Re Bacon's Will, Camp v. Coe (1886), 31 Ch. D. 460.

5411. ———.] The rule established by the old law as to exors. being trustees of undisposed-of residue must not be extended beyond the cases which established it.

By a will in 1881, to which Executor's Act, 1830 (c. 40) did not apply, testator appointed three exors., & gave to each an equal pecuniary legacy & to two of them specific legacies of unequal value. There being no gift of residue & no next of kin, the Crown claimed the residuary estate:—*Held*: on the true construction of this will, the peculiar circumstances raised no presumption that testator intended to make the exors. merely trustees, & they were entitled to the residuary estate for their own benefit.—*A.-G. v. JEFFERYS*, [1908] A. C. 411; 77 L. J. Ch. 685; 99 L. T. 737; 24 T. L. R. 793; 52 Sol. Jo. 660, H. L.; *affg. S. C. sub nom. Re GLUKMAN, A.-G. v. JEFFERYS*, [1908] 1 Ch. 552, C. A.

5412. Whether intention for executor to take beneficially—Legacies to executors.]—A man dying possessed of leasehold property, which he orders to be sold, & the money paid to a charity, which is prevented from taking by Statute of Mortmain, the exor. having a legacy, & there being no next of kin, is a trustee for the Crown.—*MIDDLETON v.*

SPICER (1783), 1 Bro. C. C. 201; 28 E. R. 1083, L. C.

Annotations.—*Consd.* Taylor v. Haygarth (1844), 14 Sim. 8; Dyke v. Walford (1848), 5 Moo. P. C. C. 434. *Appld.* Powell v. Merrett (1853), 1 Sm. & G. 381. *Foll.* Cradock v. Owen (1854), 2 Sm. & G. 241. *Appld.* Johnstone v. Hamilton (1865), 5 Giff. 30. *Consd.* Re Bond, Panes v. A.-G. (1900), 82 L. T. 612. *Reid.* Barclay v. Russell (1797), 3 Ves. 424; Barrow v. Wadkin (1857), 24 Beav. 1; *Re* Higginson & Dean, *Ex p.* A.-G., (1899) 1 Q. B. 325. *Mentd.* A.-G. v. Hurst (1790), 2 Cox, Eq. Cas. 364; A.-G. v. Winchelsea (1791), 3 Bro. C. C. 373; Marsh v. A.-G. (1860), 2 John. & H. 61; Brook v. Badley (1867), L. R. 4 Eq. 106.

5413. ——— *Of equal amounts.*—[Gift of residue to exors. in trust, with equal legacies to the exors. by name :—*Held* : not to pass a beneficial interest in undisposed of residue, which came to the Crown.—*CHESTER v. CHESTER* (1871), L. R. 12 Eq. 444; 19 W. R. 940.

Annotation.—*Mentd.* Ferring v. Trill (1874) 22 W. R. 512.

5414. ——— *Of unequal amounts.*—*Re* KNOWLES, ROOSE v. CHALK, No. 5410, *ante*.

5415. ——— ————*J*.—A.-G. v. JEFFERYS, No. 5411, *ante*.

5416. ——— *Property bequeathed on trust.*—[Testatrix gave her real & personal property to A., B. & C., their heirs, exors., etc., in trust to sell the same immediately after her death, & to stand possessed of the produce, in trust for such persons as she should direct by a codicil. But she did not make any codicil, nor did she leave either heir or next of kin. After her death, A., B. & C. sold her real estate :—*Held* : they were entitled to the proceeds, for their own benefit; & the Crown was entitled to the personal estate.—*TAYLOR v. HAYGARTH* (1844), 14 Sim. 8; 2 L. T. O. S. 437; 8 Jur. 135; 60 E. R. 259.

Annotations.—*Foll.* Powell v. Merrett (1853), 1 Sm. & G. 381. *Consd.* Barrow v. Wadkin (1857), 24 Beav. 1; *Re* Bacon's Will, Camp v. Coe (1886), 31 Ch. D. 460. *Distd.* *Re* Bond, Panes v. A.-G., (1901) 1 Ch. 15. *Apprvd.* Talbot v. Jevers, (1917) 2 Ch. 363. *Reid.* Downe v. Morris (1841), 3 Hare, 394; Beale v. Symonds (1853), 16 Beav. 406; Masulipatam, Collector v. Cavalry Vencata Narrainapah (1861), 8 Moo. Ind. App. 529; Cumack v. Edwards (1895), 13 R. 334.

5417. ——— *Failure of trust.*—[Where personal property is given to exors. upon trust, they are excluded from claiming for their own benefit, & if the trust fails & there are no next of kin, the exor. is trustee for the Crown.—*POWELL v. MERRETT* (1853), 1 Sm. & G. 381; 22 L. J. Ch. 408; 21 L. T. O. S. 98; 17 Jur. 449; 1 W. R. 243; 65 E. R. 167.

Annotation.—*Consd.* *Re* Higginson & Dean, *Ex p.* A.-G., (1899) 1 Q. B. 325.

5418. ——— ————*J*.—*Dacre v. PATRICKSON*, No. 5416, *post*.

5419. ——— ————*J*.—*Read v. STEDMAN*, No. 5409, *ante*.

5420. ——— ————*J*.—[Testator devised & bequeathed his real & personal residue, including leaseholds, to five persons absolutely, & appointed them exors. He had told them he did so in the hope that they would fulfil his intention of devoting his estate to a charity. Testator having died without next of kin, & the devisees & exors. admitting they were not intended to take beneficially :—*Held* : the exors. were trustees of the

leaseholds for the Crown.—*JOHNSTONE v. HAMILTON* (1865), 5 Giff. 30; 6 New Rep. 352; 12 L. T. 822; 11 Jur. N. S. 777; 13 W. R. 901; 60 E. R. 910.

5421. ——— ————*J*.—*CHESTER v. CHESTER*, No. 5413, *ante*.

5422. ——— ————*J*.—[Testatrix devised & bequeathed real & personal estate to H. & G. upon trust for conversion & payment of her funeral & testamentary expenses, debts & legacies, & the ultimate residue of her real & personal estate she gave equally between H. & G. for their own use & benefit absolutely. She then appointed H. & G. exors. & trustees of that her will. By codicil she revoked the gift of the ultimate residue to H. & G., & instead thereof gave them each £500 for his trouble in acting as an exor. & trustee of her will. Testatrix died without leaving any heir-at-law or next of kin. There was a considerable amount of residuary personal estate :—*Held* : on the face of the will & codicil the exors. were not intended to take anything more than the £500 legacies, & the Crown was therefore entitled as against them to the undisposed of residuary estate.—*Re HUDSON'S TRUSTS* (1883), 52 L. J. Ch. 789; 48 L. T. 502; 31 W. R. 778.

5423. ——— *Will on printed form Blanks not filled in.*—[A will, which was on a printed form, after giving certain legacies, contained a gift of all the property of testatrix real & personal "unto ——— to & for ——— own use & benefit absolutely," & the appointment of C., "to pay all my debts, funeral expenses ——— to be exor. of this my will." Testatrix had no next of kin, & there was parol evidence sufficient to show an intention on her part that the exor. should take the residue for his own benefit :—*Held* : the effect of the blanks in the will could not be greater than to raise a presumption against the exor. of a resulting trust for the next of kin; (2) & as there were no next of kin, evidence of the intention of testatrix was admissible as against the Crown, & therefore the exor. was entitled to the residue for his own benefit. *Re BACON'S WILL, CAMP v. COE* (1886), 31 Ch. D. 460; 55 L. J. Ch. 368; 51 L. T. 150; 34 W. R. 319; 2 T. L. R. 278, D. C.

5424. *Admissibility of evidence to show intention of testator.*—*Re BACON'S WILL, CAMP v. COE*, No. 5423, *ante*.

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SECT. 7. ORDER OF APPLICATION OF ASSETS.

SUB-SECT. I. LIABILITY OF PERSONAL ESTATE.

A. For Payment of Unsecured Debts and Legacies.

(a) In General.

See Land Transfer Act, 1897 (c. 65), s. 2 (3) (repealed by Law of Property Act, 1922 (c. 10), s. 156 (11)); Administration of Estates Act, 1925 (c. 23), s. 32.

5425. *General rule—Personal estate primarily liable.*—[If a man has goods to the value of £100 & is indebted in £20 & he devises & bequeaths to his wife by his testament the moiety of all his

PART IV. SECT. 7. SUB-SECT. 1.—A. (a).

5425 i. *General rule—Personal estate primarily liable.*—[A testator, by his will, gave to his widow an annuity of \$4,000 in lieu of dower. His will contained certain devise, & gave other legacies & annuities, which the testator charged on the whole of his estate not before devised, & he empowered his exors. to sell any of his property which they should think necessary. The

widow elected to take the annuity :—*Held* : that the legacies & annuities were payable primarily out of the personal estate.—*DAVIDSON v. BOOMER* (1871), 18 Gr. 475.—*CAN.*

5425 ii. ————*J*.—[Testator bequeathed to his wife all moneys in bank, notes, mtgns., & all goods & chattels whatsoever & whosoever, including his beneficiary certificate, etc. The will dealt, also, with certain lands & all the goods of testator. The

goods were given by general, not by specific or residuary, bequest to the widow, & nothing was said in the will as to payment of debts. Testator left some real property not mentioned or included in the will, & as to which he died intestate. As against the widow, it was contended that the debts should be paid out of the personalty in exoneration of the lands descended :—*Held* : notwithstanding Devolution of Estates Act, ss. 4, 9, the personal

Sect. 7.—Order of application of assets: Sub-sect. 1, A. (a).]

goods to be equally divided between her & his exors., & makes his exors., & dies, & the exors. pay the £20, yet the wife shall have the moiety of the whole estate, viz. £50 without any de-falcation, so that the exors. have assets besides.—ANON. (1601), Gouldsb. 149; 75 E. R. 1057.

5426. ———.]—GRIFE v. GOODWIN (1703), Freem. Ch. 264; 22 E. R. 1200.

5427. ———.]—**Foreign debts.**—If a Dutchman be possessed of real estate in Holland, & personal estate in England, & devise his real estate to A., & his personal to B. the personal estate shall be first applied to pay his debts in Holland, though real estate there is liable to debts.

It is there, as it is here, that the personal estate shall come in aid of the real estate & be charged in the first place (*per CUR.*).—ANON. (1723), 9 Mod. Rep. 66; 88 E. R. 319.

5428. ———.]—R., by his will, after stating that he intended to dispose of his estate, gave his real estate & two several legacies to his nephew, S., & then gave to his niece, M., £3,000, also to his niece A., £5,000 in the Old Annuity Stock of the South Sea Co.; to his niece W., £3,000 in the New Annuity Stock of the South Sea Co.; to his cousin P., £5,000 in the Old Annuity Stock of the South Sea Co.; & after other bequests, gave the residue of his real & personal estate to his nephew S., & appointed P., his exor.; at the times of making his will & of his death, testator was possessed of only one sum of £5,000 in the Old Annuity Stock of the South Sea Co.:—*Held*: the two legacies of £5,000 in the Old South Sea Annuity Stock were not specific legacies in the strict sense of the term, but separate & distinct legacies, to be made good out of the personal assets of testator.—PURSE v. SNABLIN (1738), West temp. Hard. 470; 1 Atk. 414; 25 E. R. 1037, L. C.

Annotations:—*Expld.* Avelyn v. Ward (1750), 1 Ves. Sen. 420. *Consd.* Sloech v. Thorington (1754), 2 Ves. Sen. 660. *Held.* Jeffreys v. Jeffreys (1743), 3 Atk. 120; Whigfield v. Newton (1744), 9 Mod. Rep. 428; Door v. Geary (1749), 1 Ves. Sen. 255; Ashburner v. Macquibre (1786), 2 Bro. C. C. 108; Simmons v. Vallance (1793), 4 Bro. C. C. 345; *Re* Willecocks, Warwick v. Willecocks, [1921] 2 Ch. 327.

5429. ———.]—VERNON v. VAUDREY (1740), Barn. Ch. 280; 2 Atk. 119; 27 E. R. 646, L. C.

Annotations:—*Mentd.* Allfrey v. Allfrey (1849), 1 Mac. & G. 87; *Alexr v. Arnold* (1852), 2 De G. M. & G. 432; *Holland v. Holland* (1869), 4 Ch. App. 449, n.

5430. ———.]—Under a will by which lands were charged with all debts, the exor., to whom a residue, after payment of legacies, was bequeathed, claimed the personal effects as a specific legacy:—*Held*: the personals were first applicable, & the land a security afterwards, to the amount charged upon it.—GLEED v. GLEED (1753), 3 Keny. 14; 96 E. R. 1201, L. C.

5431. ———.]—HARMOOD v. OGLANDER, No. 5850, *post*.

5432. ———.]—**Liability of personalty specifically bequeathed.**—It is the duty of exors., as far as possible, to preserve articles specifically be-

queathed, according to testator's wish, & unless compelled, they ought not to apply them to the payment of debts.—CLARKE v. ORMONDE (EARL) (1821), Jac. 108; 37 E. R. 791, L. C.

Annotations:—*Reid.* Seale v. Hayne (1863), 9 L. T. 570. *Mentd.* Lee v. Park (1836), 1 Keen, 714; Ranken v. Harwood, Ranken v. Boulton (1846), 5 Hare, 215; Rowland v. Morgan (1848), 17 L. J. Ch. 339; Vincent v. Godson (1850), 3 De G. & Sm. 717; Macrae v. Smith, Pantou v. Smith (1856), 2 K. & J. 411; Marriage v. Skiggs, *Re* Skiggs (1859), 4 De G. & J. 4; Springett v. Dashwood (1860), 2 Giff. 521; Haly v. Barry (1868), 3 Ch. App. 452; *Re* Womersley, Etheridge v. Womersley (1885), 29 Ch. D. 557.

5433. ———.]—A., the exor. of B., dealt with canal shares, which had belonged to B., as his own property, & ultimately bequeathed them to C.; & he gave certain other chattels, which always had been his own property, to D., & died possessed of but very little other property, leaving some of B.'s debts unpaid, & a balance due from him in respect of his receipts & payments on account of B.'s estate. At his death the canal shares remained standing in B.'s name:—*Held*: those shares were not exclusively applicable to pay B.'s unsatisfied debts; but A.'s general personal estate must be applied first, & C. & D. must contribute to make up the deficiency in proportion to the value if the articles bequeathed to them respectively.—IBBETSON v. IBBETSON (1843), 13 Sim. 544; 7 Jur. 1033; 60 E. R. 211.

5434. ———.]—FIELDING v. PRESTON, No. 5902, *post*.

5435. ———.]—Testatrix who was entitled to half of her sister's residuary estate, bequeathed a large legacy, which, if it should fail, she directed should fall "into her own estate." She bequeathed the residue of her property, except that derived from her sister, to A., & the residue of her property derived from her sister's estate to B.:—*Held*: the latter must contribute with the former towards payment of the debts, expenses & legacies.—GREENWOOD v. JEMMETT (1858), 26 Beav. 479; 53 E. R. 983.

5436. ———.]—Testator, who died in 1822, by his will, gave to his brother J. a legacy of £100, to be paid "as soon as conveniently may be after my decease." He then gave an annuity of £50 to H., to be payable out of his real estate until one of testator's nephews should attain twenty-one, & on the happening of that event he directed his real estate to be exonerated from the annuity of £50 & his real & personal estate to be sold, & the annuity paid out of the income of the produce. He declared that after the nephew attained twenty-one the annuity should be a charge only on his personal estate. In 1839 the nephew came of age & the real estate was sold, & the whole income paid to H. in part of her annuity until 1856, when she died. In 1858 J., the legatee, filed a bill for payment out of the trust fund, alleging that the personalty was not sufficient, but no personal representative of testator was made a party. The Master of the Rolls dismissed the bill on the grounds that the legacy was not charged on real estate, & that it was barred by Stat. Limitations. On appeal:—*Held*: the personal estate was the

estate was still the primary fund for the payment of debts, & in this will no sufficient indication was to be found of testator's intention to relieve the personalty from the payment of the debts.—*Re* McGARRY (1909), 18 O. L. R. 584; 14 O. W. R. 344.—CAN.

5435 iii. ———.]—The general rule of law as to pecuniary legacies, in the absence of sufficient indication of a contrary intention, is that they are payable by the legal personal representatives of testator out of the

personal estate not specifically bequeathed. Unless charged upon it by the will they are not payable out of the real estate.—*Re* STRATTICONA'S (LORD) ESTATE, [1918] 2 W. W. R. 499; 28 Man. L. R. 579.—CAN.

5435 iv. ———.]—The ot. always primarily takes the account of the personal fortune, & when the trust is clearly to pay all debts generally, it does not intermeddle with the real estate, until the personal appears to be insufficient; but if there be any doubt

which fund is primarily to be applied it then takes care to preserve both.—FINGAL (EARL) v. BLAKE (1828), 2 Mol. 50; 2 Ir. L. Rec. 1st. ser. 101.—IR.

o. Protected policy money.—Liability of—For payment of debts.—The property of K. consisted of teams & other goods, valued about £600, & a policy of insurance on his life, which had been in existence for more than three years prior to his death. Without the amount of the policy there would not

primary fund, which there was no evidence was insufficient; there was no personal representative of testator before the ct., & by lapse of time the bill came too late.—*BRIGHT v. LARCHER* (1859), 4 De G. & J. 608; 28 L. J. Ch. 837; 33 L. T. O. S. 354; 5 Jur. N. S. 1233; 7 W. R. 658; 45 E. R. 236, L. J.J.

Annotations.—*Mentd.* *Bright v. Legerton* (No. 1) (1860), 29 Beav. 60; *Re Howe, Jacobs v. Hind* (1889), 58 L. J. Ch. 703.

5437. ———.]—Testator, after directing payment of his debts & funeral & testamentary expenses, bequeathed a number of pecuniary legacies, & then gave "all the residue & remainder" of two specified mtge. debts then due to him, after payment of his debts & funeral & testamentary expenses, but not adding "& legacies," to three persons named. At the date of the will testator's personal estate consisted of the two mtge. debts which were just sufficient for payment of the legacies, if payable thereout, debts, & funeral & testamentary expenses. Subsequently to the date of his will testator became possessed of further personal estate, but as the will contained no general residuary gift, this remained undisposed of. The total personal estate exclusive of the two mtge. debts, was not sufficient for payment of the debts, funeral & testamentary expenses & legacies.—*Held*: "the residue and remainder" of the two mtge. debts meant what was left after payment thereout of the debts, funeral & testamentary expenses only, & the undisposed of personalty could alone be resorted to for the general pecuniary legacies.—*HIGGINS v. DAWSON*, [1902] A. C. 1; 71 L. J. Ch. 132; 85 L. T. 703; 50 W. R. 337, H. L.; *reversg.* S. C. *sub nom.* *Re GRAINGER, DAWSON v. HIGGINS*, [1900] 2 Ch. 756, C. A.

Annotations.—*Reid.* *Re Balls, Trowby v. Balls*, [1900] 1 Ch. 791; *Re Townley, Public Trustee v. Alder*, [1922] 1 Ch. 154. *Mentd.* *Re Pinney, Pinney v. Pinney* (1902), 46 Sol. Jo. 552; *Re Glassington, Glassington v. Follett*, [1906] 2 Ch. 305; *Re Gibbs, Martin v. Harding*, [1907] 1 Ch. 465; *Re Ackerley, Chapman v. Andrew*, [1913] 1 Ch. 510; *Re Pearce, Alliance Assoc. v. Francis*, [1913] 2 Ch. 674; *National Soc. for Prevention of Cruelty to Children v. Scottish National Soc. for Prevention of Cruelty to Children*, [1915] A. C. 207; *Re Vear, Vear v. Vear* (1917), 62 Sol. Jo. 159; *Ward v. Van Der Loeff, Burnyeat v. Van Der Loeff*, [1924] A. C. 653.

5438. Costs of realising & transferring property.—*Specific legacy.*—Where legacies out of property in the colonies, of a specific amount, are directed to be paid in England, the specific sums must be paid, without any allowance for the expense of transmission. *MARTIN v. FEAR* (1832), 2 L. J. Ch. 21.

5439. ———.] *PERRY v. MEDDOWCROFT*, No. 3888, *ante*.

5440. ———.]—Testatrix who was domiciled & died in England, by her will appointed C. & D. exors. & gave all her real & residuary personal estate, except her shares in a certain French co. to C. & D., upon trust for sale, & to hold the net proceeds, after payment of her debts & funeral & testamentary expenses, upon trust to pay a certain charitable legacy, & to divide the residue into thirteen parts, as to eleven of them upon certain trusts, & as to two other of such parts upon trust to pay the capital or income thereof, or neither, to her nephew E., or to apply the capital or income thereof, or any part of either, for his benefit, or for the benefit of his wife or any child,

or children, of his as C. & D. might in their absolute & uncontrolled discretion consider desirable; & she gave all her twenty-one shares in the French co. "to my trustees" (C. & D.) upon trust to sell or retain the same & to hold the same upon trust for certain persons. Seven of the shares were charged with the payment of certain legacies. Shortly after testatrix's death the trustees sold some of the shares, & applied the proceeds in paying off a legacy charged by the will on seven of the shares. In completing their title according to French law the trustees paid certain sums claimed by the French Govt. by way of succession duty, & in so doing & also in connection with the realisation of the shares, they incurred certain costs.—*Held*: the trustees, being also exors., must as such have assented to the gift of the shares to themselves, & after such assent, were entitled to the shares as trustees & not as exors., & the French duty & costs must be borne by the shares & not by the general estate.—*Re DE SOMMERY, COLEMBIER v. DE SOMMERY*, [1912] 2 Ch. 622; 82 L. J. Ch. 17; 107 L. T. 253; 57 Sol. Jo. 78.

Annotations.—*Consd.* *Re Scott, Scott v. Scott*, [1915] 1 Ch. 592. *Apld.* *Re Grosvenor, Grosvenor v. Grosvenor*, [1916] 2 Ch. 375. *Expld.* *Re Hewett, Eldridge v. Hewett* (1920), 90 L. J. Ch. 126. *Reid.* *Re Scott, Scott v. Scott*, [1916] 2 Ch. 268. *Mentd.* *Kennedy v. Kennedy*, [1914] A. C. 215; *Re Allott, Haumer v. Allott*, [1924] 2 Ch. 498.

5441. ———.]—*Re GROSVENOR, GROSVENOR v. GROSVENOR*, No. 4632, *ante*.

5442. ———.]—Exors. are entitled to pay & should pay the costs of packing & shipping to England from Hong Kong, & delivering to the legatees, specific legacies bequeathed by a will proved in England.—*Re HEWETT, ELDRIDGE v. HEWETT* (1920), 90 L. J. Ch. 126; 65 Sol. Jo. 116.

5443. ———.]—Deft. as the agent of an exor., wrote to a legatee informing him of his legacy & its amount, & stating that he would remit it in any way the legatee might suggest. He transacted the business necessary for the transfer of the legacy, & remitted to the legatee the amount of the legacy, minus a sum deducted for expenses.—*Held*: deft. was not liable to the legatee, in an action for money had & received, for the sum so deducted.—*BARLOW v. BROWNE* (1840), 16 M. & W. 126; 16 L. J. Ex. 62; 153 E. R. 1127.

Annotation.—*Mentd.* *Monkwearmouth Flour Mill Co. v. Lightfoot* (1897), 15 T. L. T. 327.

5444. ———.]—Testator whose assets consisted partly of personal estate in the colony of Victoria, where duty is payable on the property of all deceased persons, died domiciled in England, & by his will gave many pecuniary legacies, & divided the residue among some of the pecuniary legatees.—*Held*: the duties attaching in Victoria, & all expenses of realisation were payable out of the general estate before distribution, & the pecuniary legatees were entitled to their legacies free of all colonial duties & expenses except the English legacy duty.—*PETER v. STILLING* (1878), 10 Ch. D. 279; 27 W. R. 469.

Annotations.—*Volld.* *Re Maurice, Brown v. Maurice* (1896), 75 L. T. 415. *Distd.* *Re Brewster, Butler v. Southam*, [1908] 2 Ch. 365; *Re Scott, Scott v. Scott*, [1914] 1 Ch. 847.

5445. ———.]—Testator domiciled in England, whose assets consisted of considerable personalty in England & also of realty leaseholds & personalty in Australia, by his will, after bequeathing pecuniary legacies of considerable amount, gave his residuary real & personal estate upon trust

be sufficient to pay pltf.'s & other claims in full. Defts. claimed that by Life Insurance Act, 1879, s. 2, the life policy was not liable to be made available for the payment of deceased's debts.—*Held*: the creditors were

entitled to the fund.—*KELLY v. BRUMM* (1886), 2 Q. L. J. 130.—*AUS.*

P. ———.]—*For costs of administration.*—Where life policies are protected by statute against claims of

creditors, that part of ordinary administration expenses which is represented by the numerical proportion of the protected policies to the whole estate should fall on the policies, but they should bear none of the

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for such of his five children as should be living at his death in equal shares, the share of each child being settled upon him or her for life with remainder to his or her children, with power for his trustees to manage & cultivate his real & leasehold estates until sold:—*Held*: the duties due to the Govt. of South Australia were not, like the duties due to the English Govt., payable out of the share of each child; but were part of the costs of realisation, & were therefore payable out of testator's general assets before distribution.—*Re MAURICE, BROWN v. MAURICE* (1896), 75 L. T. 415; 13 T. L. R. 36.

Annotation:—*Distd. Re Brewster, Butler v. Southam*, [1908] 2 Ch. 365.

5446. —[—]—Testatrix domiciled in England made an English will appointing English exors. & trustees & Colonial exors. & trustees. She devised certain land in Melbourne, Victoria, to her colonial trustees, upon trust to sell the same & to pay or remit the proceeds of sale to her English trustees to be held upon certain specific trusts. She devised & bequeathed the residue of her real & personal estate to her English trustees upon trust to sell & convert the same into money & thereout to pay, *inter alia*, her "debts" & to stand possessed of the residue thereof upon certain residuary trusts:—*Held*: (1) the direction to pay debts out of residue referred to actual debts & did not include local death duty on the Melbourne property, though "deemed to be a debt of testatrix" by the local law; (2) the local death duty & other expenses of realising the Melbourne property fell on that property & not on residue.—*Re BREWSTER, BUTLER v. SOUTHAM*, [1908] 2 Ch. 365; 77 L. J. Ch. 605; 99 L. T. 517.

Annotations:—*As to* (2) *Follid. Re De Sommersy, Coelenbier v. De Sommersy*, [1912] 2 Ch. 622. *Reid. Re Grosvenor, Grosvenor v. Grosvenor* (1916), 85 L. J. Ch. 735.

5447. Cost of preserving property—Specific legacy.]—The cost of the upkeep of a specific legacy incurred between the death of testator & the assent of the exor. must be borne by the specific legatee & not by the general residuary estate.—*Re PEARCE, CRUTCHLEY v. WELLS*, [1909] 1 Ch. 819; 78 L. J. Ch. 484; 100 L. T. 699; 25 T. L. R. 497; 53 Sol. Jo. 419.

Annotations:—*Reid. Re De Sommersy, Coelenbier v. De Sommersy*, [1912] 2 Ch. 622; *Re Hewett, Eldridge v. Hewett* (1920), 90 L. J. Ch. 126.

Payment of death duties—English duties.]—See ESTATE & OTHER DEATH DUTIES, Vol. XXI., pp. 6 *et seq.*

—**Foreign duties.]**—See ESTATE & OTHER DEATH DUTIES, Vol. XXI., p. 130.

5448. Costs of administration.]—*BARTON v. COOKE*, No. 4694, *ante*.

5449. —[—]—Where a tenant for life of residue under a will, with power to appoint, fails to exercise the power, & by the will, in default of appointment, pecuniary legacies are given, & the remainder of the residue amongst residuary legatees, the pecuniary legatees must, on the death of the tenant for life, bear a ratable proportion of the estate duty then payable. In such a case, however, the costs, & in particular the fees & withdrawal fee of the public trustee, are ordinary expenses of administration, & must be borne by the residue.—*Re HICKLIN, PUBLIC TRUSTEE v. HOARE*, [1917] 2 Ch. 278; 86

L. J. Ch. 740; 117 L. T. 403; 33 T. L. R. 478; 61 Sol. Jo. 630.

5450. Payment of debts—Under statute staple.]—*MASON v. CHEYNEY* (1873), Cas. temp. Finch, 42; 23 E. R. 23.

5451. — **Under judgment.]**—*BRESSENDEN v. DECREETS* (1874), 2 Cas. in Ch. 197; 22 E. R. 909. *Annotation*:—*Mentd. East India Co. v. Coles* (1783), 3 Swan. 142, n.

5452. — [—]—Land belonging to a tenant in tail in possession was delivered in execution under a writ of *elegit*. The judgment debtor died, & gave no direction exonerating his personal estate from the debt:—*Held*: Locke King's Acts were not applicable, & the judgment debt was not chargeable on the land in exoneration of the personal estate.—*Re ANTHONY, ANTHONY v. ANTHONY*, [1893] 3 Ch. 498; 62 L. J. Ch. 1004; 69 L. T. 300; 41 W. R. 667; 37 Sol. Jo. 632; 3 R. 671.

5453. — **Under bond.]**—Bond given to the wife before marriage to leave £1,000, though extinguished at law by the marriage, yet good in equity & shall bind the real assets.

The bond if set up must be wholly & entirely set up, & not in part only, to bind the personal assets, & not the real (SIR NATHAN WRIGHT, LORD KEEPER).—*ACTON v. PEIRCE* (1704), 2 Vern. 480; 23 E. R. 908; *sub nom. ACTON v. ACTON*, Prec. Ch. 237.

Annotations:—*Reid. Bishop v. Church* (1751), 2 Ves. Sen. 371. *Mentd. Jones v. Meredith* (1739), 2 Com. 661; *Milbourn v. Ewart* (1793), 5 Term Rep. 381.

5454. — [—]—Bill by a single bond creditor against the exors. & heirs of obligor, to be paid what was due to him, out of the personal assets of the obligor; & if not sufficient out of the real assets descended.—*WALTER v. GORING* (1757), 1 Dick. 299; 21 E. R. 284.

5455. — [—]—Bill by a single bond creditor, to be satisfied out of personal & real assets, was, after consideration, dismissed, so far as it prayed satisfaction out of the real estate.—*BENFORD v. LEIGH* (1785), 2 Dick. 707; 21 E. R. 446, L. C.

5456. — **Bond merely collateral security.]**—D. devised estates to trustees for a term of years in trust to raise money for payment of all his debts & legacies, & subject to that term he limited the estates in strict settlement with the ultimate remainder to his own right heirs. By the falling-in of the intermediate limitations, A. & B. became entitled to the estates as right heirs of testator. Testator's debts & legacies remaining unsatisfied, A. & B. executed joint bonds for the amount of them, & then A. died:—*Held*: these bonds were not debts of A. to which his personal estate was primarily liable, but they must be borne in the first instance by the devised estate.—*BASSET v. PERCIVAL* (1780), 1 Cox, Eq. Cas. 268; 29 E. R. 1161.

5457. — **Under simple contract.]**—Where freehold, copyhold, & leasehold estates are devised, subject to a general charge for the payment of debts, & the freeholds & leaseholds are subject to mtges., & there is a descended freehold estate purchased after the will, the general personal estate not specifically bequeathed is first to be applied in payment of simple contract debts as far as it will extend, & the surplus of simple contract debts is to fall proportionally on the

expenses of investigating the claims of creditors. Expenses which affect only the policies themselves should *prima facie* fall wholly on the policies.—*FITZGERALD v. FITZGERALD* (1910), 10 S. R. N. S. W. 666; 27 N. S. W.

W. N. 167.—**AUS.**

g. Commission of executor on corpus.]—The commission of an exor. on corpus so far as it is a commission on personal estate, is to be paid in the ordinary course out of the assets in the

ordinary order: so far as it is a commission on the corpus of real estate, it is to be thrown *pro rata*.—*PERPETUAL TRUSTEE CO., LTD. v. TASKER* (1913), 13 S. L. N. S. W. 322; 30 N. S. W. W. N. 177.—**AUS.**

freehold, copyhold, & leasehold estates devised; then the specialty debts, including all mtge. debts, are to be satisfied out of the descended freehold estate as far as it will extend; & the surplus of such specialty debts is also to fall proportionally upon the freehold, copyhold, & leasehold estates devised. *Semble*: furniture specifically bequeathed, ought to contribute to the payment of the debts proportionally with the devised real estate.

Where a testator gives an annuity to A. for life, payable quarterly, the first payment to be made within eighteen months after his death, the annuity does not commence till fifteen months from the death of testator.—*IRVIN v. IRONMONGER* (1831), 2 Russ. & M. 531; 39 E. R. 496.

Annotation:—*Consd.* *Middleton v. Middleton* (1852), 15 Beav. 450.

5458. Costs of conveyance of estate—Contracted for after date of will.—The heir-at-law is not entitled to have the costs of conveyance of an estate, contracted for after date of will, paid out of the personalty.—*WAITE v. BARNES* (1831), Coop. Pr. Cas. 502; 47 E. R. 621.

5459. Completion of contracts of deceased—Contract to erect buildings.—A. having a leasehold estate on which he had covenanted to erect buildings within a certain time, bequeathed it & also his personal estate, subject as to the latter to the payment of his debts, to trustees, for B. for life, with several limitations over. A. died before the time expired, leaving the covenant unperformed in part:—*Held*: his general personal estate was liable to the performance of the covenant.—*MARSHALL v. HOLLOWAY* (1832), 5 Sim. 196; 58 E. R. 311.

Annotations:—*Consd.* *Fitzwilliams v. Kelly* (1852), 10 Hare, 266; *Armstrong v. Burnet* (1855), 20 Beav. 424; *Eccles v. Mills*, [1898] A. C. 360; *Re Hughes, Ellis v. Hughes*, [1913] 2 Ch. 491. *Reid*. *Moffett v. Bates* (1857), 3 Sim. & G. 468; *Mellish v. Vallins* (1862), 2 John. & H. 194; *Re Betty, Betty v. A.-G.* (1899), 68 L. J. Ch. 435.

5460. ———.]—A person contracted with a builder to erect a house on a piece of freehold land belonging to him. & died intestate before the house was finished:—*Held*: the heir-at-law was entitled to have the house finished at the expense of the personal estate of the intestate.—*COOPER v. JARMAN* (1866), L. R. 3 Eq. 98; 36 L. J. Ch. 85; 12 Jur. N. S. 956; 15 W. R. 142.

Annotation:—*Apld.* *Re Day, Sprake v. Day*, [1898] 2 Ch. 510.

5461. ———.]—Testator having in his lifetime entered into a contract for the erection of buildings on land belonging to him:—*Held*: the buildings not having been completed before testator's death, the devisee of the land was entitled to have them completed at the cost of testator's personal estate.—*Re DAY, SPRAKE v. DAY*, [1898] 2 Ch. 510; 79 L. T. 436; 47 W. R. 238; *sub nom.* *Re DAY, DAY v. SPRAKE*, 67 L. J. Ch. 619.

(b) *Bequests cum onere.*

Specific legacy—By whom costs of getting in & preserving property borne.—*See* Sub-sect. 1, A. (a), *ante*.

5462. ———.]—**Of imported wines—Liability for customs duties.**—A legatee, under a bequest of wines, which arrived in the port of London in a ship before death of testator, the report of the arrival of the ship being made before, but the entry of the wines not being made until after the death of testator, is not subject to the payment of the duties, the exor. being bound to pay them out of the assets.—*SEWART v. DENTON* (1785), 2 Chit. 456; 4 Doug. K. B. 219; 99 E. R. 849.

Annotation:—*Apld.* *Bothamley v. Sherson* (1875), L. R. 20 Eq. 304.

5463. ———.]—*ROBERTSON v. BROADBENT*, No. 4554, *ante*.

5464. Bequest of business—By whom losses borne—Business losses.—A testator carried on the business of an iron master on the D. estate, in partnership, until Jan. 1851, after which time he became sole proprietor of the business & estate. During the co-partnership the partners were credited with their shares of profits & debited with their shares of loss in their private accounts with the firm; & a similar account was kept by testator after becoming sole proprietor, as between himself & the business. This private account was debited with considerable losses at the time of the last balance before testator's death, & on carrying the account down to the death a further balance of loss appeared:—*Held*: as between the general personal estate & the D. estate & business, which were separately bequeathed, the personal estate must pay both these balances to the D. estate.—*GUEST v. SCHREIBER* (1856), 4 W. R. 766.

5465. ———.]—Where testator bequeathed his business in third shares to his wife & two sons, the three "to rank equally in the good will, fixtures, machinery, stock, book debts, etc., connected with the business," & there were trade liabilities in connection with the business:—*Held*: this was not a bequest with the obligation to discharge the trade liabilities, & they must be discharged as debts out of the residuary personal estate in the first instance, & only to the extent that that was insufficient borne by the specific legatees of the business.—*Re TIMBERLAKE, ARCHER v. TIMBERLAKE* (1919), 63 Sol. Jo. 286.

5466. ———.]—Testator bequeathed his business & business assets upon certain trusts thereafter mentioned. At the date of his death there were two large sums of money standing to his credit in two separate banks, with regard to one of which there was a large sum due by way of overdraft in excess of the account:—*Held*: the two funds passed to the legatees of the business as business assets.

This testator was a man of wealth not altogether confined to his business. When he ultimately came to deal with the residue, he obviously intended to exonerate it from debts which were properly chargeable against the business. Now, the indebtedness to the bankers, which had originated in a current or loan account in London, was not in connection with the business. Private speculation had involved the testator in very large liabilities, which, having regard to his position, were raised by a large sum on loan. The question is whether, in that state of things, it can be said that the indebtedness of testator to the bank to an amount in excess of the deposit account, was a liability affecting this business asset so as to impose on that business asset the obligation to discharge the loan on the account to the London bank. I do not think it can (*EVE, J.*).—*Re BEECHAM, WOOLLEY v. BEECHAM* (1910), 63 Sol. Jo. 430.

5467. Bequest of share of partnership property—By whom partnership debts borne.—F. & L. were partners entitled in equal shares. Part of the assets consisted of leasehold premises vested in them as joint tenants, in which the business was carried on. F., by his will, bequeathed to L. "all my share of the leasehold premises in which my business is carried on." After F.'s death the assets of the partnership proved insufficient to pay the partnership debts, though L. & the estate of F. were amply solvent. L. bought the share of F. in the leasehold premises, without prejudice to his rights under the bequest; & a certificate

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having been made in a suit for the administration of F.'s estate, showing that it was solvent, L. presented a petition to have it declared that the effect of the bequest was to give him a moiety of the leasehold, exonerated out of F.'s estate from the partnership debts, & for the return of the purchase-money which he had paid:—*Held*: the bequest only gave such interest in the leasehold as F. had, namely, a right to a moiety subject to payment of the partnership debts; & as the partnership debts exhausted the assets the bequest failed.—*FARQUHAR v. HADDEN* (1871), 7 Ch. App. 1; 41 L. J. Ch. 260; 25 L. T. 717; 20 W. R. 46, L. J. J.

Annotation:—Distd. Re Holland, Brettell v. Holland, [1907] 2 Ch. 88.

5468. ———.]—One of the two partners in a solvent business died & by his will, after bequeathing his share in the partnership to his exors. upon certain trusts, made a specific devise of his share in certain freeholds which formed part of the partnership assets. The other partnership assets were more than sufficient to pay the partnership debts:—*Held*: as between the beneficiaries claiming under the will, the specific devise of the share in partnership freeholds was valid, & the devisees took it free from liability to contribute to the partnership debts.—*Re HOLLAND, BRETTCELL v. HOLLAND, [1907] 2 Ch. 88; 76 L. J. Ch. 449; 97 L. T. 49.*

5469. Bequest of leaseholds.—Liability for repairs.—Z. bequeathed certain leasehold property to which she had become entitled by will, to R., his exors., administrators & assigns, absolutely, during the residue of her term therein, subject to the payment of the rent & performance of the covenants reserved & contained in the lease under which she held the premises; & as to her residuary personal estate, subject to the payment of her debts, funeral, testamentary, & other expenses, she gave, devised & bequeathed the same to J., his heirs, exors., administrators & assigns absolutely. The lease under which the premises thus bequeathed to R. were held contained a covenant by the lessee to keep them in repair. It appeared that, at the time of testatrix's decease, dilapidations had taken place, but whether any of them had taken place before she came into possession of the premises was not shown. An order having been made, letting R. into possession & setting aside a sum of stock out of testatrix's estate to indemnify the exors.:—*Held*: (1) on the language of the will, & also on general principles, R. took the property *cum onere*, & was liable as between himself on the one hand, & the exors. of Z. & her residuary legatee on the other, to do the repairs in respect of dilapidations existing at testatrix's death; (2) the exors. of Z. being liable as between themselves & the lessor in respect of dilapidations which had taken place during their testatrix's lifetime, were entitled to receive from R. an indemnity in respect of such liability before he was let into possession.—*HICKLING v. BOYER* (1851), 3 Mac. & G. 635; 21 L. J. Ch. 388; 20 L. T. O. S. 33; 16 Jur. 137; 42 E. R. 404, L. C.

Annotations:—As to (1) Distd. Harris v. Poyner (1852), 1 Drew. 174. Refd. Swainson v. Swainson (1856), 6 De G. M. & G. 648; Re Tomlinson, Tomlinson v. Andrew, [1898] 1 Ch. 232. As to (2) Refd. Pinfold v. Shillingford (1877), 25 W. R. 425.

5470. ———.]—A testator gave all his residuary real estate & his stock, mtges. & securities for money, & all other his personal estate & effects to his wife & his son, upon trust for his wife for life, subject to an annuity for his son; & after

her death, as to all the devised & bequeathed freehold & residuary real & personal estate, of which his wife was to have the yearly interest, upon trust for his son absolutely. Testator left leaseholds, as to which, at the time of his death, he was liable to the landlord for repairs, & they were afterwards repaired at the widow's expense:—*Held*: (1) the widow was entitled to the leaseholds *in specie*; (2) the repairs were to be borne by the residue, & not by the tenant for life.—*HARRIS v. POYNER* (1852), 1 Drew. 174; 21 L. J. Ch. 915; 16 Jur. 880; 61 E. R. 418.

Annotations:—As to (1) Consd. Re Wareham, Wareham v. Brewin, [1912] 2 Ch. 312. Refd. Macdonald v. Irvine (1878), 8 Ch. D. 101; Re Gamo, Game v. Young, [1897] 1 Ch. 881. As to (2) Refd. Pinfold v. Shillingford (1877), 25 W. R. 425.

See, generally, LANDLORD & TENANT.

5471. ——— *Fine incident to preservation of lease.*—The under-lessee of a renewable customary leasehold estate covenanted with the meane lessors, the trustees of a charity, to pay the fines & expenses beyond the amount of one year's rent, on the admittance of new trustees when reduced to a certain number. Pending litigation in respect of the amount of the fines payable to the lord of the manor, the under-lessee died, having specifically bequeathed the leasehold estate. On special case between the parties beneficially interested in the leasehold estate, the amount of the fines payable in the lifetime of the under-lessee, & the costs of the litigation in respect thereof, were ordered to be paid out of her general personal estate, & the amount of the fines payable after her decease, & the costs of the litigation in respect thereof, were ordered to be paid by the specific legatees.—*FITZWILLIAMS v. KELLY* (1852), 10 Hare, 260; 22 L. J. Ch. 1016; 17 Jur. 249; 68 E. R. 926.

Annotations:—Appld. Armstrong v. Burnet (1855), 20 Beav. 424. Consd. Mellish v. Vallins (1862), 2 John. & H. 194. Refd. Moffett v. Bates (1857), 3 Sm. & G. 468; Re Box (1863), 1 Hem. & M. 552; Eccles v. Mills, [1898] A. C. 360; Re Betty, Betty v. A.-G., [1899] 1 Ch. 821.

5472. ——— *Sum for dilapidations & for rent subsequent to testator's death.*—A testator specifically bequeathed certain personal estate upon trusts for H. & her children after payment thereof of a legacy & of his debts & funeral expenses, & bequeathed his residuary estate to pltf., whom he appointed his exor. Part of the residuary estate consisted of a leasehold house, held for a term at a rack rent & considerably out of repair. This leasehold being worthless, pltf., five months after testator's death, surrendered it to the landlord, who would only accept a surrender on payment of rent for two & a half quarters from testator's death & a sum for dilapidations. The residuary estate as a whole was valuable:—*Held*: pltf. was not entitled to have the sums which he had paid to the landlord for dilapidations & for rent subsequent to testator's death paid out of the specifically bequeathed property as being debts of testator.—*Re HAWKINS, HAWKINS v. HAWKINS* (1880), 13 Ch. D. 470; 42 L. T. 306; 44 J. P. 329; 28 W. R. 526, C. A.

Annotations:—Apprvd. Eccles v. Mills, [1898] A. C. 360. Refd. Re Betty, Betty v. A.-G., [1899] 1 Ch. 821; Re Hughes, Ellis v. Hughes (1913), 109 L. T. 509.

5473. ——— *In aggregate gift with freeholds.*—*Re KENSINGTON (BARON), LONGFORD (EARL) v. KENSINGTON (BARON), No. 5614, post.*

5474. Bequest of shares.—Liability for calls.—*BLOUNT v. HIPKINS, No. 5647, post.*

5475. ———.]—Testator bequeathed shares in cos., in which he was an original shareholder, to his son, when he completed his majority:—*Held*: the legatee, on attaining twenty-one, was

entitled to the dividends from testator's death, & to have the shares fully paid up out of the residuary estate.—*WRIGHT v. WARREN* (1851), 4 De G. & Sm. 367; 64 E. R. 872.

Annotations:—*Consd. Armstrong v. Burnet* (1855), 20 Beav. 424; *Day v. Day* (1860), 1 Drew. & Sm. 261; *Re Box* (1863), 1 Hem. & M. 552. *Reid. Re Woodin, Woodin v. Glass*, [1895] 2 Ch. 309.

5476. ———.]—Calls made upon shares in an incorporated co. after the death of the owner are payable out of his general personal estate, & not by the legatee for life under a gift of all testator's shares in the co.—*CLIVE v. CLIVE* (1854), Kay, 600; 2 Eq. Rep. 913; 23 L. J. Ch. 981; 24 L. T. O. S. 33; 69 E. R. 255.

Annotations:—*Apd. Browne v. Collins* (1871), L. R. 12 Eq. 586. *Reid. Armstrong v. Burnet* (1855), 20 Beav. 424; *Wright v. Tuckett* (1860), 1 John. & H. 266; *Bates v. Mackinley* (1862), 31 Beav. 280; *Re Box* (1863), 1 Hem. & M. 552.

5477. ———.]—Where the interest of a testator in the subject-matter which he professes to bequeath is complete, the future calls fall on the legatee & not on the general personal estate; but when further payments are required to make perfect that interest, the general personal estate is applicable for that purpose.

A testator bequeathed shares in a banking co., upon which all calls had been paid, & which, at his decease, was complete & carrying on business; five years after his decease a further call was required:—*Held*: the legatees must pay the call, & it was not a charge upon the general personal estate of testator.—*ARMSTRONG v. BURNET* (1855), 20 Beav. 424; 3 Eq. Rep. 870; 24 L. J. Ch. 473; 25 L. T. O. S. 209; 1 Jur. N. S. 765; 3 W. R. 433; 52 E. R. 666.

Annotations:—*Follid. Day v. Day* (1860), 1 Drew. & Sm. 261; *Re Box* (1863), 1 Hem. & M. 552. *Reid. Moffett v. Bates* (1857), 3 Sm. & G. 468; *Addams v. Forick* (1859), 26 Beav. 384; *Re Betty, Betty v. A.-G.*, [1899] 1 Ch. 821. *Mentd. Eccles v. Mills*, [1898] A. C. 360.

5478. ———.]—A testatrix, who held unpaid-up shares in a banking co., bequeathed them specifically by a codicil to her will. She subsequently received notice of a series of calls on days named. This was accompanied by a notice that the first call must be paid on a specified day, & a form of receipt was inclosed. Testatrix paid the first call, but died before the days named for the other calls. Similar notices were sent to her exors. fourteen days before each of the other days named for payment:—*Held*: the notification of the series of calls did not create a charge on the estate of testatrix within the meaning of the co.'s deed of settlement, or prevent a transfer of her shares; the liability was created by the subsequent notice to pay, & the legatees must take the shares *cum onere*, & they must reimburse the exors. such calls as had been paid by the exors. after the death of testatrix with interest at 4 per cent.—*ADDAMS v. FERRICK* (1859), 26 Beav. 384; 28 L. J. Ch. 594; 33 L. T. O. S. 252; 5 Jur. N. S. 588; 53 E. R. 946.

Annotation:—*Follid. Day v. Day* (1860), 1 Drew. & Sm. 261.

—[See, also, COMPANIES, Vol. IX., p. 406, Nos. 2600 *et seq.*; Vol. X., p. 1136, Nos. 8012–8014.

5479. Devise of mortgaged property—Direction to pay interest out of rents until mortgage paid off—For what amount of interest estate liable.]—Estate devised with direction that exors. should pay interest of a mtge. upon it out of the rents until the mtge. should be paid off, & that such mtge. should be the first which his exors. should discharge:—*Held*: the estate was liable to such interest for one year only from testator's death.—*BRANLAND v. HALLEWELL* (1838), Coop. Pr. Cas. 344; 47 E. R. 536.

5480. Specific devise—Covenant preparatory to lease—Covenant not running with reversion.]—

A lease under seal contained a covenant by the lessor to finish laying down 1,000 acres, part of the land demised, in good English grass within a year. The deed contained a subsequent declaration "that there shall not be implied in this lease any covenant or provision whatever on the part of either of the parties hereto":—*Held*: the covenant must be construed as qualified & controlled by the declaration. Accordingly, it did not run with the reversion; & not being incident to the relation of landlord & tenant, liability for breach thereof properly fell to be borne by the general estate of the deceased lessor.

Even if, as held by the ct. below, it was unqualified & ran with the reversion, it was not a charge thereon. As between the specific devisees of the reversion & the general estate, the latter should primarily bear a liability which in its nature is not incident to the relation of landlord & tenant, but was incurred preparatory thereto.—*ECCLES v. MILLS*, [1898] A. C. 360; 67 L. J. P. C. 25; 78 L. T. 206; 46 W. R. 398; 14 T. L. R. 270, P. C.

Annotations:—*Consd. Re Betty, Betty v. A.-G.*, [1899] 1 Ch. 821. *Apd. Re Hughes, Ellis v. Hughes*, [1913] 2 Ch. 491. *Reid. Re Giers, Cooper v. Giers*, [1899] 2 Ch. 54. *Mentd. Stuart v. Joy*, [1904] 1 K. B. 362.

5481. ———. Covenant running with reversion.]—In 1901 testator demised freehold premises used as pottery works to lessees for a term of fourteen years at a yearly rent of £120, & thereby covenanted with the lessees that he would, if required by the lessees during the term, build an additional oven & cone & shed & workshops according to the plan prepared by a named architect, the lessees paying an additional rent at the rate of £10 per cent. *per annum* on the gross outlay of the lessor on the works, such additional rent to be computed from the date when the architect should certify in writing that the works had been completed. There was no actual plan in existence at the date of the lease, but shortly afterwards the architect prepared a plan & the workshops were erected by testator, but disputes having arisen as to the proposed site of the other works, nothing further was then done. Testator died in 1909, having by his will, which was made in the same year, specifically devised the demised premises. In 1911 the lessee required testator's exors. to complete the works, & the disputes were referred to arbn., & the arbitrator by his award required the exors. to erect the works on part of the demised premises & to pay the costs of the award. On a summons raising the question whether the expenses of erecting the works & the costs of the arbn. were payable by the specific devisees in exoneration of testator's general estate:—*Held*: the obligation imposed by the covenant was not one in its nature incident to the relation of landlord & tenant, but was preparatory to the complete establishment of that relation & therefore, according to the law stated in *Eccles v. Mills*, No. 5480, *ante*, was one which, as between the specific devisees of the reversion & the general estate, ought to be primarily borne by the general estate.

This covenant is, I think, one which would run with the reversion, but LORD MACNAUGHTEN points out that that fact is not sufficient to relieve the testator's general personal estate from bearing the burthen of his liabilities, & that the inquiry must go deeper (*WARRINGTON, J.*).—*Re HUGHES, ELLIS v. HUGHES*, [1913] 2 Ch. 491; 83 L. J. Ch. 31; 109 L. T. 509.

Sect. 7.—Order of application of assets: Sub-sect. 1, A. (c), (d) & (e) i.]

(c) *Appropriation of Specific Fund for Payment.*

5482. General rule—Fund to be first applied.]—Rule as to the application of assets. Where the will, going beyond a mere charge, creates a particular fund for payment of debts, that shall be first applied, in exoneration of descended estates, whether acquired after the date of the will, or not, & of the personal estate, even in favour of the next of kin, taking it for want of disposition.—*MILNES v. SLATER* (1803), 8 Ves. 295; 32 E. R. 367.

Annotations:—Consd. Dacre v. Patrickson (1860), 1 Drew. & Sm. 182. *Reid. Harmood v. Oglander* (1803), 8 Ves. 106. *Mentd. Pearmain v. Twiss* (1860), 2 Giff. 130.

5483. ———.]—*TROTT v. BUCHANAN*, No. 5091, *post*.

5484. Appropriation of specific part of personal estate—Residuary estate disposed of.]—Testator gave specifically parts of his personal estate, chargeable with his debts & legacies, & gave the residue of his personal estate to another:—*Held*: the debts & legacies would fall upon the specific gift, & not upon the residue.—*BROWNE v. GROOMBRIDGE* (1819), 4 Madd. 495; 50 E. R. 788.

Annotations:—N.F. Kilford v. Blancy (1885), 31 Ch. D. 56. *Reid. Webb v. De Beauvoisin* (1862), 31 Beav. 573. *Mentd. Smith v. Jackson* (1823), 1 L. J. O. S. Ch. 231; *Parker v. Marchant* (1842), 1 Y. & C. Ch. Cas. 290; *Taylor v. Taylor* (1853), 10 Harc. 475; *Re Jones, Jenkins v. Jones* (1866), 14 L. T. 540.

5485. ———.]—Testatrix having made several specific bequests of stock, gave the residue of her funded property, after payment of her debts & legacies, to A.; she gave the residue of her real & personal estates to others, & directed one particular legacy to be paid out of the stock:—*Held*: the residue of the stock was the primary fund for the payment of the debts & legacies.—*HOAT v. YEATS* (1819), 1 Jac. & W. 102; 37 E. R. 314.

Annotations:—Consd. Re Grainger, Dawson v. Higgins (1900), 83 L. T. 209. *Reid. Parker v. Marchant* (1842), 1 Y. & C. Ch. Cas. 290.

5486. ———.]—Specific bequest of personality to trustees for certain persons, "subject to the provisions hereinafter made." Then followed a proviso, that these trust funds "should be liable to & applicable" by the trustees, to the payment of the debts, etc. There was a residuary bequest to other persons:—*Held*: the specific legacy was primarily liable to the payment of the debts, etc.—*WEBB v. DE BEAUVOISIN* (1862), 31 Beav. 573; 1 New Rep. 81; 32 L. J. Ch. 217; 9 Jur. N. S. 369; 11 W. R. 132; 54 E. R. 1261.

Annotations:—Reid. Coventry v. Coventry (1865), 2 Drew. & Sm. 470. *Mentd. Harloe v. Harloe* (1875), L. R. 20 Eq. 471.

5487. ———.]—A testator directed that, after payment of his debts, all his money should be divided between his three children. All his other personal property he devised to his eldest son:—*Held*: the debts were primarily payable out of the money specifically bequeathed.—*VERNON v. MANVEIS (EARL)* (No. 2) (1862), 31 Beav. 623; 32 L. J. Ch. 246; 54 E. R. 1281.

5488. ——— Residuary estate undisposed of.]—

A testator bequeathed specific chattels charged with the payment of a pecuniary legacy & of all testator's just debts & funeral & testamentary expenses & he bequeathed other specific & pecuniary legacies, but made no residuary bequest:—*Held*: notwithstanding the charge, the general undisposed of residue was first applicable.—*HEWETT v. SNARE* (1847), 1 De G. & Sm. 333; 63 E. R. 1092.

5489. ———.]—Bequest of specific chattels in trust to sell, "in the first place" to pay the debts, & then to divide the residue amongst five persons. There was no residuary gift:—*Held*: the debts were primarily payable out of the general residue.—*NEWBEGIN v. BELL* (1857), 23 Beav. 386; 53 E. R. 152.

Direction to raise specified sum out of realty.]—*See Sub-sect 2, D., post*.

(d) *Where Realty made Primary Fund for Payment.*
See Sub-sect. 2, post.

(c) *Creation of Mixed Fund of Realty and Personality.*

i. *Mode of Creation.*

5490. Trust for sale of realty & personality—Direction in will to pay debts & legacies out of proceeds of sale.]—Testator by his will devised all his real estate to his exors. for the purposes thereafter stated; &, after empowering them either to continue his business or to dispose of it, he gave the profits of it in the one case, & the interest of the moneys arising from the sale in the other, & also the interest of the securities on which the rest of his capital should be invested, to his daughter for life her receipt to be a discharge. He then gave her the rents & profits of all his real estates during her life; & at her decease he devised & bequeathed to her heirs all his estates real & personal as tenants in common; if his daughter had but one child, such child was to possess the whole; but if she should die without issue, then at her decease he gave certain legacies. He next directed all his goods & effects to be sold, his legacies to be paid, & a sum invested sufficient to purchase £150 a year, which was to be paid to the husband of the daughter. He then ordered his real estates to be sold at the decease of his daughter or at the decease of his brothers & sisters, according as a particular event might turn out; & he gave over to certain persons all the residue of his personal estate, including the proceeds of the sale of the real estates when sold, & the rents of them until they were sold. The daughter died without having had issue:—*Held*: the annuities & legacies given at her decease were charged both on the real & personal estate, & were to be borne proportionally by the two funds.—*DUNK v. FENNER* (1831), 2 Russ. & M. 557; 39 E. R. 506.

Annotations:—Reid. Boughton v. Boughton, Boughton v. James (1848), 1 H. L. Cas. 406. *Mentd. Garratt v. Cockerell* (1842), 1 Y. & C. Ch. Cas. 494; *Toller v. Attwood* (1850), 15 Q. B. 929; *Parker v. Birken* (1854), 1 K. & J. 156; *Re Wynch's Trusts, Ex p. Wynch* (1854), 5 De G. M. & G. 188; *Herrick v. Franklin* (1868), L. R. 6 Eq. 593.

5491. ———.]—A testator, by will duly

PART IV. SECT. 7, SUB-SECT. 1.— A. (c).

f. Funeral expenses—Charged on rents.]—Testator having directed that his funeral expenses should be deducted from the rents of certain property:—*Held*: these expenses were specifically charged upon the rents. The other debts were directed to be paid out of the personality undisposed of.—*Re CHAN, ETC.* (1913), 15 Hong Kong L. R. 74.—**HONG KONG.**

g. Legacies—Charged on fund on deposit in bank—Testator indebted to bank—Executor's right to permit bank to retain amount of debt.]—One P. died, leaving a will by which he directed that certain legacies should be paid out of a fund of Rs.10,000 invested in fixed deposit in the Delhi & London Bank. The Bank had during P.'s life-time advanced certain sums to his daughter on an undertaking by P. that he would stand surety for the

loan. P. was also himself indebted to the Bank:—*Held*: on suit by the legatees, that the exor. of P.'s will was perfectly justified, on being satisfied as to the fact of P.'s relations with the Bank above described, in permitting the Bank to realise from the fund in question both the amount of the loan to P.'s daughter & the amount of his own indebtedness.—*POCOCK v. DELHI & LONDON BANK, LTD.* (1914) 1 L. R. 36 All. 217.—**IND.**

attested, gave all his real & personal estate to trustees, to convert into money & pay his debts, & then to appropriate & take out of his trust moneys £1,000, which he gave to pltf. By a codicil, not properly attested so as pass real estate, he revoked the legacy:—*Held*: on this will testator had made his real & personal estate a common fund for payment of this legacy: the revocation was inoperative as regarded the real estate, & pltf. was entitled in the proportion which the real estate bore to the personal.—*STOCKER v. HARBIN* (1841), 3 Beav. 479; 49 E. R. 188.

Annotation:—*Consd. Simmons v. Rose* (1856), 6 De G. M. & G. 411.

5492. ———.]—A testator seized of real estate, & entitled to some personal estate including a leasehold colliery & canal shares, appointed a settled real estate to his son, & gave all his real & personal property to trustees, upon trust, at some convenient & proper period, with the approbation of the son, to sell & convert the same, & to invest & apply £1,000 upon certain trusts, & to pay two life annuities, & subject as aforesaid, for the purpose of paying to pltf. an annuity of £200, besides half the income of his real & personal estates except the estate given to his son, provided that her annuity should in no case exceed the sum of £800 a year. He directed that the profit of his mines should not be deemed income, but only so much as should remain after laying by £10 per cent. for repairs, etc. Subject to the above legacy & annuities, testator gave all his real & personal estate to his son, & appointed his son & the two trustees exors.; & empowered the trustees to let the son into possession of all the property, upon his securing the legacy & annuities. Testator died, leaving personal estate insufficient to pay his debts, unless the colliery was resorted to. The trustees disclaimed & renounced. The son proved the will, entered into possession of the whole property, & worked out the colliery, which yielded, in the whole, profits amounting to £27,000. He paid testator's debts out of his own moneys, & claimed to be allowed interest upon them:—*Held*: (1) the amount of testator's debts, & funeral & testamentary expenses, must be deducted from the value of his personal estate at the end of a year after his death, & the son must be charged with interest on the surplus; & the annual income of testator's estate, applicable to the payment of the annuities & the interest of the £1,000 legacy, was then to be ascertained; (2) the £1,000 legacy was payable out of the real & personal estate *pro rata*.—*LORD v. WIGHTWICK* (1853), 4 De G. M. & G. 803; 2 Eq. Rep. 349; 23 L. J. Ch. 235; 22 L. T. O. S. 249; 43 E. R. 721, L. J.J.; *affd. sub nom. WIGHTWICK v. LORD* (1857), 6 H. L. Cas. 217, H. L.

Annotation:—*Generally, Mentl. Wright v. Chard* (1859), 29 L. J. Ch. 82.

5493. ———.]—A testator by his will gave a life annuity which he directed to be issuing out of his real estate until a nephew attained twenty-one, & thenceforth out of his personal estate. He directed the real estate to be sold by trustees, who were also exors. of the will, on the nephew attaining twenty-one, & the proceeds to be held upon the trusts thereafter declared. He also directed the trustees to sell his personal estate, & out of the proceeds to pay his debts, funeral & testamentary expenses & legacies, & to invest the residue, with the surplus rents & profits of the real estate until it was sold, & the proceeds of it after the sale, & stand possessed of the investments upon trust to set apart thereout a fund for payment of the annuity, & on its determination to apply the fund,

set apart to answer it, in the same manner as was therein directed with respect to the residue of the personal estate. He gave the residue of the trust fund to his nephew. An insufficient fund was set apart to answer the annuity, of which there were consequently arrears at the annuitant's death:—*Held*: (1) the legacies were payable out of the proceeds of the real as well as of the personal estate; (2) the annuity was also payable out of the mixed fund; (3) the arrears of it were payable out of the fund set apart to answer it.—*BRIGHT v. LARCHER* (1858), 3 De G. & J. 148; 44 E. R. 1225, L. J.J.

Annotations:—*As to* (1) *Consd. Field v. Peckett* (No. 1) (1861), 29 Beav. 568. *As to* (2) *Refd. Perkins v. Cooke* (1862), 2 John. & H. 393; *Gee v. Mahood* (1878), 9 Ch. D. 151. *As to* (3) *Refd. Brayne v. Rees* (1866), 15 W. R. 195.

5494. ———.]—Testator gave his real & personal estate to trustees, upon trust, out of the rents & produce, or by a sale or other disposition thereof, to raise an annuity for his wife & certain legacies, & to invest the surplus. He directed a le of his real estate after the death of his wife, & gave his residue to his children:—*Held*: the personal estate was not primarily charged with the annuity, but the real & personal estate formed one common fund for its payment.—*BEDFORD v. BEDFORD* (1865), 35 Beav. 584; 55 E. R. 1023.

Annotation:—*Consd. Allan v. Gott* (1872), 7 Ch. App. 439.

5495. Trust for sale of realty—*Direction in will for proceeds to be treated as personalty*—*Residue to be applied as residue of personal estate*.—A. by will devised his real estates to trustees, in trust, to sell the same in order to pay off the incumbrances & to apply the residue as he directed with respect to the residue of his personal estates. He devised the residue of his personal estates, after payment of debts & legacies, to his exors. upon certain trusts. On the implied intention of testator, taken from the whole context of the will, the surplus of the money produced by the sale of the real estates was charged with the payment of simple contract debts.—*KIDNEY v. COUSSMAKER* (1797), 7 Bro. Parl. Cas. 573; 3 E. R. 371, H. L.; *affg. S. C. sub nom. KIDNEY v. COUSSMAKER*, *WILLIAMS v. COUSSMAKER* (1793), 2 Ves. 267, L. C.; (1792), 1 Ves. 436, L. C.

Annotations:—*Consd. Bright v. Larcher* (1858), 3 De G. & J. 148. *Foll. Field v. Peckett* (No. 1) (1861), 29 Beav. 568. *Refd. Gibbs v. Ogilby* (1806), 12 Ves. 413.

5496. ———.]—Testator devised his real estate to his exors. in trust to sell, & he declared that, until the sale, it should "be considered as converted into personalty from the time of his decease," & that the produce should "be deemed part of his residuary personal estate." He bequeathed the residue of his personal estate to several persons. The personal estate proving insufficient to pay the pecuniary legacies:—*Held*: they were a charge on the produce of the real estate.—*FIELD v. PECKETT* (No. 1) (1861), 29 Beav. 568; 30 L. J. Ch. 811; 4 L. T. 459; 7 Jur. N. S. 983; 9 W. R. 525; 54 E. R. 748.

5497. ———.]—*Executors to hold proceeds "as part of personal estate."*—A testator devised his real estates to A. & B., in trust to sell & pay off all incumbrances thereon, & stand possessed of the residue "as part of his personal estate." He bequeathed his personal estate to the same persons, in trust to convert, & with the produce thereof & of the sales of his real estates to pay his debts, etc., & the legacies, & to pay the residue to whom he should give the same by codicil. He made no gift of the residue:—*Held*: (1) the incumbrances were payable out of the real estate; (2) the debts & legacies were payable *pari passu*

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out of the mixed fund, composed of the produce of realty & personality.—*SHALLCROSS v. WRIGHT* (1850), 12 Beav. 505; 50 E. R. 1154.

Annotations:—*As to* (2) *Reid. Simmons v. Rose* (1856), 6 De G. M. & G. 411. *Generally, Mentd. Taylor v. Taylor* (1853), 3 De G. M. & G. 190.

5498. ——*J*—*ROBINSON v. LONDON HOSPITAL (GOVERNORS)*, No. 5529, *post*.

5499. ——*J*—A testator, after directing payment of all his debts, devised the residue of his freehold & copyhold estates to trustees, upon trust to sell & absolutely dispose of the same, & he directed the moneys to arise from such sales should be deemed to be part of his personal estate, & that the rents & profits of the hereditaments, till their sale, should be deemed to be part of the annual income of his personal estate, & that the same moneys, rents & profits should be subject to the disposition thereafter made concerning his personal estate & the annual income thereof respectively; & as touching his personal estate, he bequeathed the same to the trustees, upon trust to invest the same in consols & pay certain legacies. Testator made no disposition of the residue of his estate:—*Held*: (1) the real & personal estate was constituted a blended fund, & applicable, *pari passu*, in payment of debts & legacies; (2) the heir was not entitled to an inquiry as to the relative value of the real & personal estates, with a view to ascertain the amount for which he was liable to contribute, but a sale of such real estate must be made.—*SIMMONS v. ROSE* (1856), 6 De G. M. & G. 411; 25 L. J. Ch. 615; 26 L. T. O. S. 265; 2 Jur. N. S. 73; 4 W. R. 225; 43 E. R. 1292, L. C.

Annotations:—*As to* (1) *Consd. Luckcraft v. Pridham* (1879), 48 L. J. Ch. 636. *Reid. Percival v. R.* (1864), 3 H. & C. 217.

5500. — No absolute direction in will for conversion of realty.—It is not necessary that there should be an absolute direction for conversion of real estate, in order that the real & personal estate may constitute a mixed fund for payment of legacies.

A testator gave his real & personal estate to trustees, & empowered them to sell the real estate, & he directed that an annuity should be paid out of the annual income of the estate; & he also directed certain legacies to be paid out of his trust estates, moneys & premises. He was intestate as to the residuary estate by reason of the death, in his lifetime, of the residuary devisee & legatee:—*Held*: the legacies were payable out of the real & personal estate ratably.—*ALLAN v. GOTT* (1872), 7 Ch. App. 439; 41 L. J. Ch. 571; 26 L. T. 412; 20 W. R. 427, L. JJ.

Annotations:—*Consd. Howard v. Dryland* (1877), 38 L. T. 24; *Luckcraft v. Pridham* (1879), 48 L. J. Ch. 636; *Re Smith, Smith v. Smith*, [1913] 2 Ch. 216. *Reid. Penny v. Penny* (1879), 11 Ch. D. 440; *Wells v. Row* (1879), 48 L. J. Ch. 476; *Re Stephens, Warburton v. Stephens* (1889), 43 Ch. D. 39; *Bentlnck v. Portland* (1897), 38 L. T. 53; *Re Spencer Cooper, Poß v. Spencer Cooper*, [1908] 1 Ch. 130; *Re Raggi, Brass v. Young*, [1913] 2 Ch. 206.

5501. — No trust for conversion for purpose of satisfying charge.—*Re SMITH, SMITH v. SMITH*, No. 5640, *post*.

5502. Trusts to receive rents & profits of real & personal estates.—Under a bequest of real & personal estates, upon trust to receive the rents & profits, & to pay legacies & annuities, & vest the surplus rents, etc., for other purposes, the personal estate is the primary fund liable to the payments, there being no direction to discharge it, or to sell the real estate, so as to constitute a mixed fund.—*BOUGHTON v. BOUGHTON, BOUGHTON v. JAMES*

(1848), 1 H. L. Cas. 406; 10 L. T. O. S. 497; 9 E. R. 815, H. L.

Annotations:—*Consd. Robinson v. London Hospital* (1853), 10 Hare, 19. *Idid. Creak v. Owen* (1854), 2 Sm. & G. 241. *Fold. Tidd v. Lister* (1854), 3 De G. M. & G. 857; *Tench v. Chess* (1855), 6 De G. M. & G. 453. *Consd. Simmons v. Stanley* (1864), 2 De G. J. & Sm. 183. *Consd. Meller v. Cross*, *Eyre v. Parker* (1866), L. R. 2 Eq. 592; *Allan v. Gott* (1872), 7 Ch. App. 439. *Idid. Howard v. Dryland* (1877), 38 L. T. 24. *Consd. Re Oliver, Wilson v. Oliver*, [1908] 2 Ch. 74. *Reid. Biann v. Bell* (1859), 5 De G. & Sm. 658; *Bentley v. Oldfield* (1854), 19 Beav. 225; *Bellairs v. Bellairs* (1874), L. R. 18 Eq. 510; *Wells v. Row* (1879), 48 L. J. Ch. 476; *Patching v. Barnett* (1881), 45 L. T. 292; *Re Dumble, Williams v. Murrell* (1883), 23 Ch. D. 360. *Mentd. Early v. Benbow* (1846), 2 Coll. 342; *Greenwood v. Roberts* (1851), 15 Beav. 92; *Re Finch, Abbiss v. Burney* (1881), 17 Ch. D. 211; *Re Roberts, Repington v. Roberts-Gawen* (1881), 19 Ch. D. 520; *Wainwright v. Miller*, [1897] 2 Ch. 255; *Re Gage, Hill v. Gage*, [1898] 1 Ch. 498.

5503. ——*J*—Testator being possessed of real & personal estate directed the latter to be invested in Govt. securities the interest whereof with all the rents & profits from freehold, copyholds or leasehold property after payment of all his debts, etc., he gave & devised upon certain trusts:—*Held*: this did not evidence a sufficient intention to create a mixed fund so as to exempt the application of the personal estate in the first instance from the discharge of his debts.—*TIDD v. LISTER, BASSIL v. LISTER* (1853), 3 De G. M. & G. 857; 23 L. J. Ch. 249; 23 L. T. O. S. 101; 18 Jur. 543; 2 W. R. 184; 43 E. R. 336, L. C.

Annotations:—*Mentd. Hudson v. Carmichael* (1854), Kay, 613; *Re Duffy's Trust* (1860), 28 Beav. 386; *Life Assn. of Scotland v. Siddal* (1861), 3 De G. F. & J. 271; *Durham v. Crackles* (1862), 1 New Rep. 165; *Knox v. Wells* (1864), 2 Hem. & M. 674; *Re Carr's Trusts* (1871), L. R. 12 Eq. 609; *Taunton v. Morris* (1879), 11 Ch. D. 779.

5504. ——(1) Testator was possessed of leaseholds of tithes held for three lives & renewable on the dropping of any of the lives. He was in the habit of effecting insurances on the lives, & out of the moneys payable at a death he renewed the lease, & effected a fresh policy on the new life inserted. By his will he gave all his real & residuary personal estate to trustees to accumulate the same for twenty-one years, & authorised them thereout to keep up the policies, to renew the leases, & to effect fresh policies on the new lives "on the plan he himself had adopted," & subject thereto he gave the said estate & its accumulations to D. for life, with remainder to her sons & daughters successively in tail. D. married & had two daughters only, the elder of whom died an infant in her mother's lifetime. One of the *cestuis que vie* died, & there was a large surplus of the sum assured after renewing the lease & effecting a new policy:—*Held*: although the will imported a power only to the trustees to renew the lease, etc., it was one which they were bound to exercise, & was consequently equivalent to a trust, & therefore a competent part of the fund must be retained for those objects; but, subject thereto, the policies, being part of the personal estate of testator, vested absolutely in the first tenant in tail, subject to the life-estate of the tenant for life under the will, & were now payable to her legal personal representative, petitioner.

(2) As to contribution between the real & personal estate:—*Held*: the personal estate was primarily liable.—*MELLER v. STANLEY* (1864), 2 De G. J. & Sm. 183; 4 New Rep. 124; 10 L. T. 512; 12 W. R. 780; 46 E. R. 345, L. JJ.

5505. ——*J*—Testator devised & bequeathed the residue of his real & personal estate to trustees upon trust to convert his personal estate into money, & to take the rents & profits of such real & personal estate to pay certain annuities mentioned in his will, at various times & in various manners;

& "subject as aforesaid," his trustees were to stand possessed of the real & personal estate upon trust as to one moiety, to pay the rents, etc., to his wife for life; & as to the other moiety during the life of testator's wife, & as to the whole after his death, out of the rents, etc., to pay the annuities & out of his personal estate to pay the legacies left by his will, & on insufficiency of personal estate testator charged such legacies on real estate; & after making provision for a grandniece & others, testator directed that, "subject as aforesaid," his trustees should stand possessed of the residue of his real & personal estate upon trust, after the death of his wife, so long during the then residue of the life of his nephew R. until he should have a son who should arrive at the age of twenty-one years, or die under that age leaving lawful issue, upon trust to pay certain sums therein mentioned, & "subject as aforesaid," testator directed that his trustee should stand seized of the residue of his real estates upon trusts for the eldest or only son of R. & the heirs of his body in strict settlement. The entail was barred, & R.'s son became owner in fee simple of the real estate. The question was how the annuities were to be borne, whether, on the son of R. attaining twenty-one, the real estate was exonerated, or the annuities were to be paid ratably out of the rents & proceeds of the whole real & personal estate treated as one fund:—*Held*: although, there was no absolute conversion of real estate, the annuities were to be paid ratably out of the whole income as one fund; & the case did not fall within the rule laid down in *Boughton v. Boughton*, *Boughton v. James*, No. 5502, *ante*, as in that case the surplus funds were all to go to the same person.—*HOWARD v. DRYLAND* (1877), 38 L. T. 24.

5506. Trust for maintenance of infants out of real & personal estates—Directions for division of property on children attaining twenty-one.]—A testator gave his real & personal estate to trustees, for the maintenance of his four children until they attained twenty-one. As they arrived at that age, respectively, he directed it to be divided as follows: A legacy of £100 to his son, & his property at G., freehold, between his daughters:—*Held*: on a deficiency of personal estate, the legacy was not charged on the real estate.—*BENTLEY v. OLDFIELD* (1854), 19 Beav. 225; 52 E. R. 335.

5507. Devise of realty & personal to same person—For life of devisee.]—*HILL v. TOOGOOD* (1837), 1 Jur. 704.

5508. — Whole charged with payment of debts—Death of devisee in lifetime of testator.]—Claim filed for the administration of an estate & payment of debts. Testatrix devised & bequeathed all her real & personal estate to A. & charged the whole with payment of her debts. A. died in the lifetime of testatrix, & the real estate descended on her heir-at-law:—*Held*: the debts should be paid out of the personal estate, so far as that should be adequate to such payment, & that a sufficient part of the real estate should be sold for payment of the debts, for which the personal estate might prove insufficient.—*FERRIS v. FERRIS* (1850), 15 L. T. O. S. 342; 14 Jur. 845.

5509. Devise of real estate & separate gift of residuary personal estate.]—*Re COWELL, TEMPLE v. TEMPLE* (1920), 150 L. T. Jo. 296.

5510. Mixed fund created by will—Bequest by codicil of realty "freed from charges created by will."—Testatrix, by her will, directed her real estate to be sold, & charged debts & legacies & a sum of £5,000 upon the proceeds of the real estate & her personal estate as a mixed fund.

The trust of the mixed fund was for A. for life, & after her decease, subject to the charge of £5,000 in favour of the appointees of A. by will, for C. absolutely. By a codicil testatrix gave to A., in fee, the real estate, freed from any charges created by the will:—*Held*: the personal estate was subject to the whole of the £5,000 charge.—*TATLOCK v. JENKINS* (1854), Kay, 654; 23 L. J. Ch. 767; 24 L. T. O. S. 42; 18 Jur. 891; 69 E. R. 276.

ii. Effect of Creation.

5511. Whether mixed fund primarily liable.]—Testator charges all his temporal estate with the payment of his debts & legacies & then devises all his freehold & copyhold estate to his eldest son & his heirs subject to his debts & legacies & makes him exor., the money arising by the sale of the lands shall be first applied to the payment of the debts.—*WALKER v. MEAGER* (1729), Mos. 204; 2 P. Wms. 550; 25 E. R. 351, L. C.

5512. —.]—Testator devised his real estates to trustees upon trust to sell & to stand possessed of the produce thereof, & also of his moneys & securities for money upon trust, in the first place, to pay his debts, funeral expenses, & legacies; & as to the residue of the moneys arising from the sale of his real estates, not mentioning his personality, after payment of the debts, sums, & legacies thereinbefore mentioned, upon trust to invest & pay the interest to A. & B. for their lives. Testator had other personal estate, which he also disposed of by his will:—*Held*: the mixed fund was the primary fund for payment of his debts & legacies, the portions of it arising respectively from the real & personal estate were to be applied *pro rata*, & the surplus of it was to be divided proportionably between the parties who were entitled, under the will, to the produce of the realty, & those who were entitled to the personality, who in this case were the next of kin.—*WEST v. COLE* (1841), 4 Y. & C. Ex. 460; 10 L. J. Ex. Eq. 40; 160 E. R. 1087.

5513. — Necessity for direction in will for payment out of mixed fund.]—Where a testator creates for purposes of disposition a mixed fund of the proceeds of realty directed to be converted & personality, the personality is not exempted from its primary liability to debts, etc., unless these are directed expressly or by necessary implication to be paid out of the mixed fund. The mere fact that the will contains a constructive charge of debts upon real estate will not amount to such a direction.—*LUCKCRAFT v. PRIDHAM* (1879), 48 L. J. Ch. 636.

5514. — —.]—*ELLIOTT v. DEARSLEY*, No. 5754, *post*.

5515. — —.]—*Re BOARDS, KNIGHT v. KNIGHT*, No. 5758, *post*.

5516. — —.]—*Re BALLS, TREWBY v. BALLS*, No. 4338, *ante*.

5517. —.]—Testator commenced his will by saying "First I will that all my just debts including mtge. debts & funeral & testamentary expenses be paid & satisfied." He then gave a specific bequest of personality to his son T., & six separate specific devises of realty to that son & his other children. Finally he devised other real estate & the residue of his personality upon trust for conversion, & out of the proceeds to pay his just debts including mtge. debts & funeral & testamentary expenses, & to hold the balance for his sons & daughters equally. The values of the properties were as follows: Specific bequest to T., £1,671; real estate specifically devised to the children, £17,110; personality subject to final trust, £330;

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realty subject to that trust, £1,170. Part of the realty specifically devised was unincumbered; other parts were subject to various mtges. amounting to £7,000. The other, unsecured, debts amounted to £970. It was conceded that the funds subject to the final trust, so far as they would extend, must be applied in payment, ratably of the mtge. debts & the other debts & funeral & testamentary expenses:—*Held*: (1) the implied charge of debts created by the initial direction was explained & limited by the final creation of a definite fund for the purpose, & no other part of the real estate than that comprised in it was charged with debts & funeral & testamentary expenses; (2) the proportion of mtge. debts not discharged out of the special trust fund must be borne by the various mtgd. properties, each bearing the balance of its own incumbrance; (3) the proportion of the other debts & expenses not discharged out of the special fund must, as between the personalty specifically bequeathed to T. & the various specifically devised real estates, fall ratably on them in proportion to their values, which in the case of those which were incumbered would be the total value of each property less the proportion of mtges. on it not discharged out of the special fund.—*Re MAJOR, TAYLOR v. MAJOR*. [1914] 1 Ch. 278; 83 L. J. Ch. 461; 110 L. T. 422; 58 Sol. Jo. 286.

—*J*.—*See, also*, Sub-sect. 2, C. (c) ii., *post*.

5518. Realty & personalty liable *pro rata*.]—*LONG v. SHORT*, No. 5882, *post*.

5519. —*J*.—Where a testator creates a mixed & general fund from real & personal estate, & directs that fund to be applied in payment of debts & legacies, the real & the personal estate must contribute, in proportion to their relative amounts, to the payment of the debts & legacies; & if some of the legacies fail by lapse or otherwise, that part of the fund which would have been applicable to those purposes, being undisposed of, belongs, as far as it is composed of real estate, to

the heir, &, as far as it is composed of personal estate, to the next of kin.—*ROBERTS v. WALKER* (1830), 1 Russ. & M. 752; 39 E. R. 288.

Annotations.—*Distd. Hill v. Toogood* (1837), 1 Jur. 704. *Apld. West v. Cole* (1841), 4 Y. & C. Ex. 460. *Distd. Boughton v. Boughton*, *Boughton v. James* (1848), 1 H. L. Cas. 406. *Foidl. Shallicross v. Wright* (1850), 13 Beav. 505. *Distd. Blann v. Bell* (1852), 5 De G. & Sm. 658. *Consd. Bentley v. Oldfield* (1854), 19 Beav. 225; *Tatlock v. Jenkins* (1854), Kay, 654. *Apld. Cradock v. Owen* (1854), 2 Sm. & G. 241; *Simmons v. Rose* (1856), 6 De G. M. & G. 411; *Allan v. Gott* (1872), 7 Ch. App. 439. *Distd. Wells v. Row* (1879), 48 L. J. Ch. 476. *Expld. Elliott v. Dearsley* (1880), 16 Ch. D. 322. *Apld. Re Spencer Cooper, Poë v. Spencer Cooper*, [1908] 1 Ch. 130. *Distd. Re Smith, Smith v. Smith*, [1913] 2 Ch. 216. *Reid. A.-G. v. Southgate* (1841), 12 Sim. 77; *Robinson v. Geldard* (1852), 3 Mac. & G. 735; *Tench v. Cheese* (1856), 6 De G. M. & G. 453; *Percival v. R.* (1864), 3 H. & C. 217; *Disney v. Crosse, Eyre v. Parker* (1866), L. R. 2 Eq. 592; *Howard v. Dryland* (1877), 38 L. T. 24; *Re Milnes, Milnes v. Sherwin* (1885), 53 L. T. 534. *Mentd. Eyre v. Marsden* (1839), 4 My. & Cr. 231; *Elborne v. Goode* (1844), 14 Sim. 165; *Coombs v. Queen's Proctor* (1852), 2 Rob. Eccl. 547; *Bellairs v. Bellairs* (1874), L. R. 18 Eq. 510; *Re Dumble, Williams v. Murrell* (1883), 23 Ch. D. 360; *Re Oliver, Wilson v. Oliver*, [1908] 2 Ch. 74.

5520. —*J*.—*DUNK v. FENNER*, No. 5490, *ante*.

5521. —*J*.—An alien, resident in England, purchased an equitable interest in freehold lands, & also a lease for a long term of years, & afterwards obtained letters of denization, which in terms conferred upon him not only the power of acquiring lands in future, but of retaining & enjoying all lands which he had theretofore acquired. By his will he directed all his property to be sold & converted into money, & after charging this mixed fund with his debts & legacies, gave the residue to aliens resident abroad, one of whom was his heir-at-law:—*Held*: the interest in land & the pure personal estate must respectively be valued & bear their proportions of the debts & legacies.—*FOURDRIN v. GOWDEY* (1834), 3 My. & K. 383; 3 L. J. Ch. 171; 40 E. R. 146.

Annotations.—*Distd. Boughton v. Boughton*, *Boughton v. James* (1848), 1 H. L. Cas. 406. *Reid. A.-G. v. Southgate* (1842), 12 L. J. Ch. 147. *Mentd. Du Hourmelin v. Sheldon* (1839), 1 Beav. 79; *Barrow v. Vaddin* (1857), 24 Beav. 1; *Fairer v. Park* (1876), 3 Ch. D. 303.

5522. —*J*.—*STOCKER v. HARBIN*, No. 5491, *ante*.

PART IV. SECT. 7, SUB-SECT. 1.—A. (c) ii.

5518 i. Realty & personalty liable *pro rata*.]—Testator by will made a specific devise & bequest to his wife for life, & devised & bequeathed the residue to his estate to trustees upon trust for sale & conversion, but postponing the sale of the property devised to his wife for life until after her death, & out of the proceeds to pay his debts & legacies, & he gave certain legacies, including legacies to his exors., but made no further disposition of the residue. The trustees realised the personal estate & sold the real estate other than that postponed; & after paying the debts & legacies, had a large surplus on their hands. The Master found that testator had no next of kin:—*Held*: the debts & legacies should be apportioned between the real & personal estate according to their respective values.—*A.-G. v. M'PHERSON* (1877-78), 3 V. L. R. 270.—*AUS.*

5518 ii. —*J*.—Where a married woman died intestate possessed of personalty, to which her husband became entitled, & realty which was divisible between her husband & her next of kin:—*Held*: the personal estate must bear the cost of its collection & conversion, & the realty the cost of its realisation & both real & personal estates must contribute in proportion to their respective values towards payment of the debts & costs of administration.—*Re PEARCE* (1905),

1 Tas. L. R. 106.—*AUS.*

5518 iii. —*J*.—Where by his will testator expresses the intention that his real & personal property shall form a blended mass from which certain legacies & annuities are to be paid, these legacies & annuities are charged on the corpus of the real estate & in such a case the rule that a legacy is *prima facie* payable out of personalty has no application.—*PARKIN v. JAMES* (No. 2) (1905), 2 C. L. R. 565.—*AUS.*

5518 iv. —*J*.—Testator, after directing payment of his debts out of his personal property, or if that should prove insufficient, then, that so much of his real estate as would supply the deficiency might be sold for that purpose, went on to direct that his land should be sold, & the income of the capital arising from the sale be paid yearly to his wife, for her maintenance during her natural life, after which he gave a number of charitable bequests & pecuniary legacies, but made no residuary gift:—*Held*: testator had created a mixed fund to answer the purposes of his will, & if the personalty was not sufficient for the payment of the debts, the legacies were payable out of the land; if it was sufficient, they were payable out of the mixed fund.—*TOOMEY v. TRACY* (1883), 4 O. R. 708.—*CAN.*

5518 v. —*J*.—Where testator is minded to make his real estate, in addition to his personal estate, assets for the payment of debts & legacies, or either of them, the presumption

is that the real estate is made an auxiliary fund, only secondarily liable to the personal estate, which still retains its primary liability. It is absolutely necessary, therefore, not only to have an expression of operation of the real estate, but also a sufficient exoneration of the personal estate, either wholly or partially, before there can be any interference with the ordinary rule for the application of assets. This expression of operation & exoneration may be found if the *ct.*, after looking at the whole will, is convinced that there was an intention on the part of testator that not only the real estate should be operated, but that the personal estate should be exonerated. When testator creates from real estate & personal estate a mixed & general fund & directs the whole of that fund to be applied to certain stated purposes, he does, in effect, direct that the real & personal estates, which have been converted into that fund, shall answer the stated purposes & every one of them *pro rata* according to their respective values. If any of those purposes fail, then the part of the fund which, according to the intention of testator, would otherwise have been applicable to those purposes, is undisposed of.—*Re STRATHCONA'S (LORD) ESTATE*, [1918] 2 W. W. R. 499; 28 Man. L. R. 579.—*CAN.*

t. Legacies to be paid out of estate
—*Gift of residuary real & personal estate*—*To legatee absolutely—Legatee*

5523. —.]—*WEST v. COLE*, No. 5512, *ante*.

5524. —.]—Testator seized of real estate & possessed of leasehold & other personal estate, devised & bequeathed the whole to trustees to make sale of & get in all his real & personal estate & out of the produce to pay his funeral expenses, debts & certain legacies & he bequeathed the residue for charitable purposes. In a suit to administer the estate, it was decreed that the funeral expenses, debts & legacies should be paid out of the realty, the personal estate savouring of realty, & the pure personal estate, *pro rata*.—*A.-G. v. SOUTHGATE* (1842), 12 L. J. Ch. 147, L. C.

Annotation.—*Reid. Simmons v. Rose* (1856), 6 De G. M. & G. 411.

5525. —.]—*SHALLCROSS v. WRIGHT*, No. 5497, *ante*.

5526. —.]—(1) An annuity bequeathed by will, & directed to be paid out of a moiety of the rents, issues, profits, dividends, interest and proceeds of the real & personal estate of the testator, after the expiration of a life interest therein:—*Held*: not to be primarily payable out of the personal estate of testator, but to be apportionable between the real & personal estates.

(2) A legacy directed by an appointment in pursuance of a will to be raised by mtge. of the moiety of the residuary real & personal estate, on the expiration of a life interest in such moiety, & the residue of such legacy, & another legacy directed to be raised & paid by mtge. or sale of the whole or any part of the real & personal estate, on the expiration of another life interest:—*Held*: not to be charged primarily payable out of the personal estate, but to be apportionable between the real & personal estate.—*FALKNER v. GRACE* (1851), 9 Hare, 280; 22 L. J. Ch. 153; 68 E. R. 509.

Annotations.—*As to* (1) *Distd. Tench v. Cheese* (1855), 6 De G. M. & G. 453; *Howard v. Dryland* (1877), 38 L. T. 24. *As to* (2) *Reid. Allan v. Gott* (1872), 7 Ch. App. 439.

5527. —.]—*D.*, by will directed payment of his just debts out of his Irish estate, & exonerated his personality therefrom. He then devised the Irish estate to trustees to sell, & by sale or mtge. or out of the rents & profits to pay specific debts & legacies; and out of the rents & profits to pay two annuitants, with devises over in strict settlement, & all the residue to E. I. Upon the question, out of what property the annuities & costs were payable:—*Held*: they were payable ratably.—*BARNARD v. ROBERTS* (1853), 1 W. R. 222.

5528. —.]—*LORD v. WIGHTWICK*, No. 5492, *ante*.

5529. —.]—(1) When the real & personal estate of a testator are constituted into one mass, & subjected to certain charges, the charges are to be apportioned between the real & personal estate & borne by them *pro rata*, according to their relative values.

(2) A declaration in a will that the proceeds of the sale of testator's real & personal estate shall be considered to all intents & purposes as part & parcel of his personal estate, will not prevent his heir from receiving the moneys arising from the sale of the real estate, in exclusion of testator's next of kin.—*ROBINSON v. LONDON HOSPITAL (GOVERNORS)* (1853), 10 Hare, 19; 22 L. J. Ch. 754; 68 E. R. 821.

Annotations.—*As to* (1) *Consol. Simmons v. Rose* (1856),

also executor.—Testator, after directing that his funeral charges & debts should be paid by his exor., disposed of his real & personal estate as follows: First, he gave & bequeathed certain

legacies to be paid out of his estate & then he gave the residue & remainder of his estate, real & personal, to his son W. absolutely, & he nominated W. sole exor.—*Held*: the legacies were

6 De G. M. & G. 411. *Generally. Mentd. Calvert v. Armitage* (1863), 1 Hem. & M. 446; *Perring v. Trail* (1874), L. R. 18 Eq. 89; *Re Verrall, National Trust for Places of Historic Interest or Natural Beauty v. A.-G.*, [1916] 1 Ch. 100.

5530. —.]—A testatrix gave her residuary estate to her exors. & directed them to apply such part as by law might be legally so applied towards the endowment of district churches & chapels; & as to such part as might not be legally so applied, she stated that she made no disposition:—*Held*: the debts & legacies must be apportioned between the residue, consisting of pure personality, & that consisting of personality savouring of the realty.—*EDWARDS v. HALL* (1853), 11 Hare, 1; 1 Eq. Rep. 145; 17 Jur. 593; 1 W. R. 348; 68 E. R. 1161; *on appeal* (1855), 6 De G. M. & G. 74, L. C.

Annotations.—*Consol. Re Somers-Cocks, Wegg-Prosser v. Wegg-Prosser*, [1895] 2 Ch. 449. *Mentd. Dunn v. Bownas* (1855), 1 K. & J. 596; *Ware v. Cumberlege* (1855), 20 Beav. 503; *Linley v. Taylor* (1859), 28 L. J. Ch. 686; *Fisher v. Briarly* (1860), 1 De G. F. & J. 643; *Marsh v. A.-G.* (1860), 30 L. J. Ch. 233; *Alexander v. Brame* (No. 2) (1861), 30 Beav. 153; *Bennett v. Blain* (1863), 15 C. B. N. S. 518; *Tatham v. Drummond* (1864), 3 New Rep. 706; *Entwistle v. Davis* (1867), L. R. 4 Eq. 272; *R. v. Southampton Port Comrs.* (1870), L. R. 4 H. L. 449; *Chandler v. Howell* (1876), 4 Ch. D. 651; *Holdsworth v. Davenport* (1876), 3 Ch. D. 185; *Shepherd v. Beetham* (1877), 6 Ch. D. 597; *Re Holburne, Coates v. Mackillop* (1885), 53 L. T. 212; *Re Corcoran, Corcoran v. Riddell* (1892), 62 L. J. Ch. 267; *Re Hollon, Forbes v. Hardcastle* (1893), 68 L. T. 160; *Re Pickard, Elmsley v. Mitchell*, [1894] 2 Ch. 88.

5531. —.]—*SIMMONS v. ROSE*, No. 5499, *ante*.

5532. —.]—A testator by his will declared in effect that his debts, legacies, funeral & testamentary expenses, & the costs, charges, & expenses incidental to the execution of the trusts of his will, should be paid ratably out of all his estate, real & personal. In the administration of his estate by the ct., the debts, etc., were paid out of the personality, but without prejudice to the liability of the realty. On the further consideration of the action:—*Held*: the real estate must make good to the personal estate its ratable proportion of the amount paid out of the personal estate for debts, etc., with interest.—*ASHWORTH v. MUNN* (1886), 34 Ch. D. 391; 56 L. J. Ch. 451; 56 L. T. 86; 35 W. R. 513; 3 T. L. R. 260.

5533. —.]—A general direction to pay legacies out of a mixed fund of residue charges them ratably on the portions attributable to realty & personality.—*Re SPENCER COOPER, POE v. SPENCER COOPER*, [1908] 1 Ch. 130; 77 L. J. Ch. 64; 98 L. T. 344.

Annotation.—*Mentd. Re Palmer, Leventhorpe v. Palmer* (1912), 106 L. T. 319.

5534. —.]—By his will a testator, after making certain specific bequests & a specific devise, directed that, "after payment thereof of all debts, funeral & testamentary expenses & all death duties attracted & payable under the provisions contained in this my will," a specific fund should be divided & paid to beneficiaries as therein mentioned. He then dealt with his residuary real & personal estate by directing sale, conversion & investment in terms that were usual, except that they contained no trust for payment of debts or funeral or testamentary expenses, & after making provision for some terminable benefits settled the rest of the investments as therein & in a codicil mentioned. It had been previously decided that the death duties payable out of the special fund included the estate duties & legacy

by the will charged upon the estate, real & personal, & falling personal estate became a charge on the land.—*MOORE v. MELLISH* (1882), 3 O. R. 174.—*CAN.*

Sect. 7.—Order of application of assets: Sub-sect. 1, A. (e) ii., B. & C. (a), (b) i. & ii.]

& succession duties payable on testator's death on the specific & pecuniary legacies, the annuities & the residue of the proceeds of real & personal estate. It appeared that the special fund was insufficient to pay in full all the liabilities made payable out of it:—*Held*: all the liabilities made payable out of the special fund ought to be paid thereout ratably, & neither by a process of marshalling nor by virtue of testator's intention could the liabilities payable solely out of the special fund be discharged in full thereout so as to cast on residue the payment of the remaining liabilities in as far as the balance of the special fund was insufficient to pay them.—*Re TOWNLEY, PUBLIC TRUSTEE v. ALDER*, [1922] 1 Ch. 154; 91 L. J. Ch. 258; 126 L. T. 591; 66 Sol. Jo. 157.

B. For Payment of Debts and Legacies Secured on Pure Personality.

5535. Right of legatee to have legacy redeemed out of personal estate.]—A man having pawned a jewel for a sum of money, devised the jewel to B. & made C. his exor., & gave him all his goods, chattels & personal estate, after his debts & legacies paid; & the question was, whether B. should pay the debt for which the jewel was pawned, or whether it should be paid out of the personal estate by the exor.:—*Held*: it should be paid out of the personal estate, & the legatee should have the jewel discharged of it.—*ANON.* (1703), *Freem. Ch.* 272; 22 E. R. 1205.

5536. — Right of legatee to compensation falling redemption.]—Where a specific legacy is pledged or charged by testator, the specific legatee is entitled to have his legacy redeemed or exonerated by the exor.; & if the exor. fail to perform that duty, the specific legatee is entitled to compensation to the amount of his legacy out of the general assets of testator.—*KNIGHT v. DAVIS* (1833), 3 My. & K. 358; 3 L. J. Ch. 81; 40 E. R. 136.

Annotations:—*Appl. Bothamley v. Sherson* (1875), L. R. 20 Eq. 304. *Reid. Lewis v. Lewis* (1871), L. R. 13 Eq. 218.

5537. — — —.]—*BOTHAMLEY v. SHERSON*, No. 4568, *ante*.

5538. —.]—A testatrix by will gave a legacy to G. of £2,000 "in which sum or thereabouts he now stands indebted to me, subject nevertheless to, & I hereby charge the same, with payment of the following annuities & sums of money" to P. & others. There was a proviso "that I do not intend by the legacy of £2,000 to G. to exonerate or release him from the debt which may be due to

me from him at my decease, but I direct whatever sum shall be then due from him shall be taken in part & satisfaction of the £2,000." The will directed legacies to be paid within twelve months, but no further allusion was made to these legacies. G. was indebted to testatrix at her death in £2,000, & was insolvent:—*Held*: the legacy to P. & others was demonstrative & not specific, & therefore on D.'s insolvency, was payable out of general assets.—*VICKERS v. POUND* (1858), 6 H. L. Cas. 885; 28 L. J. Ch. 16; 31 L. T. O. S. 372; 4 Jur. N. S. 543; 6 W. R. 580; 10 E. R. 1543, H. L.

5539. Personal estate insufficient—Contribution between specific legatees—Notwithstanding charge of debts on real estate.]—Where the general personal estate of a testator not specifically bequeathed is insufficient for payment of his debts, a specific legatee of property charged by testator in his lifetime with the payment of a sum of money must, as between such specific legatee & other specific legatees or devisees, bear the burden of the incumbrance; & a general direction in the will that testator's debts shall be paid after his decease is not sufficient to throw any part of such burden on the specific devisees of real estate.—*Re BUTLER, LE BAS v. HERBERT*, [1894] 3 Ch. 250; 63 L. J. Ch. 662; 43 W. R. 190; 8 R. 504.

Annotation:—*Reid. Re Roberts, Roberts v. Roberts*, [1902] 2 Ch. 834.

C. For Payment of Debts Secured on Realty or Chattels Real.

NOTE.—In this sub-section *Real Estate Charges Acts*, 1854 (c. 113), 1867 (c. 69) & 1877 (c. 34) known as *Locke King's Acts* are referred to as 1854 Act, 1867 Act, 1877 Act respectively.

(a) Before Real Estate Charges Acts (Locke King's Acts).

NOTE.—Having regard to *Locke King's Acts* the cases decided before those Acts are set out in the form in which they appear below.

5540. Right to claim payment out of personal estate.]—*STARLING v. DRAPERS CO.* (1678), *Cas. temp. Finch*, 401; *POCKLEY v. POCKLEY* (1681), 1 Vern. 36; *JOHNSON v. MILKSOPP* (1689), 2 Vern. 112; *SERLE v. ST. ELOY* (1726), 2 P. Wms. 385; *FORRESTER v. LEIGH (LORD)* (1753), Amb. 171; *TWEEDALE (MARCHIONESS) v. COVENTRY (EARL)* (1783), 1 Bro. C. C. 240; *PHILIPS v. PHILIPS* (1787), 2 Bro. C. C. 273; *ASTLEY v. TANKERVILLE (EARL)* (1792), 3 Bro. C. C. 545; *HAMILTON v. WORLEY* (1793), 2 Ves. 62; *WYTHE v. HENNIKER* (1833), 2 My. & K. 635; *KENT v. LEEKS* (1835), 4 L. J. Ch. 111; *BICKHAM v. CRUTTWELL* (1838), 3 My. & Cr. 763; *IBBETSON v. IBBETSON* (1841), 12 Sim.

PART IV. SECT. 7, SUB-SECT. 1.—C. (a).

5540 i. Right to claim payment out of personal estate.]—Testator by his will devised certain property, both real & personal, to his exors. in trust to sell the same & invest the proceeds in good securities to form part of his residuary estate; & he provided that, after payment of his debts, funeral & testamentary expenses & certain legacies, such residuary estate should be divided among the legatees in proportion to the amounts of their respective legacies as previously specified. Another portion of his real estate was devised to F. in trust to apply the rents & profits to the benefit of his wife & children, giving him no power of alienation, & restricting the terms of leases to be given by him to one year; this devise was also on condition that F. should, out of the rents & profits, pay to the sister of the testator an annuity of £75 during her lifetime. The property so devised to F. was

mortgaged:—*Held*: F. was entitled to have the mtge. paid by the exors. out of the residuary estate.—*MCLEOD v. FIRTH* (1876), 3 Pug. 453.—*CAN.*

5540 ii. —.]—About 1837 M. devised his land to his wife for life with remainder to K. Administration with the will annexed was granted to the widow. At testator's death the lands were mortgaged for £150. In a suit after testator's death, a foreclosure was obtained, & the property sold, & purchased by the administratrix for £905. Administratrix received personal assets of testator sufficient to have paid off the mtge. had she chosen so to apply them. The sum of £725 was lent to the administratrix by K. The administratrix then sold the property to the public authorities for £1,750, out of which she paid K. £400. From 1858 K., with the leave of the administratrix, occupied one-fourth of an acre of the land, until ejected in 1873, under expropriation, the comrs. taking in all 3½ acres of this property, the

balance being in the occupation of A. & her husband, the applts. These 3½ acres were appraised at \$2,310, which was paid into ct. K. claimed title to the whole land taken under parcel agreement, that she should have it in satisfaction of £325, the residue unpaid of the loan, & obtained a rule nisi for the payment to her of the £2,310, awarded as compensation. In May, 1872, the administratrix executed an informal instrument under seal, purporting to be a lease of her life estate to applts. in the whole property, reserving a rental of \$80 a year & liberty to occupy two rooms in the dwelling-house. On motion to make this rule absolute, affidavits were filed, including those of applts. On Jan. 18, 1875, the matter was referred to a master to take evidence & report thereon, subject to being modified by the ct. or a judge. The master reported that applts. had the sole legal & equitable rights in the property. On motion to confirm that

206; *LOCKHART v. HARDY* (1846), 9 Beav. 379; *SARGENT v. ROBERTS* (1848), 17 L. J. Ch. 117; *LOMAX v. LOMAX* (1849), 12 Beav. 285; *HEDGES v. HEDGES* (1852), 5 De G. & Sm. 330; *JENKINSON v. HARCOURT* (1854), Kay, 688; *TOWNSHEND v. MOSTYN* (1858), 26 Beav. 72; *BAGOT v. BAGOT* (1864), 34 Beav. 134; *Re BULL, CATTY v. BULL* (1883), 49 L. T. 592.

5541. — Right of heir to make such claim.]—*SMITH v. HOPTON* (1842), 1 Rep. Ch. 155; *ANON.* (circa 1673), Freem. Ch. 301; *ANON.* (1679), 1 Cas. in Ch. 4; *POCKLEY v. POCKLEY* (1681), 1 Vern. 36; *EYRE v. HASTINGS* (1683), 2 Rep. Ch. 273; *WHITE v. WHITE* (1688), 2 Vern. 43; *ANON.* (1695), Freem. Ch. 205; *MEYNELL v. HOWARD* (1696), Prec. Ch. 61; *WOOD v. FENWICK* (1702), Prec. Ch. 206; *BISHOP v. SHARP* (1704), Freem. Ch. 276; *KING v. KING* (1735), 3 P. Wms. 358; *LOYD v. THURSBY* (1743), 1 Hov. Supp. 224; *LEMAN v. NEWNHAM* (1747), 1 Ves. Sen. 51; *PARSONS v. FREEMAN* (1751), 3 Atk. 741; *LAWSON v. LAWSON* (1781), 3 Bro. Parl. Cas. 424; *TANKERVILLE (EARL) v. FAWCET* (1786), 2 Bro. C. C. 57; *SCOTT v. BEECHER* (1820), 5 Madd. 96; *Ex p. DIGBY* (1821), Jac. 235; *ILCHESTER (EARL) v. CARNARVON (EARL)* (1839), 1 Beav. 209; *CHESTER v. POWELL, POWELL v. POWELL* (1843), 7 Jur. 389; *WISDEN v. WISDEN* (1854), 2 Sm. & G. 396; *BOND v. ENGLAND* (1855), 2 K. & J. 44; *SWAINSON v. SWAINSON* (1856), 6 De G. M. & G. 648; *HARPER v. MUNDAY* (1856), 7 De G. M. & G. 369.

5542. Real estate charged for portions or jointure.]—*BURGOIGNE v. FOX* (1738), 1 Atk. 575; *GRAVES v. HICKS* (1833), 6 Sim. 391; *BARHAM v. CLARENDON (EARL)* (1852), 10 Hare, 126; *LOOSEMORE v. KNAPMAN* (1853), Kay, 123.

5543. — Real estate purchased subject to mortgage.]—*ANCASTER v. MAYER* (1785), 1 Bro. C. C. 454; *TWEDDELL v. TWEDDELL* (1787), 2 Bro. C. C. 152; *WOODS v. HUNTINGFORD* (1796), 3 Ves. 128.

5544. — Land mortgaged by mortgagor as surety.]—*ROBINSON v. GEE* (1749), 1 Ves. Sen. 251; *FORRESTER v. LEIGH (LORD)* (1753), Amb. 171; *SHAFTO v. SHAFTO* (1786), 1 Cox, Eq. Cas. 207; *EYTON v. BROUGHTON* (1853), 1 Eq. Rep. 164; *QUARTERMAINE v. CUFF* (1853), 1 W. R. 176.

5545. — Mortgage of wife's real estate for debts of husband.]—*TATE v. AUSTIN* (1714), 1 P. Wms. 264; *ASTLEY v. TANKERVILLE (EARL)* (1792), 3 Bro. C. C. 545; *WHEELLEY v. GARFIELD* (1856), 4 W. R. 700.

5546. Personal estate insufficient.]—*ONEAL v. MEAD* (1720), 1 P. Wms. 693; *HALLIWELL v. TANNER* (1830), 1 Russ. & M. 633.

(b) *Since Real Estate Charges Acts (Locke King's Act).*

i. *In General.*

See 1854, 1867 & 1877 Acts.

5547. Three Acts must be read together.]—*Re FRASER, LOWTHER v. FRASER*, No. 5556, *post*.

report, the ct. made an order apportioning the \$2,310 between K. & applts., the former being declared entitled to be paid \$1,015.61, & the latter, on filing the written consent of the widow to the residue of the \$2,310.—*Held*: the administratrix, having personal assets of testator sufficient to discharge the mtge., was bound in the due course of her administration to discharge that incumbrance, & the parol agreement made by her with her daughter was null & void.—*KHARNEY v. KEAN* (1879), 3 S. O. R. 332.—*CAN.*

5540 iii. — Unless express ex-

*emption.]—*Money due upon mtge. is a debt of the mtgor., to the payment whereof his personal estate is primarily liable, as between his heir or devisee & his exor., unless some express or necessarily implied declaration of his exempts his personal estate, & throws the charge upon the real.—*BELVEDERE v. ROCHFORD* (1772), 5 Bro. Parl. Cas. 298.—*IR.*

5540 iv. —.]—Testator having two estates mtgd., with judgments collateral to the mtges., by a will made after 1854, devised them in

5548. "Heir or devisee"—Donee under will of option to purchase real estate.]—Testator devised & bequeathed his residuary real & personal estate to trustees upon trust for sale & conversion, & directed that they should allow his son the option of purchasing two houses forming part of his real estate for £450. The two houses were subject to a mtge. for £300. The son gave notice to the trustees of his intention to exercise the option, & took out a summons to determine whether the option gave him the right to a conveyance free from incumbrances.—*Held*: the son was not an heir or devisee, & therefore 1854 Act, s. 1, did not apply, & he was entitled to have the property conveyed to him free from the mtge.—*Re WILSON, WILSON v. WILSON*. [1908] 1 Ch. 839; 77 L. J. Ch. 564; 98 L. T. 828.

ii. *To What Property Acts applicable.*

See 1854 Act, s. 1; 1877 Act, s. 1.

5549. Copyholds.]—1854 Act, for rendering mortgaged estates primarily liable for payment of the mtge. debt in exoneration of the personal & other estates of deceased mtgor. includes copyholds.—*PIPER v. PIPER* (1860), 1 John. & H. 91; 29 L. J. Ch. 719; 2 L. T. 458; 6 Jur. N. S. 1026; 8 W. R. 541; 70 E. R. 675.

5550. Leaseholds.]—A bequest of leasehold property, subject to a mtge., is not within 1854 Act.—*SOLOMON v. SOLOMON* (1864), 33 L. J. Ch. 473; 10 L. T. 54; 10 Jur. N. S. 331; 12 W. R. 540.

*Annotations:—*Apprvd. *Re Wormsley's Estate, Hill v. Wormsley* (1876), 4 Ch. D. 665. *Expld. Re Kershaw, Drake v. Kershaw* (1888), 37 Ch. D. 674. *Consd. Re Fraser, Lowther v. Fraser*, [1904] 1 Ch. 726.

5551. —.]—1867 Act amounts to a legislative declaration that the Ct. of Chancery had put a wrong interpretation on 1854 Act, & though it only expressly enacts that a direction for payment of debts out of personalty shall not be held to indicate a contrary intention to the rule that a mtge. is to be paid primarily out of the estate subject to it, it really overthrows the whole reasoning on which the former cases had proceeded.

Testator seized of an estate partly leasehold & partly freehold subject to a mtge. devised it specifically, & also created a mixed fund consisting of personalty the proceeds of a sale of some realty & annuities to be raised out of the mtgd. estate & other estates, & directed his debts to be paid out of this mixed fund.—*Held*: he did not manifest a contrary intention to the rule laid down by 1854 Act, but as leaseholds were not within that Act the mtge. ought to be apportioned between the freeholds & leaseholds according to their values at testator's death, & the part apportioned in respect of the leaseholds paid out of the mixed fund.—*GALL v. FENWICK* (1874), 43 L. J. Ch. 178; *sub nom. GAEL v. FENWICK*, 29 L. T. 822; 22 W. R. 211.

5552. —.]—Leaseholds are not within 1854 Act.—*Re WORMSLEY'S ESTATE, HILL v. WORMSLEY*

strict settlement to two of his sons; & he bequeathed several pecuniary & specific legacies, & directed that his debts & legacies should be paid out of the residue of his personal estate & property, which he bequeathed to his sons.—*Held*: the mtge. debts should be paid out of the personal estate, in preference to the pecuniary legacies.—*SMITH v. SMITH* (1860), 10 L. Ch. R. 89.—*IR.*

5540 v. —.]—*BURLEY v. ARMSTRONG* (1861), 12 L. Ch. R. 270; 14 Ir. Jur. 50.—*IR.*

Sect. 7.—Order of application of assets: Sub-sect. 1, C. (b) ii., iii. & v.]

(1876), 4 Ch. D. 665; 46 L. J. Ch. 102; 25 W. R. 141.

Annotation:—Consd. Re Fraser, Lowther v. Fraser, [1904] 1 Ch. 726.

5553. —.]—By virtue of 1877 Act, s. 1, the Act now extends to leaseholds.—*Re KERSHAW, DRAKE v. KERSHAW* (1888), 37 Ch. D. 674; 57 L. J. Ch. 599; 58 L. T. 512; 36 W. R. 413.

Annotation:—Reid. Re Fraser, Lowther v. Fraser, [1904] 1 Ch. 726.

5554. "Interest in any land"—Bequest of proceeds of sale of land—Under trust for sale.—*LEWIS v. LEWIS*, No. 5581, *post*.

See, now, 1877 Act, s. 1.

5555. —.]—*Debentures secured on land abroad.*—*Re CHANTRELL, SUTLEFFE v. VON LIVERHOFF*, [1907] W. N. 213.

5556. *Rentcharge—Issuing out of leaseholds.*—A rentcharge issuing out of leaseholds is a chattel real. A rentcharge of this kind contracted to be purchased by a testator who died intestate in respect thereof is within the provisions of 1854, 1867, & 1877 Acts, which are to be read together, & passes to his next of kin as persons claiming through him, subject, as between themselves & the other persons claiming through deceased, to a primary liability to payment of the vendor's lien for unpaid purchase-money, notwithstanding the absence of any reference to next of kin in the negating part of 1877 Act, s. 1.—*Re FRASER, LOWTHER v. FRASER*, [1904] 1 Ch. 726; 73 L. J. Ch. 481; 91 L. T. 48; 52 W. R. 516; 20 T. L. R. 414; 48 Sol. Jo. 383, C. A.

Annotations:—Mentd. Re Joseph, Pain v. Joseph (1908), 98 L. T. 392; *Re Taylor, Dale v. Dale*, [1909] W. N. 59; *Re Whiting, Ormond v. De Launay*, [1913] 2 Ch. 1; *Re Aynsley, Kyrie v. Turner*, [1914] 2 Ch. 422; *Re Wedgwood, Sweet v. Cotton* (1914), 111 L. T. 436; *Re Smith, Prada v. Vandroy* (1916), 85 L. J. Ch. 657; *Re Florence, Lydall v. Haberdashers' Co.* (1917), 87 L. J. Ch. 86.

iii. To What Charges Acts applicable.

5557. *General rule.*—B. died in 1904 intestate, leaving real estate. G., the heir-at-law, having failed to pay the estate duty, died intestate, in 1907:—*Held*: the estate duty payable on the death of B. was an "equitable charge" within 1877 Act, & it was therefore a charge on the real estate in exoneration of the personal estate of G.

1877 Act is applicable to & includes every equitable charge of whatever nature or description, whether created by statute or however enforceable.—*Re BOWERMAN, PORTER v. BOWERMAN*, [1908] 2 Ch. 340; 77 L. J. Ch. 594; 99 L. T. 7.

5558. *General charge in will of debts on realty in aid of personal estate.*—1854 Act only applies where there is a defined & specified charge on a specified estate; & a general charge on real estate by a testator in aid of his personal estate does not come within the definition of a "mtge." on the real estate in the hands of the devisee, unless & until the amount has been accurately defined & the devisee has expressly taken the estate subject to such ascertained charge.—*HEPWORTH v. HILL* (1862), 30 Beav. 476; 31 L. J. Ch. 569; 6 L. T. 403; 8 Jur. N. S. 960; 10 W. R. 477; 54 E. R. 974.

5559. *Equitable mortgage by deposit—& memorandum.*—*PEMBROOKE v. FRIEND*, No. 5591, *post*.

5560. —.]—*No memorandum.*—An equitable mtge. by deposit is not taken out of the operation of 1854 Act because it is unaccompanied by a memorandum.—*DAVIS v. DAVIS* (1876), 24 W. R. 962.

5561. *Lien for unpaid purchase-money.*—Upon a contract for the purchase of real estate, a deposit was paid, & the balance of the purchase-money made payable at a future day, before the arrival of which the purchaser died intestate:—*Held*: the lien for such balance upon the purchased estate was not a charge thereon within 1854 Act & consequently, the heir-at-law was entitled to have such balance paid out of the personal estate of deceased purchaser.—*HOOD v. HOOD* (1857), 26 L. J. Ch. 616; 29 L. T. O. S. 398; 3 Jur. N. S. 684; 5 W. R. 747.

5562. —.]—A lien for unpaid purchase-money is not a charge by way of mtge. within 1867 Act, where purchaser dies intestate.—*HARDING v. HARDING* (1872), L. R. 13 Eq. 493; 41 L. J. Ch. 523; 26 L. T. 656.

Annotations:—Reid. Re Cockcroft, Broadbent v. Groves (1883), 49 L. T. 497; *Re Fraser, Lowther v. Fraser*, [1904] 1 Ch. 111.

5563. —.]—Testator who had contracted to purchase real estate, & paid the deposit money, by will made in 1881, specifically devised such real estate to his daughter for life, with remainder to her children, without showing any intention that the purchase-money should be paid out of his personal estate; & he died without having disposed of his personal estate, which was rather less in amount than the unpaid purchase-money, & without having completed the purchase or paid any further part of the purchase-money. After his death an action by the vendor against the exor. & trustee of the will for specific performance of the contract was compromised by the deft. thereto, & the contract was put an end to upon the terms that the vendor should retain the deposit money & have his costs; & this compromise was confirmed by the ct. by an order made by consent in an administration action in the presence of the tenant for life of the real estate & the trustee, all the remaindermen being infants.

Upon the further consideration of the administration action, the devisees contained that they were entitled to so much of the personal estate as was equivalent to the unpaid purchase-money, upon the ground that the purchase was a conversion by testator of his personal estate to that extent, & that 1854, 1867 & 1877 Acts had not altered the law in that respect:—*Held*: there was a vendor's lien, & 1877 Act applied; accordingly all the devisees were entitled to was the real estate charged with the unpaid purchase-money, & therefore on the facts to nothing.

The last [1877] Act which for the first time applies the rule as to vendor's lien to the administration of the estate of an intestate, seems to limit the expression of contrary intention to the case of a testator (*KAY, J.*).—*Re COCKCROFT, BROADBENT v. GROVES* (1883), 24 Ch. D. 94; 52 L. J. Ch. 811; 49 L. T. 497; 32 W. R. 223.

Annotation:—Reid. Re Fraser, Lowther v. Fraser, [1904] 1 Ch. 111.

5564. —.]—A contract to buy improved ground-rents from her lessee by a reversioner was carried out after her death:—*Held*: the purchase-money was a charge, within 1867 & 1877 Acts, on the improved ground-rents so purchased.—

PART IV. SECT. 7, SUB-SECT. 1.—C. (b) iii.

5561 i. *Lien for unpaid purchase-money.*—Although the English Act amending Locke King's Act, &

extending its operation to the case of a vendor's lien, has not been adopted in this colony, the ct., treating sect. 3 of the Amending Act as declaratory of the intention & meaning of the former Act, & as over-riding the

judicial interpretation of that Act held that 19 Vict., No. 1, extended to a vendor's lien.—*BRETT v. HAMILTON* (1900), 21 N. S. W. L. R. 84; 16 N. S. W. W. N. 206.—*AUS.*

Re KIDD, BROOMAN v. WITHALL, [1894] 3 Ch. 558; 63 L. J. Ch. 855; 71 L. T. 481; 13 R. 101; *sub nom. Re KIDD, BLOOMER v. WITHALL*, 43 W. R. 51. 5565. —.]—*Re FRASER, LOWTHER v. FRASER*, No. 5556, *ante*.

5566. Charge on partner's real estate to secure partnership debt.—Partnership assets sufficient.]—1854 Act, does not apply to the case of a charge created by one partner on his separate real estate to secure a debt of the partnership, when at the time of his death the partnership assets are sufficient to answer all the debts of the partnership.—*Re RITSON, RITSON v. RITSON*, [1899] 1 Ch. 128; 68 L. J. Ch. 77; 79 L. T. 455; 47 W. R. 213; 15 T. L. R. 76; 43 Sol. Jo. 95, C. A.

5567. Charge to secure overdraft.—Whether mortgagor principal debtor or surety.]—A testator by his will made in 1900 specifically devised to his son A. certain freehold property, & died in 1912. In 1899 he had given to his bankers a memorandum charging this property with all moneys for the time being due & owing from him on any account whatever, having then an account at the bank, used for the purposes of his business, which he was afterwards allowed to overdraw. Testator being incapacitated by illness, A. early in 1902 took over the management of the business on testator's behalf, & the account, then in credit, was transferred into the names of A. & a daughter of testator. In Sept. 1902, the bank allowed A. to overdraw the account on testator giving a guarantee for the overdraft. In 1907 the account, then in debit, was, at testator's request, transferred into the names of A. & another daughter of testator, testator giving the bank a document whereby he requested the bank to permit A. & the daughter to overdraw & guaranteed payment of all moneys then or thereafter due on the general balance of their account or for advances or otherwise. At testator's death the guaranteed account was in debit, but the debit balance was afterwards paid out of his personal estate:—*Held*: the charge of 1899 included all money due or capable of becoming due by testator to the bank under the guarantee of 1907; testator was in substance & in fact the principal debtor for the amount overdrawn at his death, & therefore, 1854 Act applied, & the freehold property specifically devised to A. must bear the charge for that amount to the exoneration of the personal estate. If in substance as well as form testator had been merely a surety for the payment of the debit balance, & the principal debtor had paid it off after testator's death, the Act would not have applied.—*Re HAWKES, REEVE v. HAWKES*, [1912] 2 Ch. 251; 81 L. J. Ch. 641; 100 L. T. 1014.

5568. Money due to local authority for making up street.]—*Re HESKETH, SAUNDERS v. BIBBY HESKETH* (1900), 45 Sol. Jo. 11.

5569. Estate duty.]—*Re BOWERMAN, PORTEL v. BOWERMAN*, No. 5557, *ante*.

5570. Land delivered in execution under writ of elegit.]—*Re ANTHONY, ANTHONY v. ANTHONY*, No. 5452, *ante*.

5571. Provision in articles empowering company to forfeit shares.—On non-payment of debts due from shareholder.]—Testator held shares in a banking co. by whose deed of settlement it was provided that if any shareholder did not on demand pay all moneys due from him to the co., the directors might declare his shares forfeited & that nevertheless he should still be liable to pay the debt, & it was also provided that a shareholder must have paid all moneys due from him to the co. before he could transfer his shares. Testator borrowed money from the co. & deposited the

deeds of certain real estate with them as security. By his will he gave the above estate to his son A., & his residuary property to his other sons. A. claimed that testator's shares in the bank should contribute ratably to payment of the debt:—*Held*: (1) the provisions of the deed of settlement did not create a charge or lien on the shares for a debt due from the holder & no case for contribution arose; (2) if the deed of settlement had charged the shares with all debts due from the shareholder to the co., a debt for which real estate had been specifically mortgaged would still have been payable out of the mortgaged estate before resorting to the shares which were only subject to a general lien.—*Re DUNLOP, DUNLOP v. DUNLOP* (1882), 21 Ch. D. 583; 48 L. T. 89; 31 W. R. 211, C. A.

Annotation:—As to (1) & (2) *Reid. Hopkinson v. Mortimer, Harley*, [1917] 1 Ch. 646.

5572. Purported mortgage by testator of property belonging to beneficiary.—Election by beneficiary to take under will.]—Testator gave all his estate upon trust for his wife for life, & after her death he gave his leasehold property in J. street upon trust for his daughter for life, & after her death for her children; & after the death of his wife he gave his villa B. to his niece. Testator died in 1913. The J. street property was assigned to testator's wife in 1888, & on Aug. 25, 1909, testator purported to mortgage the same for £400. The villa B. was assigned to testator & his wife jointly & on Aug. 15, 1905, they mortgaged it for £400. The widow elected to take under the will:—*Held*: (1) as to the J. street property it was not primarily liable for payment of the mtge. debt, & what the widow brought in under her election was the property free from incumbrance; but as to the B. property, the 1854 Act applied, & therefore the mtge. debt was primarily payable out of it; (2) the residue of the estate being insufficient for the payment of debts, the property brought in by reason of the widow's election was liable to contribute *pari passu* with testator's property in discharging his debts.—*Re WILLIAMS, CUNLIFFE v. WILLIAMS*, [1915] 1 Ch. 450; 84 L. J. Ch. 578; 110 L. T. 569.

5573. Whether charge subsisting.—Or discharged in testator's lifetime.]—*Re LODER, STEWART v. LODER* (1890), 6 T. L. R. 370.

iv. Exclusion of Statutory Rule by Signification of Contrary Intention.

See 1867 Act, s. 1; 1877 Act, s. 1.

5574. Direction in will for payment of debts.—Out of estate.]—Testator, by his will, dated June, 1855, directed that all his debts should be paid by his exors. out of his estate:—*Held*: such direction did not exonerate a mortgaged estate, devised by the will, from the payment of the mtge. debt.—*WOOLSTENCROFT v. WOOLSTENCROFT* (1860), 2 De G. F. & J. 347; 30 L. J. Ch. 22; 3 L. T. 388; 6 Jur. N. S. 1170; 9 W. R. 42; 45 E. R. 655, L. C.

Annotations:—*Distd. Smith v. Smith* (1861), 3 Giff. 263. *Consd. Allen v. Allen* (1862), 30 Beav. 395; *Mellish v. Vallins* (1862), 3 John. & H. 194; *Rowson v. Harrison* (1862), 31 Beav. 207; *Eno v. Tatham* (1863), 3 De G. J. & J. 43; *Maxwell v. Hyalop* (1867), L. R. 4 Eq. 407. *Brownson v. Lawrance* (1868), L. R. 6 Eq. 1. *Reid. Stone v. Parker* (1860), 1 Drew. & Sm. 212.

5575. —.]—*BROWNSON v. LAWRENCE*, No. 5598, *post*.

5576. — Out of real & personal estate.]—Devises of a real estate which had been mortgaged by testator held entitled to have the mtge. paid out of the other real & the personal estate devised for payment of debts, notwithstanding 1854 Act.—

*Sect. 7.—Order of application of assets: Sub-sect. 1.
C. (b) iv.]*

NEWMAN v. WILSON (1862), 31 Beav. 33; 54 E. R. 1049.

5577. ———.]—A. by will, dated in 1845, before 1854 Act, devised all his real estate upon trust for sale, with power to postpone, & to pay his debts & invest the residue & pay the income to his wife for life, & after her death for all his children in equal shares.

By a codicil dated Jan. 30, 1855, after the commencement of 1854 Act, but before the amending Acts, A. specifically devised a part of his real estate to his wife for life with remainder to his two sons. He died in 1855 leaving sons & daughters. His only real estate was at the date of his will & his death in reversion. It was subject to certain charges created by A., & to £3,000 charged thereon by a previous owner, under whose will A. took his reversionary interest. This interest fell into possession in 1864, & in 1865 the trustees of A.'s will sold a part of his residuary real estate, & out of the proceeds paid all the charges above mentioned. A.'s widow lived until 1895, & during that time received the rents of the specifically devised real estate, no claim for contribution to the charges having been made.

After her death the trustees of A.'s will took out a summons for the determination of the question whether the specifically devised real estate ought to have contributed to the payment of the charges, & whether the right of the persons interested in the residuary estate to such contribution was barred by the Stat. Limitations:—*Held*: (1) the direction to pay debts contained in the will, which was confirmed by the codicil, & so brought under 1854 Act, expressed a "contrary intention" within the meaning of that Act, & testator's mtge. debts were charged on his residuary estate; but as to the £3,000 which was not testator's debt, the specifically devised estates ought to have contributed; (2) the widow, as tenant for life of the specifically devised estate, was under no obligation to pay the interest on any part of the £3,000 & there could be no presumption of payment of interest, & the right to contribution was barred by the statute.—*Re ALLEN, BASSETT v. ALLEN*, [1898] 2 Ch. 499; 67 L. J. Ch. 614; 79 L. T. 107; 47 W. R. 55; 42 Sol. Jo. 687.

5578. ——— *Out of residuary estate.*—Testator gave one-third of the rents of his real estate to his widow for life, & he devised an estate at B., in thirtieth parts, to his children as tenants in common. The residue of his real & personal estate, after paying his mtge. & other debts, he left to be divided into thirtieth parts, & to be taken by the same & in the same proportions as the estate at B.:—*Held*: the widow took no interest in the personalty, & the mtges. were payable primarily out of the residue & not out of the mortgaged estate, under 1854 Act.—*GREATER v. GREATER* (1859), 26 Beav. 621; 28 L. J. Ch. 756; 33 L. T. O. S. 176; 5 Jur. N. S. 454; 7 W. R. 367; 53 E. R. 1038.

Annotations:—*Expld.* *Allen v. Allen* (1862), 30 Beav. 395. *Reid.* *Elliott v. Dearsley* (1879), 40 L. T. 548. *Mentd.* *Re Stringer's Estate, Shaw v. Jones-Ford* (1877), 6 Ch. D. 1; *Re Lowman, Devenish v. Pester*, [1895] 2 Ch. 348.

5579. ———.]—The will contained a direction that the trustees should, out of the residuary estate, pay all testator's just debts:—*Held*: a mtge. debt was included therein, & the estate devised, subject to such debt, was thereby exonerated.—*STONE v. PARKER* (1860), 1 Drew. & Sm. 212; 29 L. J. Ch. 874; 3 L. T. 79; 8 W. R. 722; 62 E. R. 359.

5580. ———.]—Testatrix devised two farms to trustees, to sell & apply the money for specific purposes. These farms were subject to a mtge. for £1,600. The residue of her real & personal estate she devised to her two sons, & directed that the mtges., debts & incumbrances charged thereon should be borne by the premises specifically affected. She then directed that all her debts, funeral & testamentary expenses should be paid out of her residuary real & personal estate, & she charged the same thereon accordingly. Upon a bill by the parties interested in the purchase-moneys to arise from the two farms:—*Held*: the general direction to pay all debts included mtge. debts, & the two farms were devised free from the mtge. thereon.—*ALLEN v. ALLEN* (1862), 30 Beav. 395; 31 L. J. Ch. 442; 5 L. T. 737; 8 Jur. N. S. 758; 10 W. R. 261; 54 E. R. 942.

Annotations:—*Consd.* *Re Birch, Hunt v. Thorn*, [1909] 1 Ch. 787. *Reid.* *Elliott v. Dearsley* (1879), 40 L. T. 548.

5581. ———.]—By a settlement, dated 1831, a freehold estate was settled in trust for the husband & wife for their lives, & after the decease of the survivor upon trust, after three months from the death of the survivor, to sell & invest the proceeds in trust for the children who should attain twenty-one; & it was declared that if the major part of the children should desire that the estate should not be sold, & should give three months' notice of such desire, the trusts for sale should determine, & the estate should be held upon the trusts following the trusts for sale; but if the children preferred that the estate should be sold, the same should, until sale, be considered as personal estate. The wife died in 1837. Three children attained twenty-one & one died intestate leaving her father her heir-at-law & sole next of kin. The father, by his will, gave the third part of the estate to which he so became entitled to trustees for sale, to stand possessed of the proceeds for the benefit of A. absolutely; & testator devised & bequeathed the residue of his estate, whatsoever & wheresoever, to his trustees, upon trust, after payment thereof of all his debts & subject thereto, for J. absolutely. After the date of his will testator mortgaged his third part of the settled estate, & died in 1870. The settled estate was afterwards sold under the trust in the settlement:—*Held*: (1) the interest given by testator in the one-third of the settled estate was not an "interest in land" within 1854 Act, & consequently the mtge. debt must be paid out of the residuary estate; (2) if it had been an interest in land within the Act, the residuary gift of real & personal estate, subject to payment of debts, would not have been a sufficient expression of a "contrary intention" to have exonerated the mortgaged estate. *Semble*: (3) land devised upon trusts for conversion, & taken in its converted state, is not an "interest in land" within 1854 Act.—*LEWIS v. LEWIS* (1871), L. R. 13 Eq. 218; 41 L. J. Ch. 195; 25 L. T. 555; 20 W. R. 141.

Annotation:—*As to* (3) *Reid.* *Re Bennett, Clarke v. White*, [1899] 1 Ch. 316.

5582. ———.]—*ELLIOTT v. DEARSLEY*, No. 5754.

5583. ——— *Exception of specified mortgage debts.*—*Re TREVELYAN, PERCIVAL v. TREVELYAN* (1881), 26 Sol. Jo. 43.

Annotation:—*Consd.* *Re Nevill, Robinson v. Nevill* (1890), 59 L. J. Ch. 511.

5584. ———.]—A direction to pay debts, except the mtge. debts, if any, on Blackacre," out of residue, implies that other mtge. debts are to be paid out of residue, & is a sufficient contrary intention within 1867 Act, s. 1, to take the case

out of the Acts.—*Re VALPY, VALPY v. VALPY*, [1908] 1 Ch. 531; 75 L. J. Ch. 301; 94 L. T. 472; 54 W. R. 401; 50 Sol. Jo. 272.

5585. — *Out of personal estate.*—A direction to pay all debts out of testator's personal estate is not a sufficient expression of a "contrary or other intention," so as to prevent a devise of a mortgaged estate taking *cum onere* under 1854 Act.—*Rowson v. HARRISON* (1862), 31 Beav. 207; 31 L. J. Ch. 818; 54 E. R. 1117; *sub nom. RAWSON v. HARRISON*, 8 Jur. N. S. 875; 10 W. R. 705.

Annotation:—*Reid. Moore v. Moore* (1862), 10 W. R. 877.

5586. — *Testator bequeathed his residuary personal estate to trustees upon trust to convert the same into money, & to pay thereout all his just debts, funeral & testamentary expenses, & after full payment & satisfaction thereof, upon other trusts.*—*Held*: he thereby signified an intention within 1854 Act to make his personal estate primarily liable to pay a mtge. debt affecting his real estate.—*MOORE v. MOORE* (1863), 1 De G. J. & Sm. 602; 2 New Rep. 347; 32 L. J. Ch. 605; 8 L. T. 562; 11 W. R. 790; 46 E. R. 238, L. J.

Annotations:—*Folld. Porcher v. Wilson* (1864), 10 L. T. 714. *Consd. Maxwell v. Hyslop* (1867), L. R. 4 Eq. 407.

Reid. Rolfe v. Perry (1863), 1 New Rep. 428; *Re Newmarch, Newmarch v. Storr* (1878), 9 Ch. D. 12.

5587. — *Enumeration of particular specialty debts—Omission from list of mortgage debt.*—Testator bequeathed his residuary personal estate on trust to pay his funeral & testamentary expenses, legacies & debts, including certain specialty debts which he mentioned. Real estate devised by his will was subject to a mtge., but that debt was not among those which were mentioned in the will:—*Held*: there was on the face of the will sufficient manifestation of intention to take the case out of the operation of 1854 Act.—*PORCHER v. WILSON* (1864), 10 L. T. 714; 12 W. R. 1001; *subsequent proceedings* (1866), 14 W. R. 1011.

5588. — *Testator made a specific devise of certain real estate, which was subject to a mtge. debt, & he declared that his personal estate should be liable for debts. He then made a general devise of residuary & real estate. The personal estate of testator was not sufficient to cover the debt.*—*Held*: having regard to 1854 Act. the mtgd. estate was only exonerated to

the extent of the personalty according to the expressed intention of testator, but the residuary real estate was not liable for the mtge. debt.—*RODHOUSE v. MOLD* (1865), 6 New Rep. 287; 35 L. J. Ch. 67; 12 L. T. 629; 13 W. R. 854.

Annotation:—*Apld. Re Birch, Hunt v. Thorn*, [1909] 1 Ch. 787.

5589. — *Testator by his will, dated in 1877, directed his exors. "to pay all my just debts, funeral & testamentary expenses, out of my personal estate in exoneration of my real estate."*—*Held*: a debt due from testator at the time of his death on a mtge. of part of his real estate must be borne primarily by the mtgd. estate.—*Re ROSSITER, ROSSITER v. ROSSITER* (1879), 13 Ch. D. 355; 49 L. J. Ch. 36; 42 L. T. 353; 28 W. R. 238.

5590. — *Out of particular fund.*—*GALL v. FENWICK, No. 5551, ante.*

5591. — *"As soon as may be"*—*Subsequent devise in fee of freehold property—Property subject to equitable mortgage.*—An equitable mtge. by deposit & memorandum is within 1854 Act.

A direction in a will that all just debts be paid as soon as may be, followed by a devise in fee of a freehold house, which was subject to an equitable mtge.:—*Held*: not to be such an expression of contrary intention as to bring the case within the saving of the statute & the devise took *cum onere*.—*PEMBROOKE v. FRIEND* (1860), 1 John. & H. 132; 2 L. T. 742; 70 E. R. 692.

Annotations:—*Consd. Stone v. Parker* (1860), 1 Drew. & Sm. 212; *Woolstencroft v. Woolstencroft* (1860), 2 De G. F. & J. 347; *Allen v. Allen* (1862), 30 Beav. 395; *Brownson v. Lawrance* (1868), L. R. 6 Eq. 1. *Reid. Coote v. Lowndes* (1870) L. R. 10 Eq. 376.

5592. *Division in will of debts into different classes—Trade debts & private debts—Direction for payment of trade debts—Out of residue.*—Testator directed his private debts to be paid out of the proceeds of certain life policies; he bequeathed his residue, subject to the payment of his trade debts; after the date of his will he deposited the title deeds of real estate with his bankers to secure an overdrawn trade account:—*Held*: this amounted to a declaration of intention contrary to 1854 Act, & the devise of the real estate was entitled to have it exonerated from the banker's lien.—*Re FLECK, COLSTON v. ROBERTS* (1888), 37 Ch. D. 677; 36 W. R. 663; *sub nom.*

PART IV. SECT. 7, SUB-SECT. 1.— C. (b) iv.

5595 i. *Direction in will for payment of debts—Out of personal estate.*—Testator bequeathed his business & the premises in which it was carried on, which were leasehold, to his son W., subject to payment of all debts & liabilities owing in respect of the business; he bequeathed his personal estate on trust for conversion, & directed his funeral & testamentary expenses, debts & legacies to be paid out of the proceeds; & subject thereto for his children equally. Testator had deposited with his bankers the lease of the business premises to secure a private debt:—*Held*: the intention of testator was that W. should take the business subject to the trade debts only, & this was a declaration of intention contrary to Locke King's Act, & the business premises were exonerated from liability in respect of the private debt secured by equitable mtge.—*THOMPSON v. BELL*, [1903] 1 I. R. 489.—*IR.*

5595 ii. — *Testator devised a hotel & premises to trustees on trust to permit his wife to use them for life, she paying up any instalment or other charge thereon which might be unpaid & which might become due during her life, & after her death to*

his eldest daughter in fee. He also bequeathed the residue of his personalty to the same trustees on trust to convert, & after payment out of the proceeds of just debts, & funeral & testamentary charges, & if sufficient for that purpose, to discharge the residue of the purchase-money on the hotel, on trust for other daughters. At the date of the will the hotel was mortgaged to a building society for securing principal & interest payable by monthly instalments. After the date of the will testator paid off the building society's mtge., but afterwards mortgaged the property to a loan co. At testator's death the principal was due to the loan co., but there was no other charge on the hotel property:—*Held*: as between the devisee for life & the residuary legatees, the devised property was exonerated from the mtge. debt.—*TOXWARD v. MINIFIE* (1869), 1 C. A. 272.—*N.Z.*

5595 iii. — *A general direction to pay debts out of personalty takes the case out of Real Estate Charges Act (Locke King's Act), 1854 (c. 113), & exonerates mortgaged estates.*—*MONSON v. MONSON*, 1 J. R. N. S. 32.—*N.Z.*

a. — *Further direction for payment of mortgages—Out of rents.*—Testator, by will, directed trus-

tees to convert his personal estate into money, & therewith pay all his just debts, if sufficient; if not sufficient, the deficiency to be supplied out of other moneys coming to their hands. By codicil, he directed all mtges. to be paid out of rents of the real estate:—*Held*: the mtgees. were payable primarily out of the general personal estate, & any deficiency out of the rents of the real estate.—*MACARTNEY v. KESTERSON* (1880), 6 V. L. R. 56.—*AUS.*

b. — *Out of estate—Part of estate devised by codicil.*—Testatrix devised to trustees all her real & personal estate on trusts to convert, & after payment of her debts, funeral & testamentary expenses, to hold the residue of the proceeds of conversion upon trust for four named residuary beneficiaries or their issue with power during the minority of any person entitled to a share thereof to apply the income of that share for that person's maintenance. Portions of the real estate were subject to a mtge. By a codicil testatrix gave part of the mortgaged property to two other infants, the income from the rent to be used for their benefit until they became of age:—*Held*: Locke King's Act applied & the real estate devised by the codicil was not

Sec. 7.—Order of application of assets: Sub-sect. 1, C. (b) iv. & v.]

Re FLECK, COLTON v. ROBERTS, 57 L. J. Ch. 943; *sub nom. Re FLECK, CARLTON v. ROBERTS*, 58 L. T. 624.

5593. ——— Out of trade property.]—Testator, who was a baker, by his will made in 1885, gave his trade property, which included real & leasehold estate, & business to his son, subject nevertheless & charged, in exoneration of the rest of his estate, with payment of all debts & liabilities owing at the time of his death in connection with the business. Testator included in this gift his freehold premises situated at Acton, which he had purchased & meant for his business, subject, as to such estate, to any purchase or any other moneys payable in respect thereof at testator's death. Testator then gave the residue of his real & personal estate to trustees, upon trust to convert, & out of the proceeds to pay his funeral & testamentary expenses & debts other than those thereinbefore provided for. At his death testator owed trade debts not secured by mtge., & private debts which were secured by mtge. of real & leasehold estate used in his business, & also of real & leasehold estate not used in his business. On the question whether the real & leasehold estate used in the business was primarily liable, together with the other real & leasehold estate, to the payment of the mtge. debts under 1854, 1867, & 1877 Acts:—*Held*: testator having divided his debts into two classes, trade debts & private debts, & as to the first class having clearly indicated a contrary intention so as to exclude the operation of the Acts, the necessary implication was that he had the same intention in dealing with the second class, & the mtge. debts were therefore primarily payable out of the proceeds of sale of the residuary real & personal estate.—*Re NEVILL, ROBINSON v. NEVILL* (1890), 59 L. J. Ch. 511; 62 L. T. 864.

5594. Direction in will for payment of mortgage out of particular fund.]—A direction that a mtge. debt on Whiteacre shall be paid out of the proceeds of sale of Blackacre exonerates Whiteacre to the extent of those proceeds, but does not indicate a general "contrary or other intention" within 1854 Act, s. 1, so as to enable the devisees of Whiteacre to come on the general personal estate for any deficiency.—*Re BIRCH, HUNT v. THORN*, [1909] 1 Ch. 787; 78 L. J. Ch. 385; 101 L. T. 101.

5595. Bequest of personalty subject to payment of debts.]—A bequest of personalty subject to the payment thereof of all testator's just debts is a sufficient indication of intention to make the personal estate the primary fund for the payment of mtge. debts, under 1854 Act.—*MELLISH v.*

VALLINS (1862), 2 John. & H. 194; 31 L. J. Ch. 592; 8 Jur. N. S. 864; 70 E. R. 1027; *sub nom. MOLLISH v. VALLINS*, 6 L. T. 215; 10 W. R. 421.

Annotations:—Reff. Eno v. Tatham (1863), 4 Giff. 181; *Rolfe v. Perry* (1863), 1 New Rep. 438.

5596. ———]—A bequest contained in a will dated 1857 of all testator's personal estate "subject to the payment of his debts" renders such personal estate primarily liable for the payment of a sum of money, with which testator had charged it by way of mtge., notwithstanding 1854 Act which makes the mtged. lands primarily liable to bear mtge. debts; the direction to pay debts out of a particular fund amounting to a sufficient indication of a "contrary or other intention" within 1854 Act.—*ENO v. TATHAM* (1863), 3 De G. J. & Sm. 443; 1 New Rep. 529; 32 L. J. Ch. 311; 8 L. T. 127; 9 Jur. N. S. 481; 11 W. R. 475; 46 E. R. 706, L. J.

Annotations:—Distd. Brownson v. Lawrance (1868), L. R. 6 Eq. 1. *Distd. Gall v. Fenwick* (1874), 43 L. J. Ch. 178. *Distd. Elliott v. Doarsley* (1880), 16 Ch. D. 322. *Reff. Coote v. Lowndes* (1870), L. R. 10 Eq. 376; *Lewis v. Lewis* (1871), L. R. 13 Eq. 218; *Re Newmarch, Newmarch v. Storr* (1878), 9 Ch. D. 12. *Mentd. Ellis v. Banker* (1871), 7 Ch. App. 104.

5597. Part of real estate charged by will in aid of personal estate.]—*Re NEWMARCH, NEWMARCH v. STORR*, No. 5608, *post*.

5598. Specific devise of part of real estate—Remainder of estate passing under residuary devise.]—(1) In the will of testator dying before Jan. 1, 1868, a direction that all his debts shall be paid "out of his estate" does not exclude the operation of 1854 Act.

(2) The owner of the equity of redemption of two estates comprised in the same mtge. specifically devised one estate, & left the other to pass by a residuary devise:—*Held*: he thereby signified a "contrary or other intention" within 1854 Act, so as to make the estate which passed by the residuary devise primarily liable to the whole of the mtge. debt.—*BROWNSON v. LAWRENCE* (1868), L. R. 6 Eq. 1; 37 L. J. Ch. 351; 18 L. T. 143; 16 W. R. 535, 927.

Annotations:—As to (2) N.F. Gibbins v. Eyden (1869), L. R. 7 Eq. 371. *Distd. Sackville v. Smyth* (1873), L. R. 17 Eq. 153. *N.F. Re Smith, Hannington v. True, Giles v. True* (1886), 33 Ch. D. 195.

5599. ———]—Testator, who was entitled to an estate subject to a mtge., devised part of it for the benefit of his widow for life, & the remainder to his residuary devisee, & bequeathed his personal estate subject to debts, & directed that the deficiency should be charged on his residuary real estate:—*Held*: no contrary or other intention was shown within 1854 Act, so as to exonerate the widow's life interest from keeping down a proportionate part of the interest on the mtge.—

entirely taken out of the residuary gift, & was primarily liable for its proportion of the mtge. debt, & the mortgaged property must also bear its proportion of the general debts, funeral & testamentary expenses.—*Re EBERLEIN, MILFORD v. STURT* (1908), 9 S. R. N. S. W. 11.—*AUS.*

c. — Out of mixed fund.]—The fact that of two lots, owned by testator subject to incumbrances, one is devised to his son D., while the other passed under a general devise to the executors, in trust for the heirs-at-law, affords no indication of intention that D. shall enjoy free from the mtge. debt, nor does the fact that testator directs his debts to be paid out of a mixed fund.—*MASON v. MASON* (1887), 13 O. R. 735.—*CAN.*

5594.1. Direction in will for payment of mortgage out of particular

fund.]—Testator by his will directed that his mtge. debts should be paid out of the rents & profits of certain realty, portion of which was mortgaged, & by a subsequent clause of his will he directed that his residuary personalty be applied towards the reduction of any debt due upon any of his real estate:—*Held*: the directions in the will amounted to the signification of a contrary intention within Conveyancing & Law of Property Act, 1898, s. 109 (1), & the mtge. debts must be paid ratably out of the two special funds created by testator for this purpose.—*Re HEININGER, HEININGER v. HEININGER* (1908), 8 S. R. N. S. W. 120.—*AUS.*

d. Fund insufficient.]—Testator devised the whole of his real & personal estate except certain specific chattels to his trustees subject to the payment of

his debts, with payment of which, except his mtge. debts, he primarily charged his personal estate upon certain trusts, as to property A. upon certain specific trusts upon property B. on trust to sell, & out of the proceeds in the first place, to pay off a mtge. on property A. & to invest the balance of the proceeds of sale:—*Held*: A. was not exonerated from payment of the mtge. debt, except to the extent of the proceeds of sale of B. & those proceeds being insufficient the balance of the debt must be charged on A.—*MOSS v. MOSS* (1898), 19 N. S. W. Eq. 146.—*AUS.*

e. Specific devise of part of real estate—Subject to payment of specified sum to trustees—Real estate also subject to mortgage.]—Testator by his will gave to his trustees all his real & personal property on trust for his

SACKVILLE v SMYTH (1873), L. R. 17 Eq. 153; 43 L. J. Ch. 494; 22 W. R. 179.

Annotation.—**Folld. Re Smith, Hannington v. True, Giles v. True** (1886), 33 Ch. D. 195.

5600. ———.]—Testator, after directing the payment of his debts, devised a freehold house to his wife "absolutely to do with as she thinks proper"; & he requested his exors. to sell & convert into money whatever freehold or other property he possessed, & to collect all debts due to him, & to apply the proceeds in the payment of certain legacies. Testator's real estate was all subject to one mtge. :—*Held*: the will did not show any "contrary or other intention" within the meaning of 1854 Act, & consequently the widow took the house subject to its ratable proportion of the mtge. debt.—*Re SMITH, HANNINGTON v. TRUE, GILES v. TRUE* (1886), 33 Ch. D. 195; 55 L. J. Ch. 914; 55 L. T. 549; 35 W. R. 103.

Several properties comprised in one mortgage.]—*See* Sub-sect. 1, O. (b) v., *post*.

5601. *Devises "freed & discharged from any mortgage thereon."*]—Testator, who died in 1889, after legacies of £100 to four of his children, made several specific devises, freed & discharged from any mtges. there might be thereon at the time of his death, for the benefit of a son & three daughters, & declared that if he should sell any of the houses thereinbefore given for the benefit of his daughters, his trustees should out of his residuary estate stand possessed of a sum equivalent to the price received for the same upon trusts similar to those declared respecting the house sold; testator then gave all other his real & personal estate upon trust to pay annuities of £250 to each of his sons, & out of the balance of the income thereof to pay the specific incumbrances upon the estate, & after payment off of the incumbrances, upon trust to assign his residuary estate to his two sons equally. Testator sold one of the specifically devised houses for £9,800. The estate proved insufficient for repayment in full to all the beneficiaries :—*Held*: (1) the four pecuniary legacies were charged upon the entire residue, & had priority over all other payments directed to be made to beneficiaries; (2) the annuities were only given to the sons in their capacity of residuary legatees, & were therefore not payable until the sum representing proceeds of sale of realty sold by testator, & the mtge. debts. on the specifically devised realty, had been provided for; (3) the £9,800, representing proceeds of sale, was to be treated as an ordinary legacy made payable out of residue; & (4) the rule in *Lutkins v. Leigh* (1734), *Cas. temp. Talb.* 53, that the pecuniary legatee has priority over the devisee, although the devisee was under the will entitled as against a residuary legatee to have the mtge. debt paid off out of residue, applied, not having been expressly negatived by testator, & the devisees of the mtged. property were not entitled to compete with the legatees.—*Re SMITH, SMITH v. SMITH*, [1899] 1 Ch. 365; 68 L. J. Ch. 333; 80 L. T. 113; 47 W. R. 223.

5602. *Special provision made during testator's lifetime for payment of mortgage.*]—M. granted a Scottish estate to his son, under the burden of the

payment of a mtge. debt secured upon another estate belonging to M. in England. The grantor died domiciled in England. By his will, he appointed exors., directed payment of his just debts, as soon as conveniently might be after his death; & devised the mtged. estate to the grantee of the Scottish estate :—*Held*: the grantee must bear the burden of the mtge. debt in question & testator's general personality was exonerated therefrom.—*SMITH v. MORETON* (1867), 37 L. J. Ch. 6.

5603. *Contrary intention signified by documents other than will—Mortgage & contemporaneous deed.*]—Testator, by his will, after reciting that it was probable that he might acquire the absolute interest in reversion in a sum of Consols, subject to preceding life estates, under some arrangement by virtue whereof he would obtain a transfer of the Consols to himself, upon his charging his real estate with an annual sum equal to the dividends arising from the Consols, devised his real estate, subject to any charge or charges that he might have made under the arrangement before referred to, for the payment of an annual sum equal to the dividends arising from the Consols, to certain uses, & disposed of his residuary personal estate in another way. Testator subsequently acquired the reversionary interest, & an arrangement was carried out under which the Consols were transferred to him, & he conveyed to the trustees, by whom the Consols were previously held, his real estate by way of mtge. for securing the re-transfer of the Consols at the end of six months, & payment in the meantime of interest equal to the dividends thereon; & by a contemporaneous deed, reciting that the transfer of the Consols to testator had been made upon an agreement for the re-transfer thereof "in case such re-transfer should ever be required," testator & the tenants for life released the trustees, & they & the tenants for life covenanted with testator that if he punctually paid the interest they would not, during the lives of the tenants for life, require the re-transfer unless required for some purpose connected with the estate, of which the Consols originally formed a part. Testator subsequently made a codicil to his will, but did not therein refer to the above-mentioned transactions. The interest on the mtge. was punctually paid, & re-transfer of the Consols was never required.

On the death of the surviving tenant for life, who survived testator, the legatees of the residuary personal estate claimed that the amount secured by the mtge. was chargeable on the real estate in their favour :—*Held*: upon the will & subsequent deeds there was sufficient evidence of a "contrary intention" within 1854 Act, & the real estate, in the events which had happened, was exonerated from payment of the mtge. debt.—*Re CAMPBELL, CAMPBELL v. CAMPBELL*, [1893] 2 Ch. 206; 62 L. J. Ch. 594; 68 L. T. 851; 3 W. R. 331.

v. Where Several Properties Mortgaged.

5604. *Whether debt borne ratably.*]—A. mortgaged freeholds & leaseholds together & died intestate in 1857 :—*Held*: as between the heir & administrator, the freeholds & leaseholds must

wife for life, & after her death gave to each of his two daughters a specified parcel of land subject to the payment by her to his trustees of the sum of £800. At the date of testator's death the two parcels of land were subject to a mtge. for £1,200 & interest thereon :—*Held*: Administration & Probate Act, 1919, s. 62, applied, & neither of the daughters was entitled to have any

portion of the mtge. debt satisfied out of any other assets of testator.—*BUHLEN v. NILSON* (1921), 29 C. L. R. 417.—AUS.

1. Contrary intention signified in document other than will—Devise in strict settlement—Effect of.]—Where there is a will, the ct. may look not only at the will, but also at any deed

or document executed by testator, to see if he signifies an intention to exonerate the mortgaged properties. Devising property in strict settlement is not sufficient to signify a contrary intention so as to exclude the operation of Real Property Statute (Locke King's Act), 1864, s. 160.—*BROWN v. ABBOTT* (1881), 7 V. L. R. 131.—AUS.

Sect. 7.—Order of application of assets: Sub-sect. 1, C. (b) v., vi. & vii., & (c).]

bear the burden ratably.—*EVANS v. WYATT* (1862), as reported in 31 Beav. 217; 54 E. R. 1121.

5605. —.]—Real estate was mortgaged to secure £1,500; & by a subsequent deed the same realty, together with other realty, was mortgaged to secure the same debt, & an additional debt; & a policy of assurance & other personalty were assigned as a further security. The mtgor. having died intestate:—*Held*: as between the administrator & heir-at-law, the estate originally mortgaged was primarily liable to the payment of the £1,500: & the additional debt must be ratably apportioned as between the realty & personalty comprised in the second deed.

Mr. Locke King's Act [1854 Act] does not affect the liability of the properties (*MALINS, V.-C.*).—*LIPSCOMB v. LIPSCOMB* (1868), L. R. 7 Eq. 501; 38 L. J. Ch. 90; 19 L. T. 342; 17 W. R. 252.

Annotations.—*Fold. De Rochefort v. Dawes* (1871), L. R. 12 Eq. 540; *Trestrail v. Mason* (1878), 7 Ch. D. 655. *Distd. Leonion v. Leonino* (1879), 10 Ch. D. 460. *Consd. Re Athill, Athill v. Athill* (1880), 16 Ch. D. 211.

5606. —.]—The owner of two estates subject to the same mtge., specifically devised one of them, & left the other to pass by a residuary devise:—*Held*: the residuary devise was specific, & the two estates must therefore bear the mtge. debt ratably.—*GIBBINS v. EYDEN* (1869), L. R. 7 Eq. 371; 38 L. J. Ch. 377; 20 L. T. 516; 17 W. R. 481.

Annotations.—*Fold. Re Smith, Hannington v. True, Giles v. True* (1886), 33 Ch. D. 195. *Mentd. Tomkins v. Colthurst* (1875), 1 Ch. D. 626; *Eager v. Furnivall* (1881), 17 Ch. D. 115.

5607. —.]—Testator having devised estates A. & B., deposited the title deeds of A. with his bankers to secure any balance that might be due from him, & being largely indebted & unable to satisfy the debt, & requiring further small advances, deposited with bank the title deeds of B. The debt remaining due at his death:—*Held*: the amount due up to the time of the second deposit was payable out of A.; & the amount accrued subsequently, out of A. & B. ratably; the value of A. to be computed after payment of the previous mtge.—*DE ROCHEFORT v. DAWES* (1871), L. R. 12 Eq. 540; 40 L. J. Ch. 625; 25 L. T. 456. **Annotations.**—*Distd. Leonino v. Leonino* (1879), 10 Ch. D. 460. *Consd. Re Athill, Athill v. Athill* (1880), 16 Ch. D. 211.

5608. —.]—A charge of debts on part of testator's real estate in exoneration of the rest without specially referring to his mtge. debts, is not a sufficient expression of an intention contrary to the rule established by 1854 Act to exonerate the mtged. estate. 1854 Act applies to a mtged. estate, different portions of which are devised to different persons; & the devisees must contribute according to the value of their respective portions. Testator, nearly the whole of whose real estate was subject to a mtge. debt, devised a part of his real estate to his sons, "charged nevertheless in aid of his personal estate & in exoneration of his other real estate with the payment of all his just debts." & he devised another part of his real estate to his daughter:—*Held*: there was no sufficient declaration of a contrary intention under 1854 Act, & both the devisees must contribute ratably to payment of the mtge. debt.—*Re NEWMARCH, NEWMARCH v. STORR* (1878), 9 Ch. D. 12; 48 L. J. Ch. 28; 39 L. T. 146; 27 W. R. 104, C. A.

5609. —.]—Where real & personal estate are comprised in the same mtge., the mtge. debt must, as between the devisees of the realty & the legatees of the personalty, be borne ratably by the real &

personal estate subject thereto, & the real estate is not, under 1854 Act, primarily liable to the payment thereof.—*TRESTRAIL v. MASON* (1878), 7 Ch. D. 665; 47 L. J. Ch. 249; 26 W. R. 260.

5610. —.]—Testator, a merchant, was in the habit of borrowing money from his bankers from time to time, depositing securities with them upon the occasion of each advance; & on Mar. 29, 1876, his total indebtedness amounted to £62,000, for which his bankers held various stocks & shares as security. On Mar. 30, 1876, testator applied for a further advance of £15,000, & executed a memorandum by which he charged that sum upon his freehold property at Caterham, & agreed that the security was to cover any money due from time to time from him to his bankers. He at the same time deposited the title deeds of the Caterham property with his bankers. He received the £15,000 & also further advances on subsequent dates; & he also subsequently deposited with the bankers certain further securities, including the title deeds of freehold & leasehold property, stocks & shares, but no subsequent memorandum was executed. Some of the stocks & shares were sold by the bankers in testator's lifetime, & the proceeds applied in reduction of the debt, which at his death stood at £28,625. It appeared from a memorandum book kept by testator, & from his ledger, that the successive advances & the successive deposits were treated by him as forming one running account. By his will he devised his Caterham property to certain persons, & devised & bequeathed his residuary real & personal estate in trust for sale, & to divide the proceeds, after payment thereof of his debts, among certain other persons:—*Held*: the debt due at testator's death, & the interest thereon from that date, must be borne by the various properties then held by the bankers, ratably according to their respective values at the death.—*LEONINO v. LEONINO* (1879), 10 Ch. D. 460; 48 L. J. Ch. 217; 40 L. T. 359; 27 W. R. 388.

Annotations.—*Re Athill, Athill v. Athill* (1880), 60 Ch. D. 211; *Re Dunlop, Dunlop v. Dunlop* (1882), 21 Ch. D. 583.

5611. —.]—Mtgor. conveyed freeholds by way of mtge. by an indenture which recited an agreement by the mtgees. to advance him the principal moneys upon having the repayment thereof with interest secured as thereafter mentioned & by a collateral security or indenture intended to bear even date with those presents. On the same day mtgor. demised leaseholds by way of mtge. to the same mtgees. to secure the same advance by an indenture which recited the mortgage of the freeholds, & that on the treaty for the advance it was agreed that the same principal & interest should be further secured by these presents. Each of the two indentures contained a covenant for the payment of the mtge. debt & interest. In an action to administer the estate of the mtgor.:—*Held*: both on the frame of the deeds themselves, & upon the evidence as to the circumstances attending the advance, the leasehold security was not "collateral" in the sense of "secondary;" & accordingly, as between the real & personal representatives of the mtgor. the mtge. debt was payable ratably out of the freeholds & leaseholds comprised in the two securities, & not primarily out of the freeholds.—*Re ATHILL, ATHILL v. ATHILL* (1880), 16 Ch. D. 211; 50 L. J. Ch. 123; 43 L. T. 581; 29 W. R. 309, C. A.

Annotation.—*Fold. Re Pimm, Sharpe v. Hodgson* (1904), 91 L. T. 190.

5612. —.]—A freehold messuage had been mortgaged jointly with a policy of assurance to secure the payment of £1,500. Testator directed the payment off of incumbrances on any part of his residuary estate out of residue. The policy of assurance was part of testator's residuary estate:—*Held*: the incumbrance must be apportioned between the freehold messuage & the policy of assurance according to their respective values, & the portion so found to be charged on the policy must be discharged out of residue.—*Re PIMM, SHARPE v. HODGSON* (1904), as reported in 91 L. T. 190; 52 W. R. 648; 48 Sol. Jo. 588.

Annotations:—*Mentd. Re Cayley, Awdry v. Cayley*, [1904] 2 Ch. 781; *Re Briggs, Richardson v. Bantoft*, [1914] 2 Ch. 413; *Re Kennedy, Corbould v. Kennedy*, [1916] 2 Ch. 379.

5613. —.]—*Re MAJOR, TAYLOR v. MAJOR*, No. 5517, *ante*.

Indication of contrary intention.]—*See* Sub-sect. 1, C. (b) iv, *ante*.

vi. Where Beneficiary takes Several Properties.

5614. Mortgage on one property exceeding value of security—Properties passing under collective devise.]—(1) When a testator includes all his real estate in one aggregate devise, a lien for unpaid purchase-money on property which testator has contracted to purchase after the date of his will, & a mtge., which exceed the value of the property on which they are respectively charged, must be paid, as to the excess, out of the real estate comprised in the aggregate gift & not out of personalty.

(2) Leaseholds given upon such trusts as should correspond with the uses of real estate, "or as near thereto as the nature of the premises will permit," are, for this purpose, included in one aggregate gift with the real estate.—*Re KENSINGTON (BARON), LONGFORD (EARL) v. KENSINGTON (BARON)*, [1902] 1 Ch. 203; 71 L. J. Ch. 170; 85 L. T. 577; 50 W. R. 201; 18 T. L. R. 89; 46 Sol. Jo. 176.

Annotations:—*As to* (1) *Distd. Re Holt, Holt v. Holt* (1916), 85 L. J. Ch. 779. *Generally, Mentd. Re Egmont's S. E., Lefroy v. Egmont*, [1912] 1 Ch. 251; *Re Lyons, Beck v. Lyons* (1912), 107 L. T. 146.

5615. — Properties descending to heir.]—Where real estate of an intestate descends to the heir-at-law, subject as to the several properties comprised in it, to a separate mtge. on each, one of which is in excess of the value of its security, his personal estate, & not the other mtgd. properties, is liable to make good the deficiency of the overcharged property.—*Re HOLT, HOLT v. HOLT* (1916), 85 L. J. Ch. 779; 115 L. T. 73; 60 Sol. Jo. 640.

vii. Other Cases.

5616. Personalty going to Crown in absence of next of kin—Mortgage not payable out of personalty.]—(1) Where personalty was bequeathed to persons upon trust for a charity, which failed under Mortmain Act, & there were no next of kin:—*Held*: the exor. was trustee for the Crown.

(2) A charge of debts, etc., on a particular real estate, assuming it to exonerate personal estate in favour of a particular legatee, does not exonerate the person, who, on failure of that legacy by means of Mortmain Act, takes it.

(3) Where there was also a charge of a mtge. debt on the particular real estate devised:—*Held*: under 1854 Act, the devisee was not entitled to have the debt paid out of the personal estate, which passed, by failure of the legacy, to other

persons than the legatee.—*DACRE v. PATRICKSON* (1860), 1 Drew. & Sm. 182; 29 L. J. Ch. 846; 2 L. T. 500, 764; 6 Jur. N. S. 863; 8 W. R. 647; 62 E. R. 348.

Annotations:—*As to* (1) *Reid. Re Lacy, Royal General Theatrical Fund Assocn. v. Kydd*, [1899] 2 Ch. 149; *Re Glukman, A.-G. v. Jefferys*, [1908] 1 Ch. 552; *Re Blow, St. Bartholomew's Hospital v. Cambden*, [1914] 1 Ch. 233. *As to* (2) *Apld. Kilford v. Blaney* (1886), 31 Ch. D. 66.

5617. Mortgage debts charged on personalty—Personalty exhausted by payment of unsecured debts—Devises of mortgaged house & unmortgaged house—Whether unmortgaged house liable to contribute.]—Testator by his will gave two adjacent freehold houses to his two sisters for life, one to each, & directed that the elder sister should have the choice, & that his mtge. debts should be paid out of his personalty. At the date of his death one of the houses was subject to a mtge., & testator's personalty was exhausted by the payment of his unsecured debts. The elder sister having chosen the unmortgaged house, the question arose whether that house should contribute to the burden of the mtge.:—*Held*: the younger sister took her house subject to the mtge. thereon.—*SARTIN v. STURGES* (1887), 3 T. L. R. 309.

5618. Mortgage debts charged on realty—Mortgage paid out of personalty—Right of repayment out of real estate.]—L. being seized in fee of real estate, mortgaged it for £2,000, & subsequently settled it on himself for life, with limitations to his children. He then, by his will, gave all his personalty to his son J., subject to the payment of his debts, funeral, & testamentary expenses, except such as were charged on any real estate by way of mtge. or otherwise. L. had insured his life for £5,000, & deposited the policy with his bankers to secure a loan from them; & soon after his death, J. received the £5,000 on the policy, & paid off both mtges., & claimed to be entitled to have the mtge. for £2,000 paid out of the real estate.—*Held*: he was entitled.—*LAWSON v. MEYNELL* (1868), 18 L. T. 174.

5619. Devises of real estate "freed & discharged from any mortgage thereon"—Not entitled to payment of mortgages out of personal estate until ordinary legatees satisfied in full.]—*Re SMITH, SMITH v. SMITH*, No. 5601, *ante*.

5620. Devisee of mortgaged property not personally liable for mortgage debt.]—Testator devised & bequeathed a freehold house & the furniture & effects therein on trust for A. & B. for life. The house was subject to a mtge. for more than its value:—*Held*: A. & B. were entitled to the use of the furniture without keeping down the interest on mtge.

Under a gift of mtgd. property the devisee never became liable for the mtge. debt, & under the old law he would not only not have been not liable, but would have been entitled to have the mtge. debt paid out of testator's estate. All that Locke King's [1854] Act does is, not to make him incur a personal liability, but to say that he shall not be able to call upon testator's representatives to pay off the debt (*PEARSON, J.*).—*SYER v. GLADSTONE* (1885), 30 Ch. D. 614; 34 W. R. 565.

Annotations:—*Consd. Frewen v. Law Life Assoc. Soc.*, [1896] 2 Ch. 511; *Re Kensington, Longford v. Kensington*, [1902] 1 Ch. 203; *Re Lyons, Beck v. Lyons* (1912), 107 L. T. 146. *Reid. Re Hotchkys, Freke v. Calmady* (1886), 32 Ch. D. 408.

(c) After 1925.

See Administration of Estates Act, 1925 (c. 23), s. 35.

Sect. 7.—Order of application of assets: Sub-sect. 2, A.]

SUB-SECT. 2.—LIABILITY OF REAL ESTATE GENERALLY.

A. In General.

See Land Transfer Act, 1897 (c. 65), s. 2 (3), repealed by Law of Property Act, 1922 (c. 16), s. 156 (11); Administration of Estates Act, 1925 (c. 23), ss. 1 (1), 32.

5621. General rule.—Necessity for clear intention to exonerate personal estate.—Whether court may look to extrinsic circumstances.—Admissibility of parol evidence.]—Testator by will subjected his real estate to payment of his debts & made his wife extrix. Parol evidence was admitted to prove testator's declarations that his extrix should have his personal estate exempt from his debts.—*GAINSBOROUGH (COUNTESS) v. GAINSBOROUGH (EARL)* (1691), 2 Vern. 252; 1 Eq. Cas. Abr. 230; 23 E. R. 764: *sub nom. GAINSBOROUGH'S (LADY) CASE*, Freem. Ch. 188.

Annotations:—*Consd. Pettit v. Smith* (1695), 1 P. Wms. 7. *Expld. Bromley v. Jeffereys* (1700), Prec. Ch. 138; *Granville v. Beaufort* (1709), 1 P. Wms. 114. *Consd. Rutland v. Rutland* (1723), 2 P. Wms. 209. *Expld. Stephenson v. Heathcote* (1758), 1 Eden, 38. *Nourse v. Finch* (1793), 4 Bro. C. C. 239; *Clennell v. Lewthwaite, Thornton v. Tracy* (1794), 2 Ves. 465. *Reid. Ulrich v. Litchfield* (1742), 2 Atk. 372; *Lake v. Lake* (1751), Amb. 126; *Walton v. Walton* (1807), 14 Ves. 318.

5622. ———.]—Devise of real estate to testator's wife, her heirs & assigns, in trust, by sale of so much & such part of the premises as should be necessary, to advance & raise so much money as would fully pay off & satisfy all his just debts & funeral expenses, & all the residue to her for life, remainder to testator's heirs on her body begotten. Testator gave to his uncle his tobacco box, & the residue of his personal estate whatsoever to his wife for ever, & appointed her executrix:—*Held*: (1) the personal estate was not exonerated from the payment of debts; (2) parol evidence of testator's intention to give his personal estate exempt from debts, rejected.—*STEPHENSON v. HEATHCOTE* (1758), 1 Eden, 38; 28 E. R. 598.

Annotations:—*As to (1) Consd. Bootle v. Blundell* (1815), 1 Mer. 193; *Greene v. Greene* (1819), 4 Madd. 148. *Reid. Gray v. Minnethorpe* (1796), 3 Ves. 103. *As to (2) Consd. Ancaster v. Mayer* (1785), 1 Bro. C. C. 454.

5623. ———.]—To exempt the personal estate under a devise for payment of debts the intention must appear plainly on the will; & the ct. cannot look to extrinsic circumstances.—*BRUMMEL v. PROTHERO* (1796), 3 Ves. 111; 30 E. R. 921.

Annotations:—*Reid. Burton v. Knowlton* (1796), 3 Ves. 107; *Collis v. Robins* (1847), 1 De G. & Sm. 131; *Gilbertson v. Gilbertson* (1865), 12 L. T. 816; *Re Banks, Banks v. Busbridge*, [1905] 1 Ch. 547. *Mentd. Bootle v. Blundell* (1815), 1 Mer. 193.

5624. ———.]—*ANON.* (1693), Freem. Ch. 192; 22 E. R. 1154.

5625. ———.]—*HALL v. BROOKER* (1711), Gilb. Ch. 72; 25 E. R. 50.

Annotation:—*Reid. Walker v. Jackson* (1743), 2 Atk. 624.

5626. ———.]—Devise of real estates charged with debts, etc., & of the personal estate to the same person, there being no express words to exempt the personal estate from the payment

of debts, etc., it was held first applicable.—*DOLMAN v. WESTON* (1716), 1 Dick. 26; 21 E. R. 176; *sub nom. DOLMAN v. SMITH*, 2 Eq. Cas. Abr. 496; Gilb. Ch. 128; Prec. Ch. 456; 2 Vern. 740, L. O.

Annotations:—*Expld. Stapleton v. Colville* (1736), 2 Eq. Cas. Abr. 373. *Reid. Whaley v. Cox* (1737), 2 Eq. Cas. Abr. 549.

5627. ———.]—Testator gives his only daughter the sum of £3,000 at her age of eighteen, or marriage, & that the trustees shall levy & raise by mtge. or sale of his lands, together with his personal estate, as much as will pay the £3,000, but that it shall not be raised till eighteen, or marriage, out of the before mentioned estate or land, that it may not be a debt in his personal estate:—*Held*: the personal estate was excepted, & the £3,000 is a charge on the real estate.

Personal estate is the natural & proper fund to be first applied to the payment of debts, unless there are express words to exempt it (*LORD HARDWICKE, C.*).—*PHIPPS v. ANNESLEY* (1740), 2 Atk. 57; 26 E. R. 432, L. C.

5628. ———.]—Notwithstanding a charge upon a term for payment of debts, a leasehold estate purchased by testator, subject to a mtge., shall bear the burden of that mtge., it not being properly the debt of testator. Personal estate primarily liable to testator's debts, however strongly the real estate is charged for the purpose, unless a clear intention is manifest to exempt it.—*ANCASTER v. MAYER* (1785), 1 Bro. C. C. 454; 28 E. R. 1237, L. C.

Annotations:—*Distd. Burton v. Knowlton* (1796), 3 Ves. 107. *Apprvd. Reade v. Litchfield* (1797), 3 Ves. 475. *Consd. Tait v. Northwick* (1799), 4 Ves. 816; *Hartley v. Hurle* (1800), 5 Ves. 540. *Appld. Watson v. Brickwood* (1804), 9 Ves. 447. *Consd. Bootle v. Blundell* (1815), 1 Mer. 193. *Appld. Greene v. Greene* (1819), 4 Madd. 148. *Reid. Webb v. Jones* (1786), 2 Bro. C. C. 60; *Brummel v. Prothero* (1796), 3 Ves. 111; *Hancox v. Abbey* (1805), 11 Ves. 179; *Lushington v. Sewell* (1827), 1 Sim. 435; *Collis v. Robins* (1847), 1 De G. & Sm. 131; *Re Banks Banks v. Busbridge*, [1905] 1 Ch. 547. *Mentd. Blacklow v. Laws* (1842), 2 Hare, 40; *Bagot v. Chapman*, [1907] 2 Ch. 222.

5629. ———.]—Under a devise to sell & pay debts & funeral expenses the personal estate was exempted without express words upon the evident intention.—*BURTON v. KNOWLTON* (1796), 3 Ves. 107; 30 E. R. 919.

Annotations:—*Consd. Hartley v. Hurle* (1800), 5 Ves. 540. *Appld. Greene v. Greene* (1819), 4 Madd. 148. *Reid. Tait v. Northwick* (1799), 4 Ves. 816; *Bootle v. Blundell* (1815), 1 Mer. 193; *Collis v. Robins* (1847), 1 De G. & Sm. 131.

5630. ———.]—Trust term in a will to raise out of real estate several sums; of which some were secured by testator's bond and covenant; the intention being to give them as portions out of the land, not as debts or legacies, the personal estate is not applicable.

To exempt the personal estate from debts, the intention must be manifest.—*READE v. LITCHFIELD* (1797), 3 Ves. 475; 30 E. R. 1113, L. C.

5631. ———.]—To exempt the personal estate from the payment of the debts the will must afford a necessary implication: viz. that inference, that leaves no doubt upon the mind of the judge.—*HARTLEY v. HURLE* (1800), 5 Ves. 540; 31 E. R. 727.

Annotations:—*Mentd. Tyler v. Lake* (1831), 3 Russ. & M.

PART IV. SECT. 7, SUB-SECT. 2.—A.

E. Only for debt of testator.]—The land of a testator or intestate is liable to be sold only for his debt.—*FREED v. ORR* (1881), 6 A. R. 690.—*CAN.*

h. Under Devolution of Estates Act.]—Devolution of Estates Act, R. S. O., c. 127, vests the real as well as the personal estate of a deceased person in his personal representatives

for the purpose of paying his debts; but, except in the case of a residuary devise of real & personal estate, which is especially provided for by s. 7, the order in which the different classes of property were applicable to the payment of debts before the passing of the Act, has not been disturbed by its provisions.—*Re HOPKINS* (1900), 20 C. L. T. 446; 32 O. R. 315.—*CAN.*

i. Insufficiency of personalty.—Residuary realty devised on trust.]—Testator, after directing payment of his debts by his execs., gave his personal estate & a dwelling-house to his daughter M., & gave M. a legacy of \$2,000. He then devised the residue of his real estate to exor. in trust, & after the death of his wife to sell the same & divide the proceeds between his children, share & share alike.

183; *Pearson v. Smedley* (1838), 2 Jur. 758; *Blacklow v. Laws* (1842), 2 Hare, 40; *Swift v. Swift* (1859), 1 L. T. 150; *Re Tarney's Trust* (1866), L. R. 1 Eq. 561.

5632. ———.]—To exempt the personal estate from the debts the will must show that intention by indication plain: a provision for the debts out of the real estate is not sufficient.—*BRIDGES v. PHILLIPS* (1801), 6 Ves. 567; 31 E. R. 1199.

*Annotations:—*Consd. *Plenty v. West* (1852), 16 Beav. 173. *Reid. Collis v. Robins* (1847), 1 De G. & Sm. 131; *Re Bull, Catty v. Bull* (1883), 49 L. T. 592.

5633. ———.]—Necessity for express words or clear manifested intention.]—The personal estate not exonerated from the debts & legacies by a mere charge. Express words or plain intention upon the whole will be necessary.—*WATSON v. BRICKWOOD* (1804), 9 Ves. 447; 32 E. R. 675.

*Annotations:—*Consd. *Boote v. Blundell* (1815), 1 Mer. 193. *Apld. Greene v. Greene* (1819), 4 Madd. 148. *Reid. Hancox v. Abbey* (1805), 11 Ves. 179; *Barnewell v. Cawdor* (1818), 3 Madd. 453; *Collis v. Robins* (1847), 1 De G. & Sm. 131; *Goodwin v. Lee* (1855), 26 L. T. O. S. 1; *Re Bull, Catty v. Bull* (1883), 49 L. T. 592.

5634. ———.]—The personal estate, being the proper & primary fund for the payment of debts & legacies, can be exempted only by express declaration, or plain & unequivocal manifestation of intention; & neither a charge, nor a direction to sell, nor the creation of a term for payment, will exempt the personal estate.—*TOWER v. ROUS (LORD)* (1811), 18 Ves. 132; 34 E. R. 267.

*Annotations:—**Apld. Gilbertson v. Gilbertson* (1865), 34 Beav. 354. *Consd. Powell v. Riley* (1871), L. R. 12 Eq. 175. *Reid. Collis v. Robins* (1847), 1 De G. & Sm. 131.

5635. ———.]—In order to exonerate the personal estate from the payment of debts, the will must contain express words for that purpose, or a clear manifested intention; a declaration plain, or necessary inference, tantamount to express words. It is impossible to define what circumstances will be sufficient to show this intention, which must arise, in every case, from the context of the will. It is not required that the intention should be so manifested as that all persons cannot fail to agree with respect to it; but so as to convince the mind of the judge deciding the particular question. It must be an intention, not only to charge the real estate, but to discharge the personal. Circumstances from which an inference has been ordinarily raised, as that of the same person being constituted trustee of the real estate & exor.; the personal estate being given as a residue, or as personal estate generally, or after an enumeration of particulars; the residuary legatee being also devisee of the real estate, or of part, for life, or otherwise, etc.; are circumstances entitled to consideration only in reference to the context of every particular will in which they occur. The amount of the personal estate is not a circumstance to be inquired into, so as to furnish a ground for construction. In this case, the personal estate was declared to be exonerated, upon the particular circumstances.—*BOOTLE v. BLUNDELL* (1815), 1 Mer. 193; 19 Ves. 494; 35 E. R. 646, L. C.

*Annotations:—*Consd. *Collis v. Robins* (1847), 1 De G. & Sm. 131. *Distd. Boughton v. Boughton, Boughton v. James* (1848), 1 H. L. Cas. 406. *Consd. Mollish v. Vallins* (1862), 6 L. T. 215; *Eno v. Tatham* (1863), 4 Giff. 181. *Apld. Gilbertson v. Gilbertson* (1865), 34 Beav. 354. *Reid. Gittins v. Steele* (1818), 1 Swan. 24; *Cunningham v. Murray* (1847), 1 De G. & Sm. 366; *Paterson v. Scott*

(1852), 1 De G. M. & G. 531; *Plenty v. West* (1852), 16 Beav. 173; *Smith v. Smith* (1861), 3 Giff. 263; *Mellish v. Vallins* (1862), 2 John. & H. 194; *Vernon v. Manvers* (No. 2) (1862), 31 Beav. 623; *Hensman v. Fryer* (1867), 3 Ch. App. 420; *Allan v. Gott* (1872), 7 Ch. App. 439; *Howard v. Dryland* (1877), 38 L. T. 24; *Patching v. Barnett* (1880), 49 L. J. Ch. 665; *Kilford v. Blaney* (1885), 31 Ch. D. 56. *Mentd. Pulley v. Hilton* (1823), 12 Price, 625; *Tatham v. Wright* (1831), 2 Russ. & M. 1; *Slaney v. Wade* (1836), 7 Sim. 595; *Waters v. Waters* (1848), 2 De G. & Sm. 591; *McGregor v. Topham* (1850), 3 H. L. Cas. 132; *Boys v. Bradley* (1853), 4 De G. M. & G. 58; *Key v. Key* (1853), 4 De G. M. & G. 73; *Boyce v. Rossborough* (1854), 3 De G. M. & G. 817; *Metcalfe v. Hutchinson* (1875), 1 Ch. D. 591; *Re Simpson, Ex p. Morgan* (1876), 34 L. T. 329.

5636. ———.]—In order to exempt the personal estate from the payment of debts & funeral expenses, there must be a clear intention either expressed, or to be extracted from the whole will, that the real estate is to be applied as the primary fund for those purposes.—*GREENE v. GREENE* (1819), 4 Madd. 148; 56 E. R. 662.

*Annotations:—**Apld. Michell v. Michell* (1820), 5 Madd. 69; *Price v. Price* (1835), 4 L. J. Ch. 243. *Fold. Gilbertson v. Gilbertson* (1865), 34 Beav. 354. *Apld. Powell v. Riley* (1871), L. R. 12 Eq. 175. *Reid. Collis v. Robins* (1847), 1 De G. & Sm. 131.

5637. ———.]—Personal estate may be exempted from the payment of debts, without express words to that effect, upon the clear intention of testator.—*DAWES v. SCOTT* (1828), 5 Russ. 32; 38 E. R. 939.

5638. ———.]—In order to exonerate the personal estate from the payment of debts, there must appear upon the whole will a manifest intention to that effect.—*DRIVER v. FERRAND* (1830), 1 Russ. & M. 681; 39 E. R. 261.

*Annotations:—**Apld. Price v. Price* (1835), 4 L. J. Ch. 243. *Reid. Collis v. Robins* (1847), 1 De G. & Sm. 131.

5639. ———.]—Although the rule is that testator, who must be taken to know that his personal estate is the primary fund for payment of his legacies & annuities, must use clear & distinct words to exonerate it from such payment, it is not necessary that he should say, in precise words, that he exonerates it, if an intention to exonerate can be gathered from the will.—*ION v. ASHTON* (1860), 28 Beav. 379; 2 L. T. 686; 6 Jur. N. S. 879; 8 W. R. 573; 54 E. R. 411.

*Annotations:—*Consd. *Poole v. Heron* (1873), 42 L. J. Ch. 348. *Reid. Re Needham, Robinson v. Needham* (1884), 54 L. J. Ch. 75. *Mentd. Sinnett v. Herbert* (1871), L. R. 12 Eq. 201; *Chandler v. Howell* (1876), 4 Ch. D. 651; *Re Christmas, Martin v. Lacon* (1886), 33 Ch. D. 332.

5640. Application of rule.—To real estate outside jurisdiction.]—By his will made in 1905 testator, after appointing exors. & trustees, gave certain legacies free of duty, & subject to the payment of these legacies & duties, & his funeral & testamentary expenses & debts, he devised & bequeathed all his real estate situate in the Argentine Republic, including therein chattels real & land of whatsoever nature, together with farming stock, crops, & household & farming effects & consumable stores, & provisions in or about his real estate in the Argentine, unto his trustees upon trust to sell, & after payment of the expenses of such sale to pay the residue to the children of his two brothers in equal shares; & testator devised & bequeathed the residue of his real & personal estate to his trustees in trust for his nephew, plff. Testator died in 1910, domiciled in England, & on a question being raised on summons whether testator had charged his real &

At testator's death, the personal estate was exceeded by the amount of the debts.—*Held: M. could not claim to have the \$2,000 paid out of the proceeds of the real estate devised to the exors.*—*TOTTEN v. TOTTEN* (1890), 20 O. R. 505.—CAN.

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k. ———.]—*Liability of entire realty.—Proportionately according to interest of devisees.*—Testator, after directing payment of his debts, bequeathed to his wife his household furniture & the rents of a farm subject to the payment of an annual sum to a daughter for life.

He then devised the farm to two grandsons with possession after the death of his wife. Testator owned another farm, which he devised to a daughter. The exor., for the payment of debts, was obliged to raise \$200.—*Held: the amount raised for*

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Sect. 7.—Order of application of assets: Sub-sect. 2, A. & B.]

personal estate in the Argentine with the payment of legacies, duties & debts, in exoneration of his residuary estate:—*Held*: (1) on the true construction of the will, the charge was confined in its operation to the Argentine property; (2) the rule of construction which required that there must be found in the will an intention not only to charge the realty, but to discharge the personalty applied to realty situate outside the jurisdiction; (3) the fund charged was not a true mixed fund within the authority of *Roberts v. Walker*, No. 5519, *ante*, inasmuch as there was no trust for conversion of the whole real & personal estate for the purposes of satisfying the charge, & the devise of real estate in the Argentine charged with these payments made it an auxiliary fund to the personalty, but did not operate to exonerate the personalty from its primary liability; (4) as the rule of construction applicable to realty had no application to the personalty, the concurrent charge of legacies & debts on the specifically bequeathed personalty did exonerate the residuary personalty from its primary liability.—*Re SMITH, SMITH v. SMITH*, [1913] 2 Ch. 216; 83 L. J. Ch. 13; 108 L. T. 952.

B. Devise of Real Estate in Trust for Payment of Debts and Legacies.

5641. Whether personal estate exonerated.]—Under a marriage settlement the settlor's daughter was entitled to £1,000 as a portion raisable out of real estate. By his will the settlor gave £10,000 more, as an addition to her portion, & devised his real estate in trust to raise thereout the portion & his debts & legacies; he made specific bequests of part of his personal estate:—*Held*: the personal estate not specifically bequeathed ought to be applied towards payment of the debts & legacies, & the daughter's portion in aid of the real estate.—*MIDDLETON v. MIDDLETON* (1685), 2 Rep. Ch. 377; 21 E. R. 692, L. C.

Annotation.—*Consd.* *Gaynsborough's Case* (1692), *Freem. Ch.* 188.

5642. — Specific bequest of surplus of proceeds of sale.]—One devises his real estate for the payment of his debts & the overplus he gives to his sisters, & devises his personal estate to his wife, whom he makes extrix. The wife shall have the personal estate exempt from debts.—*BAMFIELD v. WYNDHAM* (1699), *Prec. Ch.* 101; 24 E. R. 49. *Annotations*.—*Consd.* *Stapleton v. Colville* (1736), *Cas. temp. Talb.* 202; *Inchiquin v. French* (1745), 1 Cox, Eq. Cas. 1. *Reid*. *Walker v. Jackson* (1743), 2 Atk. 624; *Gray v. Minnethorpe* (1796), 3 Ves. 103.

5643. — —.]—Testator devised lands in trust for payment of his debts & legacies, & devised the residue of the personal estate to his wife, & also £800 out of the proceeds of the trust estate, & made her extrix. :—*Held*: she took the personal estate discharged from the payment of debts.—*WAISE v. WHITFIELD* (1713), 2 Eq. Cas. Abr. 374; 22 E. R. 319, L. C.

5644. — —.]—Where testator makes a particular provision out of his real estate for the payment of his debts, the personal estate shall not be liable to them.—*WAINWRIGHT v. BEND-*

LOWS (1716), *Prec. Ch.* 451; 2 Vern. 718; *Gilb. Ch.* 125; 24 E. R. 201, L. C.

Annotations.—*Consd.* *Stapleton v. Colville* (1736), *Cas. temp. Talb.* 202; *Inchiquin v. French* (1745), 1 Cox, Eq. Cas. 1; *Gleed v. Gleed* (1763), *Keny. Ch.* 14. *Reid*. *Walker v. Jackson* (1743), 2 Atk. 624; *Gray v. Minnethorpe* (1796), 3 Ves. 103.

5645. — —.]—W. by his will devised his real estate to trustees to sell & to apply the purchase-money in the first place in payment of all the charges & all other his debts & legacies & as to the residue of the purchase-money, to pay one moiety to his daughter M. & to lay out the other moiety in Govt. securities, & to pay the dividends for the maintenance of the three sons of his daughter A., until they should attain their respective ages of twenty-four years & when they should have attained that age, he gave that moiety equally to be divided amongst them; but if they all should die under twenty-four then he directed that such moiety should sink into & be deemed part of the residue of his personal estate & be applied in such manner as his personal estate was thereafter given & disposed of. He then gave several specific legacies; & all the residue of his personal estate he gave to his daughter A. & to H., equally to be divided between them. The debts & legacies are payable in the first instance out of the purchase-money of the real estate.—*WEBB v. JONES* (1786), 2 Bro. C. C. 60; 1 Cox, Eq. Cas. 245; 29 E. R. 33.

Annotations.—*Reid*. *Bootle v. Blundell* (1815), 19 Ves. 494; *Collis v. Robins* (1847), 1 De G. & Sm. 131.

5646. — —.]—Devise in trust to sell for payment of debts & funeral expenses, with a particular disposition of the surplus money: the personal estate, not being otherwise disposed of than by the appointment of an exor., who was not one of the trustees, is first liable to the debts, etc., especially as the produce of the sale was not sufficient for them.—*GRAY v. MINNETHORPE* (1796), 3 Ves. 103; 30 E. R. 916, L. C.

5647. — —.]—(1) Testator gave to his wife certain articles of his personal estate, which he mentioned specifically, & also certain portions of his real estates free from the mtges. thereon, & the benefit of certain contracts which he had entered into for the purchase of other real estates; & he devised the rest of his real estates to A., in trust to sell, & out of the proceeds to pay, in the first place, his funeral & testamentary expenses, his debts due on the mtges. of the estates devised to his wife, the sums due on the contracts & all his other debts & in the next place, he directed certain sums to be paid, out of the proceeds, to different persons, & gave the residue to C. & appointed his wife sole extrix. :—*Held*: the personal estate was exonerated from the debts.

(2) Testator subscribed for 20 shares of £100 each in a projected railroad, & paid £5 on each share, & covenanted to pay the remainder when called on. He bequeathed his personal estate to his widow, & devised certain of his real estates to a trustee, in trust to sell & pay all debts due from him on mtge., or for the purchase of estates which he had contracted for, & all other just debts that should be due from him at his death. When he died the shares were at a premium, &

the payment of debts was chargeable on the whole of testator's realty proportionately to the respective interests of the parties in the two farms.—*Re BROWN'S ESTATE* (1809), 18 O. L. R. 245; 13 O. W. R. 597.—*CAN.*

PART IV. SECT. 7, SUB-SECT. 2.—B.

5642.1. Whether personal estate ex-

onerated—Specific bequest of surplus of proceeds of sale.]—R. devised her freehold estate to trustees, whom she appointed exors., in trust to sell & discharge her funeral expenses & debts; she ordered sums to be paid to different persons & gave legacies to be paid out of the money arising from the sale of her lands, & the purchase-money remaining after pay-

ing the legacies she disposed of by will. B. died possessed of personal property:—*Held*: there was not enough to found a presumption that testatrix intended to exonerate the personal estate.—*M'CLELAND v. SHAW* (1805), 2 Sch. & Lef. 538.—*IR.*

1. — Conditional devise.]—Testator by his will gave a farm &

no further instalment on them had been called for. Two years afterwards, the Act for making the railroad passed:—*Held*: testator's personal estate, being exonerated from his debts, his widow was entitled to have the unpaid instalments paid out of the real estates.—*BLOUNT v. HIPKINS* (1834), 7 Sim. 43; 4 L. J. Ch. 13; 58 E. R. 753.

Annotations:—*As to* (1) *Reid*. *Collis v. Robins* (1847), 1 De G. & Sm. 131. *As to* (2) *Distd.* *Jacques v. Chambers* (1846), 2 Coll. 435. *Follid.* *Wright v. Warren* (1851), 4 De G. & Sm. 367. *Consd.* *Armstrong v. Burnet* (1855), 20 Beav. 424; *Re Box* (1863), 1 Hem. & M. 552. *Reid.* *Fitzwilliams v. Kelly* (1852), 10 Hare, 266; *Day v. Day* (1860), 1 Drew. & Sm. 261; *Re Hargreaves, Dicks v. Hare* (1890), 44 Ch. D. 236.

5648. ———.]—Lands are devised to trustees to sell, & out of the money arising by the sale, among other sums, to pay to his heir-at-law £100, & no disposition is made by testator of the surplus of his estate, & land shall not be turned into personal estate, nor more sold than is necessary to pay the legacies, & the heir shall have the surplus.—*RANDALL v. BOOKEY* (1701), Prec. Ch. 162; 2 Vern. 425; 24 E. R. 78.

Annotations:—*Reid.* *Pawlett v. Morley* (1702), Freem. Ch. 263; *Farrington v. Knightly* (1721), 1 P. Wms. 544; *Hill v. London (Bp.)* (1738), 1 Atk. 618; *Bagshaw v. Spencer* (1748), 1 Ves. Sen. 142.

5649. ———.]—Specific bequest of personal estate.]—*BOWERSBY v. BOWYER* (1720), 2 Eq. Cas. Abr. 461; 22 E. R. 393.

5650. ———.]—The personal estate under B.'s will passed as a specific legacy to the extrixes, & shall not be applied in exoneration of the real estate.—*WALKER v. JACKSON* (1743), 2 Atk. 624; 1 Wils. 24; Bunb. 302 n.; 26 E. R. 772, L. C.

Annotations:—*Consd.* *Ancestor v. Mayer* (1785), 1 Bro. C. C. 454; *Burton v. Knowlton* (1796), 3 Ves. 107; *Boote v. Blundell* (1815), 19 Ves. 494. *Mentd.* *R. v. Edwards* (1853), 9 Exch. 32.

5651. ———.]—Testator devised a part of his real estate to trustees in trust, to sell & pay certain debts mentioned in a schedule, & then devised all his personal estate to his wife, "fully & clearly exonerated from all the debts in the schedule specified;" & he settled the residue of his real estate on his wife & child in manner therein mentioned. The trust estate not being sufficient to pay the scheduled debts, the settled estates must be applied in exoneration of the personal estate.—*MORROW v. BUSH* (1785), 1 Cox, Eq. Cas. 185; 29 E. R. 1120, L. C.

Annotation:—*Follid.* *Young v. Young* (1859), 26 Beav. 522.

5652. ———.]—Bequest to E. & M. "of all & singular his plate, linen, china, household goods, & furniture & effects that he should die possessed of;" & a devise in trust of a real estate, & out of the moneys to arise from the sale thereof, to pay funeral expenses, money due on mtge., & all other debts, & the residue amongst the testator's children:—*Held*: the word "effects," coupled with the context, operated as a specific bequest of the personal estate, & the same was not liable to the payment of debts.—*MICHELL v. MICHELL* (1820), 5 Madd. 69; 56 E. R. 821.

Annotations:—*Appld.* *Price v. Price* (1835), 4 L. J. Ch. 243; *Gilbertson v. Gilbertson* (1865), 34 Beav. 354; *Powell v. Riley* (1871), L. R. 12 Eq. 175. *Reid.* *Collis v. Robins* (1847), 1 De G. & Sm. 131. *Mentd.* *Parker v. Marchant* (1842), 1 Y. & C. Ch. Cas. 290.

5653. ———.]—"Discharged from payment of debts."—Testator bequeathed his personal estate to his wife, "discharged from the payment of his debts." He then devised his real estate in H. in trust to sell & pay "all his just debts, funeral &

testamentary expenses" in exoneration of his personal estate, & he devised his real estate in N., without any expressed trust, for payment of his debts. The produce of the H. estates being insufficient to pay the debts:—*Held*: the N. estates were next liable to pay them in exoneration of the personal estate.—*YOUNG v. YOUNG* (1859), 26 Beav. 522; 53 E. R. 1000.

5654. ———.]—Personal estate held exonerated from the payment of "funeral & testamentary expenses & debts."

Testator bequeathed his leasehold & personal property except plate to his wife absolutely, & he devised his real estate in trust to sell & out of the produce to pay "his funeral & testamentary expenses & debts," & to invest "the residue" & pay the income to his wife for life, with remainders over:—*Held*: the "funeral & testamentary expenses & debts" were primarily payable out of the produce of the real estate.—*GILBERTSON v. GILBERTSON* (1865), 34 Beav. 354; 6 New Rep. 78; 12 L. T. 816; 13 W. R. 765; 55 E. R. 671.

Annotations:—*Appld.* *Powell v. Riley* (1871), L. R. 12 Eq. 175. *Mentd.* *Harloe v. Harloe* (1875), L. R. 20 Eq. 471.

Compare No. 5684, post.

5655. ———.]—Personal estate is the first & immediate fund for the payment of debts; & therefore, though a man devises part of his real estate in trust to be sold, & the money applied in payment of his debts, legacies, etc., & gives the residue of his personal estate, not specifically bequeathed, to his nephew; yet the personal estate shall be first applied in payment of the debts, in case of the trust estate, which is not to be sold unless the other fund proves deficient.—*NOKE v. DARBY* (1727), 1 Bro. Parl. Cas. 506; 2 Eq. Cas. Abr. 500; 1 E. R. 720, H. L.

5656. ———.]—Absence of negative words.]—Freehold estate devised to be sold for payment of debts, yet the personal shall be first applied, there being no negative words.—*FEREYES v. ROBERTSON* (1731), Bunb. 301; 145 E. R. 681.

Annotation:—*Distd.* *Ancestor v. Mayer* (1785), 1 Bro. C. C. 454.

5657. ———.]—(1) One devises all his real estate in trust to pay all his debts; the bond creditors recover part of their debts out of the personal estate; the simple contract debts shall be equally paid out of the real estate with the bond debts, & the bond creditors shall have nothing thereout, until the simple contract creditors shall have received as much from the same, as shall make them equal in payment with the bond creditors.

(2) On a devise of lands to pay debts, a legatee, whether specific or pecuniary, shall be paid out of the lands, if the simple contract creditors exhaust the personal estate.

(3) If one owes debts by bond, & devises his lands to S. in fee & leaves a specific legacy & dies, & the bond creditor comes upon the specific legacy for payment of his debt; the specific legatee shall not stand in the place of the bond creditor, to charge the land.

(4) One devises all his personal estate to his daughter, & all his real estate to trustees in trust to pay debts, etc., remainder to his daughter in tail, remainder over; the personal estate shall in the first place be all applied to pay the debts.—*HASLEWOOD v. POPE* (1734), 3 P. Wms. 322; 24 E. R. 1084, L. C.

Annotations:—*As to* (3) *N.F. Tombs v. Roeh* (1846), 2 Coll. 490. *Distd.* *Gervis v. Gervis* (1847), 14 Sim. 654. *As to*

other property to his son & after other devises & bequests, declared that his said son should pay testator's just debts & demands against his property, death bed & funeral expenses. There

was a residue of undisposed-of personalty:—*Held*: (1) the son took the farm on the condition that he paid all testator's debts & testamentary expenses; (2) having accepted the

bequest he was personally liable to fulfil the condition, & the undisposed-of residue was exonerated from liability.—*DUFFY v. DUFFY*, [1920] 1 I. R. 122.—IR.

**Sect. 7.—Order of application of assets: Sub-sect. 2,
B. & C. (a).]**

(4) *Conrad. Burton v. Knowlton* (1796), 3 Ves. 107; *Webb v. De Beauvoisin* (1862), 11 W. R. 132. *Distd. Re Banks, Banks v. Bushbridge*, (1905) 1 Ch. 547. *Generally, Mentd. Milbourne v. Milbourne* (1786), 1 Cox, Eq. Cas. 247; *Judd v. Pratt* (1806), 13 Ves. 168; *Kidney v. Cousmaker* (1806), 12 Ves. 136; *Maxwell v. Maxwell* (1852), 2 De G. M. & G. 705; *Orrell v. Orrell* (1871), 6 Ch. App. 302.

5658. —.]—Testator devised all his real estate to trustees upon trust to sell a competent part thereof, and in the first place, pay & discharge all his debts & legacies; & in the next place, reimburse themselves the costs of the trusts, & after such payments settle such parts thereof as should remain unsold in manner therein mentioned. He declared his meaning to be, that the whole money to be raised by such sale should be deemed & taken to be part of his personal estate. He gave all the residue of his personal estate, of what nature & kind soever, after payment of his debts, etc., to A. The personal estate under these directions must be applied in the first place in or towards payment of the debts & legacies.—*INCHQUIN (LORD) v. FRENCH* (1745), 1 Cox, Eq. Cas. 1; *Amb. 33*; 29 E. R. 1034; *sub nom. INCHQUIN (LORD) v. O'BRIEN*, 1 Wils. 82; *sub nom. O'BRIEN v. INCHQUIN*, *Ridg. temp. H.* 230, L. C.

Annotations:—Conrad. Boodle v. Blundell (1815), 1 Mer. 193; *Greene v. Greene* (1819), 4 Madd. 148; *Collis v. Robins* (1847), 1 De G. & Sm. 131. *Reid. Habergham v. Vincent* (1793), 4 Bro. C. C. 353; *Burton v. Knowlton* (1796), 3 Ves. 107; *De Zichy Ferraris & Croker v. Hertford* (1843), 3 Curt. 468. *Mentd. Lowfield v. Stoneham* (1746), 2 Stra. 1261; *Smith v. Attersoll* (1826), 1 Russ. 266; *Re Fleetwood, Sidgreaves v. Brewer* (1880), 15 Ch. D. 594.

5659. —.]—Devise, in trust, to sell & pay off a mtge.; & to raise another sum; which testator gave to his daughters. The personal estate, though bequeathed after payment of debts & legacies, exempted from the payment of those two sums, without express words, upon the plain intention.

To exonerate the personal estate from testator's debt to mtge., either express words or a plain intention must be found.

A devise to sell for payment of all debts will not exonerate the personal estate.—*HANCOX v. ABBEY* (1805), 11 Ves. 179; 32 E. R. 1056.

Annotations:—Conrad. Maugham v. Mason (1813), 1 Ves. & B. 410. *Expld. Bickham v. Cruttwell* (1838), 3 My. & C. 783. *Follid. Dickinson v. Edwards* (1844), 4 Hare, 273. *Reid. Paterson v. Scott* (1852), 21 L. J. Ch. 346; *Fream v. Dowling* (1855), 20 Beav. 624.

5660. —.]—Testator gave his real & personal estate to persons whom he afterwards appointed his exors., in trust, in the first place, to sell an advowson, & apply the proceeds in discharge of his debts & legacies, & if they should be insufficient, then to raise the deficiency by sale or mtge. of his real estates, & directed his exors. to retain their expenses, it did not expressly declare any trust of his personal estate:—*Held: the personal estate was primarily applicable to the payment of testator's debts.*—*RHODES v. RUDGE* (1826), 1 Sim. 79; 5 L. J. O. S. Ch. 17; 57 E. R. 508.

Annotation:—Reid. Bowra v. Rhodes (1862), 31 L. J. Ch. 676.

5661. —.]—Bequest of a particular fund "for payment of debts & legacies given by my will & former codicil," is no exoneration of the rest of testator's estate from its liabilities; nor does it create any exemption of other parts of the assets not specifically bequeathed.—*SUSSEX (DUKE) v. MOORE* (1832), 2 L. J. Ch. 1.

5662. —.]—Testatrix gives real estates to trustees, to be sold & directs the trustees, out of the produce, in the first place, to pay all her just debts, & funeral & testamentary expenses, & the legacies given by her will, or by any codicil, she

then specifically devises a specific part of her personal property, & all other the rest, residue & remainder of her personal estate & effects, to the trustees on trust for her three daughters & grand-daughters. The will also contains a discretionary power to the trustees to postpone the sale of the real estates, till after the death of the devisees for life: *Held: this devise of the real estates did not create an exoneration of the personal estate from the liability to debts.*—*WALKER v. HARDWICK* (1833), 1 My. & K. 396; 2 L. J. Ch. 104; 39 E. R. 731.

5663. —.]—Testator, who died in 1823, had covenanted in 1815 with trustees of a settlement made on the marriage of his son E., that he, his heirs, exors., or administrators, would during his life, or within three months after his death, pay to the trustees £3,000, to be held by them upon the trusts of the settlement. Testator, by his will, devised his P. estate to trustees for sale for payment of his debts, the trustees of that estate being also his exors.; & he devised his D. estate, to which he was entitled in remainder expectant on the death of F., who died in 1860, to trustees upon trust for T. E. for life, with remainders over. In 1863, the £3,000 not having been paid, though interest thereon had been paid down to 1849 by the exors. & trustees of the P. estate, the trustees of E.'s marriage settlement instituted a suit for the purpose of having that sum, with interest, raised by sale or mtge. of the D. estate, & for the appointment of a receiver of the rents:—*Held: the liability of testator's estate to pay the £3,000, although a liability by covenant, & debitum in presenti solvendum in futuro, was a "debt" within 3 & 4 Will. & Mar. c. 14; (2) the assumed fact that testator's personalty & proceeds of the sale of the P. estate were sufficient for payment of his debts, did not except the devise of the D. estate from the provisions of 3 & 4 Will. & Mar. c. 14, the object & language of that statute being different from that of 13 Eliz. c. 5; (3) a mtge. of the D. estate by T. E., a *cestui que trust*, was not such an alienation as to prevent a specialty creditor from availing himself, as, against the alienee, of 3 & 4 Will. & Mar. c. 14, as if an action at law be brought under that statute, it must be brought against the owner of the legal estate, being in this case the trustee, who alone is regarded as the devisee by a ct. of law; (4) although there might still be personal assets of testator capable of being realised for payment of pltf.'s debt, pltf's. had a right to be paid out of the realty specifically devised, forty years having already been occupied in endeavouring to realise the personalty; (5) although in the administration of testator's estate, funds out of which the specialty debts ought to have been paid might have been misapplied, the specialty creditors were not thereby disentitled to payment out of the estates devised, whatever relief the devisees might have against testator's representatives in respect of such misapplication; (6) the fact that one of the trustees of the marriage-settlement now represented by pltf's., who was a receiver appointed in the lunacy of testator, & who continued the receivership after testator's death, did not satisfy the debt due to himself & his co-trustee out of moneys in his hands as such receiver, did not now disentitle pltf's. to relief, a receiver being bound to follow the directions of the tribunal which appoints him.*—*COOPE v. CRESSWELL* (1866), L. R. 2 Eq. 106; 35 L. J. Ch. 496; 14 L. T. 262; 14 W. R. 568; *varied on appeal*, 2 Ch. App. 112, C. A.

Annotations:—As to (3) Dbd. British Mutual Investment Co. v. Smart (1875), 10 Ch. App. 567. *Overd. Re Atkinson*,

Proctor v. Atkinson, [1908] 2 Ch. 307. *Reid. Re Hyatt*, *Bowles v. Hyatt* (1888), 38 Ch. D. 609. *Generally, Mentd.* *Pears v. Laing* (1871), L. R. 12 Eq. 41; *Re Hollingshead*, *Hollingshead v. Webster* (1888), 37 Ch. D. 651; *Re England*, *Steward v. England*, [1895] 2 Ch. 100; *Edwards v. Walters*, [1898] 2 Ch. 157; *Astbury v. Astbury*, [1898] 2 Ch. 111; *Re Chant*, *Bird v. Godfrey*, [1905] 2 Ch. 225; *Re Lacey*, *Howard v. Lightfoot*, [1907] 1 Ch. 330; *Read v. Price*, [1909] 2 K. B. 724.

5664. —.]—*Re MEERE, KILFORD v. BLANEY*, No. 5809, *post*.

— Direction to marshal in favour of charities.]

— See CHARITIES, Vol. VIII., p. 302.

5665. What realty included—After acquired property.]—If a man devise all his lands for payment of debts, & after purchase lands, that he would decree a sale although there be no precedent articles (LORD NOTTINGHAM, C.).—*PRIDEUX v. GIBBEN* (1683), 2 Cas. in Ch. 144; 22 E. R. 887, L. C.

5666. —.]—Wills construed to charge real estate by implication for the benefit of creditors. Such implication, however, may be afterwards destroyed.

I., orders all his debts & funeral charges to be honourably paid, after his decease. In a subsequent clause he devises particular premises, enumerating them excepting H. & R., all which enumerated lands, except H. & R. he devises to trustees by & out of the money arising by sale, & out of the rents & profits thereof in the mean time, in the first place to pay & discharge his debts, funeral expenses, & all legacies given by his will, or by other writing under his hand. He afterwards says, that H. & R. shall be in the first place for payment of the legacies mentioned in his will.

Though on the first part the ct. might take the whole real to be charged with debts, yet as there is no express lien on the real by these general words, & afterward, he distributes such part of his real for debts, & such for legacies, it is too much to lay hold on the general words to say, the whole should be charged with payment of debts. It can be done only by implication on the general words; which may be explained afterward, & that implication destroyed. Consequently plffs. can only have a decree for an account of the personal estate in course of administration, & then the other parts of the real estate, except H. & R. for payment of their debts (SIR JOHN STRANGE).—*THOMAS v. BRITNELL* (1751), 2 Ves. Sen. 313; 28 E. R. 202.

Annotations.—*Consd. Sherratt v. Sherratt* (1833), *Coop. temp. Brough*. 35. *Apld. Palmer v. Graves* (1837), *Donnelly*, 203. *Distd. Price v. North* (1841), 1 Ph. 85. *Apld. Re Major*, *Taylor v. Major*, [1914] 1 Ch. 278. *Reid. Corser v. Cartwright* (1873), 8 Ch. App. 971.

C. Charge of Debts and Legacies on Real Estate generally.

(a) In General.

5667. Whether personal estate exonerated.]—If land be devised for the payment of debts & legacies, & the residue of the personal estate be given to the exors. after the debts & legacies paid; the personal estate shall notwithstanding, as far as it will go, be applied to the payment of the

debts, etc., & the land charged no further than is necessary to make up the residue.—ANON. (1680), 2 Vent. 349; 86 E. R. 480.

Annotations.—*Reid. Roper v. Radcliffe* (1712), 9 Mod. Rep. 181; *Twedell v. Twedell* (1786), Rom. 159.

5668. —.]—A. by will gives £20 to B. & makes him exor. & gives his real estate to C. paying his debts & legacies, & in default of payment within such a time, the legatees & creditors to enter & to hold till paid, & makes no express disposition of the surplus of the personal estate. The personal estate shall be applied in case of the real.—*MEAD v. HIDE* (1690), 2 Vern. 120; 23 E. R. 687; *sub nom. GOWER v. MEAD*, 2 Eq. Cas. Abr. 369; *Prec. Ch. 2*.

Annotation.—*Reid. Stapleton v. Colville* (1736), *Cas. temp. Talb.* 202.

5669. —.]—A legacy to be paid out of land is a charge on the real, & not on the personal, estate of testator.—ANON. (1699), 12 Mod. Rep. 342; 88 E. R. 1367.

5670. — Absence of words exempting personal estate.]—A. by will charges his real estate with the payment of his debts, legacies & funerals; & devised to his wife, whom he made his extrix. all his personal estate, not otherwise disposed of. Decreed the personal estate to be applied in case of the real; there being no words in the will to exempt the personal estate from the debts, & the wife taking the personal estate as extrix.—*FRENCH v. CHICHESTER* (1706), 2 Vern. 568; 3 Bro. Parl. Cas. 16; 2 Eq. Cas. Abr. 493; 23 E. R. 970.

Annotations.—*Folld. Trott v. Buchanan* (1885), 28 Ch. D. 446. *Reid. Lucey v. Bromley* (1739), *Fitz-G.* 41; *Stapleton v. Colville* (1736), *Cas. temp. Talb.* 202; *Brummel v. Prothero* (1796), 3 Ves. 111; *Re Banks*, *Banks v. Busbridge*, [1905] 1 Ch. 547.

5671. — —.]—*DOLMAN v. WESTON*, No. 5626, *ante*.

5672. — —.]—In order to exonerate the personal estate from the payment of debts & legacies, it is necessary, not merely to charge the real estate, but the will must exempt the personal estate.—*SAMWELL v. WAKE* (1782), 1 Bro. C. C. 144; 2 Dick. 597; 28 E. R. 1043, L. C.

5673. — —.]—Personalty, being the primary fund for the payment of debts, must be so applied, unless there be an intention expressed, not only to charge the real estate, but also to exonerate the personal estate.

Testator, by a testamentary paper not admitted to probate, but held effectual as regards his real estate, directed his trustees, to whom he had devised his real estate, in the first place, out of the rents & profits of his said estate, to pay all his just debts, funeral & testamentary expenses, & all costs, etc.:—*Held*: this not only charged the real, but exonerated the personal estate.—*PLENTY v. WEST* (1852), 16 Beav. 173; 22 L. J. Ch. 185; 17 Jur. 9; 1 W. R. 3; 51 E. R. 743.

5674. — —.]—Testator devised & bequeathed to two trustees all his real & personal estate upon trust, out of the rents, issues & profits, dividends, interest & income of all his real and personal estate "to raise & pay his widow £1,000 a year *durante viduitate*, & out of the same rents & profits, dividends, interest & income, to pay

PART IV. SECT. 7, SUB-SECT. 2.— C. (a).

m. *Executor's power of sale*.—Testator, with regard to the disposition of his residuary estate, used the following words: "As to all the rest, residue & remainder of my real & personal estate & effects whatsoever, which shall remain after payment of my just debts, funeral & testamentary expenses, & the several legacies or sums in gross hereinbefore mentioned

& directed to be paid, I give, devise & bequeath same, etc."—*Held*: these words were sufficient to charge the residuary real estate with the payment of the debts & legacies, & the exor. had power to sell.—*MCLEOD v. FIRTH* (1876), 3 Pug. 453.—CAN.

5670 1. *Whether personal estate exonerated*.—*Absence of words exempting personal estate*.—Testator directed his exor. to sell his farm, & out of the proceeds to pay certain legacies, &

his debts, funeral & testamentary expenses. The balance of the proceeds of the sale he directed to be divided equally between two charities. There was no disposition of any other property.—*Held*: there were no sufficient grounds for exempting the undisposed of personalty from its primary liability for debts, & the debts funeral & testamentary expenses were primarily payable thereout.—*WALKER v. M'KAY*, [1917] 1 I. R. 278.—IR.

Sect. 7.—Order of application of assets: Sub-sect. 2, C. (b).]

(b) Charge of Debts on Real Estate.

5695. Expression of desire that debts should be paid.]—If a man by his will deviseth his lands to J. & doth desire that the said J. should pay his debts, or if it be, the said J. paying his debts, or if immediately after the devise of his lands, he doth appoint or desire that his debts should be paid, or if he useth any expression in the will, whereby it appears that he had any intent to charge his lands with his debts, in such case his lands will stand charged. But in the case at bar, where testator had, in the beginning of his will, said that he desired that all his just debts should be paid; & afterwards in the said will he gave several legacies, & devised lands; it was held that this devisee was not charged with the payment of the debts; for if that should be so, the debts of every testator would be charged upon his lands, for there are but few wills but have some such expression, whereby testator desires his debts to be paid.—*ANON.* (1693), *Freem. Ch.* 192; 22 *E. R.* 1154.

5696. —.]—*BARTON v. WILCOCKS* (1723), 2 *Eq. Cas. Abr.* 499; 22 *E. R.* 423.

5697. Direction for payment of debts.]—One by will devises that his debts & legacies should be paid in the first place; & then devises his lands to his sister for life, remainder to her issue, remainder over; & made the sister extrix. Decreed the lands to be charged with the debts.—*TROTT v. VERNON* (1715), 2 *Vern.* 708; *Prec. Ch.* 430; *Gilb. Ch.* 111; 23 *E. R.* 1065, *L. C.*

Annotations:—*Consd. Kightley v. Kightley* (1794), 2 *Ves.* 328. *Reid. Harris v. Ingledeu* (1730), 3 *P. Wms.* 91; *Williams v. Chitty* (1797), 3 *Ves.* 545; *Sherratt v. Sherratt* (1833), *Coop. temp. Brough.* 35.

5698. — “All my worldly estate.”]—A. begins his will with disposing of all his worldly estate; & then wills that all his debts be first paid & gives his wife a moiety of what is left after his debts paid. The real estate is charged with the debts.—*BEACHCROFT v. BEACHCROFT* (1715), 2 *Vern.* 690; 23 *E. R.* 1047, *L. C.*

Annotations:—*Reid. Monk v. Mawdsley* (1827), 1 *Sim.* 286. *Mentd. Grayson v. Atkinson* (1752), 1 *Wils.* 333.

5699. —.]—(1) A will begins, as to all my worldly estate, my debts being first paid, I give, etc.; the real estate is liable to the debts, nothing being devised till the debts are paid.

(2) If I charge all my lands with payment of my debts, & devise part to A. & other part to B., etc., the creditors cannot be paid out of the lands till the master has certified what the proportion is, which each devisee is to contribute: but if the master certifies, that the debts will exhaust the whole real estate, then the creditors may proceed against any one devisee for the whole.—*HARRIS v. INGLEDEW* (1730), 3 *P. Wms.* 91; 2 *Eq. Cas. Abr.* 255, 462; 24 *E. R.* 981.

Annotations:—*As to (1) Consd. Spong v. Spong* (1827), 1 *Y. & J.* 300. *Generally, Mentd. Heiler v. Tarrant* (1791), *Cas. temp. Talb.* 287; *Roberts v. Marchant* (1843), 13 *L. J. Ch.* 56; *Maxwell v. Maxwell* (1852), 2 *De G. M. & G.* 705; *Boyse v. Rossborough* (1853), *Kay*, 71.

5700. —.]—Testator devises, as to all his worldly estate, that his debts be paid within a

year after his decease; & then devises his real estate to trustees for a term in trust for his wife for life, remainder to his sons successively in tail male, & gives several legacies. The real estate is chargeable with the debts in case the personal do not suffice.—*HATTON v. NICHOL* (1735), *Cas. temp. Talb.* 110; 25 *E. R.* 689.

Annotation:—*Reid. Williams v. Chitty* (1797), 3 *Ves.* 545.

5701. — Whether all debts charged.]—(1) Lands charged by will with the payment of debts, all the debts contracted by testator during his whole life, will be a charge.

(2) When a first will charges real estate with legacies & a second giving general pecuniary ones, though not executed in form, yet the latter legacies will equally be a charge upon the land.—*BRUDENELL v. BOUGHTON* (1741), 2 *Atk.* 268; 26 *E. R.* 565, *L. C.*

Annotations:—*As to (2) Apld. Inchiquin v. French* (1744), *Amb.* 33. *Consd. Habbergham v. Vincent* (1793), 4 *Bro. C. C.* 353; *Buckeridge v. Ingram* (1795), 2 *Ves.* 652; *Shedden v. Goodrich* (1803), 8 *Ves.* 481; *Locke v. James* (1843), 11 *M. & W.* 901. *Reid. Hooper v. Goodwin* (1811), 18 *Ves.* 156; *Ferraris & Croker v. Hertford* (1843), 3 *Curt.* 468; *Coverdale v. Lewis* (1862), 30 *Beav.* 409. *Generally, Reid. Mirehouse v. Scaife* (1837), 2 *My. & Cr.* 695. *Mentd. Goodtitle d. Holford v. Otway* (1796), 1 *Bos. & P.* 576.

5702. — Whether customary lands charged.]—Under a devise that all testator's debts “should be first paid & satisfied”:—*Held*: a customary estate surrendered in trust for several persons, and for the use of such as testator should appoint, was subject to testator's debts; the first disposition running over all.—*GODOLPHIN (EARL) v. PENNECK* (1754), 2 *Ves. Sen.* 271; 28 *E. R.* 175.

Annotations:—*Follid. Williams v. Chitty* (1797), 3 *Ves.* 545. *Consd. Graves v. Graves* (1836), 8 *Sim.* 43. *Reid. Price v. North* (1841), 11 *L. J. Ch.* 68.

5703. — Whether copyholds charged.]—Testator directed his debts & funeral expenses & the charge of proving his will, to be paid by his exor. therein-after named, & then devised all his copyhold lands, etc., to his son, without any words of inheritance, & appointed him his sole exor. & residuary legatee:—*Held*: the son took the inheritance of the copyhold lands charged with testator's debts, in the event of the personal estate being insufficient.—*DONER v. REYNOLDS* (1839), 4 *Jur.* 362.

Compare Nos. 5713–5715, post.

5704. —.]—*BRYDGES v. LANDEN* (1788), cited 3 *Ves. p.* 550; 30 *E. R.* 1151, *L. C.*

Annotations:—*Follid. Powell v. Robins* (1802), 7 *Ves.* 209. *Consd. Graves v. Graves* (1836), 8 *Sim.* 43. *Reid. Henvill v. Whitaker* (1827), 5 *L. J. O. S. Ch.* 158.

5705. —.]—Real estates devised, held liable to simple contract debts under a direction in the beginning of the will, that debts & funeral expenses should be first paid; that which descended to the heir by the failure of the devise, to be first applied.—*WILLIAMS v. CHITTY, CHITTY v. CHITTY* (1797), 3 *Ves.* 545; 30 *E. R.* 1148, *L. C.*

Annotations:—*Consd. Wood v. Ordish* (1855), 3 *Sm. & G.* 125. *Reid. Shallice v. Finden* (1798), 3 *Ves.* 738; *Keeling v. Brown* (1800), 5 *Ves.* 359; *Powell v. Robins* (1802), 7 *Ves.* 209; *Henvill v. Whitaker* (1827), 5 *L. J. O. S. Ch.* 158; *Sherratt v. Sherratt* (1833), *Coop. temp. Brough.* 35; *Graves v. Graves* (1836), 8 *Sim.* 43; *Mirehouse v. Scaife* (1837), 2 *My. & Cr.* 695. *Mentd. Tarbuck v. Tarbuck* (1835), 4 *L. J. Ch.* 129; *Great v. Great* (1859), 26 *Beav.* 621.

5706. —.]—Simple contract debts not charged

testator were charged generally upon his real estate.

Whenever debts are directed to be paid, they become a primary charge on the fund, out of which they are so directed to be paid, unless there is something in the will to confine the generality of the charge.—*HARDING v. GRADY* (1841), 1 *Dr. & War.* 430.—*IR.*

PART IV. SECT. 7, SUB-SECT. 2.—C. (b).

n. Whether exonerates personality.—No apparent intention in will.—Personal estate, bequeathed in trust, is the primary fund to pay debts charged on his real estate, there being no words or apparent intention in the will to exempt it.—*ALDRIDGE v. WALLS-*

COURT (LORD) (1810), 1 *Ball. & B.* 312.—*IR.*

5697 l. Direction for payment of debts.]—Testator by his will, which was confined exclusively to real estate, after devising same among the several members of his family, concluded by desiring that all his just debts should be paid as soon as convenient after his decease:—*Held*: the debts of

upon real estate by a will, first devising that all his debts & funeral expenses might be satisfied and paid by his exors.: all the real estate being specifically devised.—*POWELL v. ROBINS* (1802), 7 Ves. 209; 32 E. R. 84.

Annotations:—*Consd. Mirehouse v. Scattle* (1837), 2 My. & Cr. 695; *Reid. Henvill v. Whitaker* (1827), 5 L. J. O. S. Ch. 158; *Harris v. Watkins* (1854), Kay, 438. *Mentd. Sanderson v. Wharton* (1820), 8 Price, 680; *Price v. Carver* (1837), 3 My. & Cr. 157.

5707. —.]—Demurrer to a bill by creditors praying a sale of testator's real estate to pay unsatisfied debts for want of sufficiency of personal estate where he had directed his debts to be paid by his exors. & devised his real estate on the ground that it was not a charge on the real estate, overruled, but without costs or prejudice to the question, as being premature; because the ct. would marshal assets & therefore the cause must necessarily be brought to a hearing to enable the ct. to do justice.

Qu: whether under such a will the real estate of testator be charged with his simple contract debts?—*SANDERSON v. WHARTON* (1820), 8 Price, 680; 140 E. R. 1334.

5708. —.]—*BRAITHWAITE v. BRITAIN*, No. 4286, *ante*.

5709. —.]—Testator began his will by directing that all his just debts, funeral & testamentary expenses, should be fully paid & satisfied. He then devised all his real estate to his daughter & her issue in strict settlement; & after giving one specific & one pecuniary legacy he gave all the residue of his personal estate, after & subject to the payment of all his just debts, funeral & testamentary expenses, & the legacies before bequeathed, to his daughter:—*Held*: the concluding clause of the will was not sufficient to rebut the presumption, arising from the first, of an intention to charge the real estate in aid of the personality with the debts.—*PRICE v. NORTH* (1841), 1 Ph. 85; 11 L. J. Ch. 68; 5 Jur. 1147; 41 E. R. 563, L. C.

Annotation:—*Reid. Re Major, Taylor v. Major*, [1914] 1 Ch. 278.

5710. —.]—A. by his will directed his exors. to pay his debts, & made a gift to B., subject to a mtge. He devised other estates, which were mortgaged, to his five sons, but ordered that neither of them should enter into possession until his debts were paid. B. died in the lifetime of A., before the date of the will, leaving C. his heir-at-law:—*Held*: the direction to the exors. to pay testator's debts was not a general charge on all his real estate; B.'s heir took subject to the mtge., & the five sons were liable to contribution for the payment of testator's debts.—*WISDEN v. WISDEN* (1854), 2 Sm. & G. 396; 24 L. T. O. S. 250; 18 Jur. 1090; 2 W. R. 616; 65 E. R. 452; *subsequent proceedings* (1859), 5 Jur. N. S. 455.

Annotation:—*Mentd. Re Scott*, [1901] 1 K. B. 228.

5711. Direction to raise fixed sum by mortgage & not by sale.—(1) Where testator has given property of a permanent character, producing a permanent income, to persons for life, with remainder over, the rule of equity is that, in the absence of express declaration by testator, debts charged on the property will be held to be charged on the corpus & not on the income.

(2) An old-established lunatic asylum, which had for many years produced a steady average income, held to be a permanent property.

(3) In construing a will, the direction to raise a certain sum for debts by mtge., & not by sale, implies an intention to charge that sum on the corpus of the estate, & leads to the inference that testator would have expressly charged the larger

sums actually required to discharge all his debts in the same way.—*WASTELL v. LESLIE, CARTER v. LESLIE* (1844), 13 L. J. Ch. 205; 2 L. T. O. S. 473; 8 Jur. 367, L. C.

5712. Direction for sale of most suitable property.—To raise amount of patrimony due to testator's wife.—Testator by will dated in 1857, bequeathed to his wife all sums of money that had come to his hands as part of her patrimony for her sole use & benefit, with the option of leaving it invested at 5 per cent. to be paid her quarterly, or if she wished to draw it out, then the property most suitable for sale to be disposed of to raise the amount due to her, being in fact a charge upon the property: & if she so desired this, as well as all just debts & obligations due from him, to be discharged as the first act of his exors.:—*Held*: the wife's patrimony was to be treated as a debt, & a charge on the specifically devised property as well as the rest of the property.—*MANNOX v. GREENER* (1872), L. R. 14 Eq. 456; 27 L. T. 408.

Annotations:—*Reid. Re Betty, Betty v. A.-G.* (1899), 80 L. T. 675. *Mentd. Re Coward, Coward v. Larkman* (1887), 57 L. T. 285; *Johnson v. Johnson* (1887), 35 Ch. D. 345; *Re Anderson, Halligey v. Kirkley*, [1920] 1 Ch. 175.

5713. Whether copyholds charged.—Direction to raise money for debts out of copyholds.—If personal & real estate insufficient.—A proviso in the will of B. that if his personal estate & house & lands at W. should not pay his debts, then his exors. to raise the same out of his copyhold premises. The rents not being sufficient to discharge testator's debts, these words will give the trustees a power to sell the copyhold lands to satisfy his intention of paying his debts.—*BATEMAN v. BATEMAN* (1739), 1 Atk. 421; 26 E. R. 268.

Annotation:—*Reid. White v. Vitty* (1826), 2 Russ. 484.

5714. — Devise of all testator's real estate.—Testator only possessing copyholds.—Devise of all testator's "real" & personal estate "subject to debts" affects copyhold lands unsundered, for the benefit of the creditors, there being no freehold lands. If there had been, it would have been otherwise. No preference allowed to a creditor who became a mtgee. under the devisee in trust.—*JTHELL v. BEANE* (1748), 1 Ves. Sen. 215; 27 E. R. 990; *sub nom. ITHIEL v. BEAN*, 1 Dick. 132, L. C.

Annotations:—*Reid. Andrew v. Wrigley* (1792), 4 Bro. C. C. 125. *Mentd. Price v. Jenkins* (1876), 4 Ch. D. 483; *Gale v. Gale* (1877), 6 Ch. D. 144.

5715. — Testator charging "all his real" estate.—Copyholds surrendered to use of will.—Where testator having both freehold & copyhold estates, charges all his real estate with payment of his debts, if he has surrendered the copyhold to the use of his will, the freehold & copyhold shall be applied ratably; but if he has not surrendered the copyhold, it shall not be applied until the freehold is exhausted.—*GROWCOCK v. SMITH* (1794), 2 Cox, Eq. Cas. 397; 30 E. R. 183.

— Direction for payment of debts.—*See Nos. 5702, 5703, ante.*

5716. Whether sum due under trust charged.—The surviving trustee of a money legacy divided amongst a number of objects, made his will, stating that the whole of the trust fund had been applied, except a sum of £—, leaving a blank, & declared that if the trust had not been fully performed, it should devolve upon A., to whom he devised his real estate for life, after a limitation which failed, with divers remainders over. On the question whether this constituted a charge upon the real estate:—*Held*: that it did not; but a bill might have been filed against the son of A., who was the next tenant for life of the realty, in his character of personal representative of the

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surviving trustee, in respect of the legacy.—**HENDERSON v. ATKINS** (1859), 28 L. J. Ch. 913; 33 L. T. O. S. 159; 7 W. R. 387.

(c) Charge of Legacies on Real Estate.

i. In General.

5717. Direction to apply rents in payment of legacies.]—Where testator by his will gives certain estates to trustees upon trust to pay the rents & profits towards the payment of his debts & legacies, until the same shall come to his son T., & then gives the estates to his son T. when he attains twenty-six; but in case his son T. should die before twenty-six, then he gives *plff.* £1,000, & gives all estates given to T. to his son E., T. having died before twenty-six:—**Held**: in case the personal estate was deficient, the rents & profits of the estates devised in trust for T. should be applied in payment of the £1,000 & interest, until T. would have attained the age of twenty-six.—**IRONMONGER v. LASSELLS** (1737), *West temp.* Hard. 143; 25 E. R. 864.

5718. Legacy charged on personal & real estate.—Liability of reversionary estate.]—When a legacy is chargeable on the personal estate as well as the real, a reversionary estate shall be liable to satisfy such legacy.—**LOYD v. WILLIAMS** (1740), *Barn.* Ch. 224; 2 Atk. 108; 27 E. R. 622.

Annotations:—Mentd. *Re Yates, Throckmorton v. Pike* (1907), 96 L. T. 758; *Re Walford, Kenyon v. Walford*, [1912] 1 Ch. 219.

5719. Direction to pay debts & legacies.]—This clause beginning a will "First, I will & direct, that all my legal debts, legacies, & funeral expenses shall be fully paid," is not sufficient alone to charge legacies on real estates specifically devised, for which the intent must be clear.—**KIGHTLEY v. KIGHTLEY** (1794), 2 Ves. 328; 30 E. R. 656.

Annotations:—Consd. *Williams v. Chitty* (1797), 3 Ves. 545. *Fold.* *Shallcross v. Finden* (1798), 3 Ves. 738. *Consd.* *Spong v. Spong* (1829), 3 Bl. N. S. 84; *Sherratt v. Sherratt* (1833), *Coop. temp.* Brough. 35. *Reid.* *Keeling v. Brown* (1800), 5 Ves. 359; *Nyssen v. Gretton* (1836), 2 Y. & C. Ex. 222; *Mirehouse v. Scaife* (1837), *Donnelly*, 204.

5720. Legacy given by codicil not charged on real estate—Whether charged by virtue of will.]—**BRUDENELL v. BOUGHTON**, No. 5701, *ante*.

5721. ———.]—Trust of a term by will to pay the several legacies thereby given & also the several other legacies thereafter bequeathed. The subsequent part of the will contained a few small legacies & a codicil, unattested, directed to be taken as part of the will, reciting that the legacies given by the will to testator's daughters were not an adequate provision, gave each of them a further legacy, in addition to the legacies given

them respectively by the will. The legacies by the codicil are not charged upon the real estate.—**BONNER v. BONNER** (1807), 13 Ves. 379; 33 E. R. 336.

Annotations:—Folld. *Strong v. Ingram* (1833), 6 Sim. 197. *Reid.* *Jauncey v. A.-G.* (1861), 3 Giff. 308. *Mentd.* *Henwood v. Overend* (1815), 1 Mer. 23; *Byne v. Currey* (1834), 2 Cr. & M. 603; *Mirehouse v. Scaife* (1837), 2 My. & Cr. 695; *Re Sealy, Tomkins v. Tucker* (1901), 85 L. T. 451; *Re Smith, Prada v. Vandroy*, [1916] 2 Ch. 368.

5722. ———.]—Testator directed his trustees to sell his real & personal estate, & to apply the produce in paying his debts, & the legacies therein after given. Testator afterwards gave legacies by codicils, one of which was duly attested:—**Held**: only the legacies in the will were payable out of the real estate.—**STRONG v. INGRAM** (1833), 6 Sim. 197; 58 E. R. 567.

5723. ———.]—Testator devised a portion of his real estate to trustees for sale, & directed them to apply the proceeds & his personal estate in payment of the legacies & annuities thereby bequeathed; & in case the same should be insufficient, he charged all his real estate with the payment thereof. By several unattested codicils, he gave further legacies & annuities, & subsequently he executed a duly attested codicil, whereby he varied the appointment of trustees & exors.:—**Held**: the legacies & annuities bequeathed by the unattested codicils, were not charged on the real estate.—**RADBURN v. JERVIS** (1840), 3 Beav. 450; 49 E. R. 177.

Annotation:—Mentd. *Allen v. Maddock* (1858), 11 Moo. P. C. C. 427.

5724. Devise of realty—Coupled with implied direction to pay debts & legacies.]—The words "from & after payment of my just debts, funeral & testamentary expenses, & of the several specific legacies hereby given & bequeathed," occurring in connection with a devise of real estates, held, regard being had to the whole frame of the will, to create no charge of the legacies upon the realty.—**SHEHRATT v. SHEHRATT** (1833), *Coop. temp.* Brough. 35; 47 E. R. 13, L. C.

5725. Appointment of trustees of inheritance.]—Testator, by his will, gives an annuity to his wife & legacies to children, knowing that his personal estate was insufficient to answer these purposes; says nothing about his real estates, but appoints certain persons trustees of inheritance for the execution of his will. *Qu.*: whether the trustees took any interest in the real estates for the purposes of this will.—**TRENT v. TRENT** (1813), 1 Dow. 102; 3 E. R. 637, H. L.

5726. Devise of real estate subject to legacy.]—Testator gave a legacy to his daughter, & all his real & personal estate to his wife, &, after her death, he gave his real estate, subject to the legacy, to his son in fee. The wife survived testator,

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o. Intention to charge real estate must be manifest.]—Real estate of testator is not liable for payment of legacies, unless it is manifest that such was the testator's intention.—**Re MCKAY'S ESTATE** (1861), 5 N. S. R. (1 Old.) 131.—**CAN.**

p. ———.]—Under a deed or will whether money is a charge upon land is always a question of intention to be gathered from the terms of the instrument.—**PRATT v. BALOOM** (1911), 9 E. L. R. 274; 45 N. S. R. 123.—**CAN.**

q. Devise of real estate subject to legacy.]—Testator devised all his estate to his wife for life & after her death the real estate was to be divided between one of his sons & one of his daughters. Several pecuniary bequests

were made, which were to be paid by the son & daughter.—**Held**: the land was charged with the payment of all the legacies which were not personal or general charges against the devisees.—**ROBSON v. JARDINE** (1875), 22 Gr. 420.—**CAN.**

r. ———.]—Testator devised his real estate & chattel property to his son, subject to the payment of legacies. By a codicil he directed the chattel property to be sold, & the proceeds divided amongst his children:—**Held**: the legacies were a charge on the real estate.—**STEWART v. DICK** (1884), 10 P. R. 411.—**CAN.**

s. Direction to devisees to pay legacies.]—A testator by his will devised land to J. & directed that J. should pay one-half of the sums thereafter bequeathed to each of his daughters,

& to D. he devised other land & directed him also to pay one-half of the bequests to the daughters:—**Held**: one-half of the legacies to the daughters was charged upon the land devised to J.—**GRAY v. RICHMOND** (1892), 22 O. R. 256.—**CAN.**

t. ———.]—After certain pecuniary legacies & bequests of chattels testatrix provided as follows: "Subject to the foregoing I devise & bequeath my lands of T. unto J. & I direct that he shall pay thereout the foregoing legacies & obligations, & in case J. is not willing to accept this devise & bequest I direct that all my lands, cattle, goods & chattels be sold & that the legacies, obligations & bequests be discharged thereout & that the residue of my costs be paid to C." Testator, at the date of his death, was possessed of certain lands of T. held

& afterwards died:—*Held*: the legacy, with interest from the end of a year after testator's death, was raisable out of the real estate, in case the personal estate was deficient.—*FREEMAN v. SIMPSON* (1833), 6 Sim. 75; 2 L. J. Ch. 141; 58 E. R. 523.

Annotation:—*Reid*. *Milltown v. Trench* (1837), 11 Bl. N. S. 1.

5727. Direction for payment of legacy out of real & personal estate—Legatee empowered to enter on real estate of which testator should be seised—Whether legacy charged on land alienated by testator before death.]—A., by an indenture, covenanted with his reputed daughter M. that his heirs, exors. or administrators should, within a reasonable time after his decease, pay her the sum of £500 by & out of his real & personal estate & effects, & he declared that, if his personal effects should be insufficient to discharge the same, it should be lawful for M. to enter upon any part of the real estate of which he should be seised, & retain the rents thereof until the sum of £500 was paid; A., however, some years afterwards, conveyed all his real estate to his son, & the question was, whether the estate so conveyed was charged with the £500 or not, the personal estate being almost nil:—*Held*: the estate conveyed to the son was not charged with the £500, & that sum must be paid out of the personal estate, & if the personal estate was insufficient, then out of the real estate, if any, of which A. died seised.—*WATSON v. ARGILE* (1857), 30 L. T. O. S. 215, C. A.

5728. Direction to pay legacy "out of estate."—Testator made no express devise of his real estate, but gave a legacy of £500 "to be paid out of his estate," & after giving other legacies, directed that his exors. might realise such part of his estate as they thought right & in their judgment & pay the afore named legacies. The personal estate was sufficient to pay the legacies:—*Held*: "estate" meant personal estate only.—*Re CAMERON, NIXON v. CAMERON* (1884), 26 Ch. D. 19; 53 L. J. Ch. 1139; 50 L. T. 339; 32 W. R. 834, C. A.

ii. Bequest of Legacies coupled with Gift of Residue of Real and Personal Estate.

5729. Whether realty liable for legacy.—*AWBREY v. MIDDLETON* (1717), 2 Eq. Cas. Abr. 497; 2 E. R. 422, L. C.

Annotations:—*Folld*. *Bench v. Biles* (1819), 4 Madd. 187. *Distd*. *Sherratt v. Sherratt* (1833), *Coop. temp. Brough*. 35. *Apld*. *Scoley v. Carleledge* (1835), 4 L. J. Ch. 85. *Consd*. *Greville v. Browne* (1859), 7 H. L. Cas. 689. *Reid*. *Gallimore v. Gill* (1854), 2 Sm. & G. 158.

5730. — Residue devised to heir-at-law.—H. bequeathed several pecuniary legacies, & then gave all the rest & residue of his real & personal estate to his brother & his heirs. The brother was testator's heir at law:—*Held*: the legacies were not charged on the real estate.—*HOWELL v. HAYLER* (1747), 1 Hov. Supp. 342; 34 E. R. 818, L. C.

5731. —]—Testator begins his will: As to all my worldly estate, I give, devise, & bequeath as follows:—He gives first household furniture to his wife; then he goes on to give, devise & bequeath particular sums, as legacies to his younger

children, with maintenance; & concludes by giving, devising, & bequeathing all & singular his real & personal estate not therein disposed to his son deft.; the legacies to the children held to be a charge on the real estate, in aid of the personal.—*HASSEL v. HASSEL* (1776), 2 Dick. 527; 21 E. R. 374.

Annotations:—*Folld*. *Re Bawden*, *National Provincial Bank of England v. Crosswell, Bawden v. Crosswell*, [1894] 1 Ch. 693. *Reid*. *Mirehouse v. Scoafe* (1837), 2 My. & Cr. 695.

5732. —]—Bequest to wife of real & personal estate for life; & after her decease a gift of various legacies, & a devise of all the rest, residue & remainder of real & personal estate, to testator's nephews:—*Held*: the legacies were a charge on the real estate.—*BENCH v. BILES* (1819), 4 Madd. 187; 56 E. R. 876.

Annotations:—*Consd*. *Nyssen v. Ernst* (1836), 6 L. J. Ex. Eq. 22. *Folld*. *Francis v. Clemon* (1854), *Kay*, 435; *Wheeler v. Howell* (1857), 3 K. & J. 198. *Apld*. *Greville v. Browne* (1859), 7 H. L. Cas. 689. *Consd*. *Gainsford v. Dunn* (1874), L. R. 17 Eq. 405. *Reid*. *Mirehouse v. Scoafe* (1837), 2 My. & Cr. 695.

5733. —]—Testator gave to his exors. in separate clauses of his will, all his real & personal estate upon the trusts after mentioned; he then gave a life estate in both species of property, & directed that, after the death of the tenants for life, his exors. should invest £1,000 for the benefit of his nieces. The personal estate proving deficient, the £1,000 was held to be charged on the real estate.—*SCOLEY v. CARTELEDGE* (1835), 4 L. J. Ch. 85.

5734. —]—Testatrix, in the execution of a power of appointment, after reciting the power, gave her whole estate, real & personal, to B. as trustee, upon trust, to permit her husband to take the rents, issues, & profits, etc., for his own use & benefit for his natural life, subject nevertheless as hereinafter mentioned; & upon further trusts for children of the marriage; & in default of issue, she gave, devised, & bequeathed to her husband all her estate & effects as aforesaid, "to hold to him, his heirs, exors., & assigns for ever, subject nevertheless, & chargeable with the payment of the sum of £100 to each of his six sisters, which I do hereby give & bequeath to them accordingly. Also I give & bequeath unto my godsons J. D. C. & E. A. B., etc., the sum of £200 each, to be paid to them within twelve calendar months next after my decease":—*Held*: these latter legacies of £200 each, were charges on the real estate, the personal estate proving insufficient.—*NYSSSEN v. ERNST* (1836), 6 L. J. Ex. Eq. 22.

5735. —]—Real estate, when included in a general devise of a residue, is liable to make good a deficiency in the personal estate for the payment of annuities bequeathed by the will.—*FARNAM v. WIGGINS* (1847), 9 L. T. O. S. 243.

5736. —]—Testator gave some pecuniary legacies, & devised a certain farm & lands to his wife, for such term & at such rent as his brother R. should think fit, & then gave, devised, & bequeathed all the rest, residue, & remainder of his real & personal estate to his son J., & appointed him exor.:—*Held*: the residuary form of the devise to the exor. made the legacies a charge upon the real estate, notwithstanding that a previous

under a statutory tenancy. At the date of the execution of his will he had entered into an agreement for sale of other lands of T. also held under a statutory tenancy, & after his death the sale was completed, & the purchase-money (a sum of £650) was paid to his exor.:—*Held*: the debts & testamentary expenses were payable primarily out of the undisposed-of

residuary estate, & the legacies were primarily payable out of the property bequeathed to J.—*GURRY v. CONDON*, [1918] 1 I. R. 236.—IR.

PART IV. SECT. 7, SUB-SECT. 2.—C. (c) ii.

a. *Whether realty liable for legacy*—*Realty part of residue.*]—Testator gave £250 to M. & devised lands at N.

to W., & gave other lands & legacies to other persons, & the residue of his property to D. N. fell into the residuary devise, & was the only land comprised in such devise:—*Held*: the legacies were charge on N.—*MANSON v. ROSS* (1884), 1 B. C. R. pt. 2, 49.—CAN.

b. *Mixed residue.*]—Legacies directed to be paid out of a mixed

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interest in real estate was given by the will.—**FRANCIS v. CLEMON** (1854), Kay, 435; 2 Eq. Rep. 426; 23 L. J. Ch. 288; 23 L. T. O. S. 57; 18 Jur. 223; 2 W. R. 308; 69 E. R. 184.

Annotations:—*Follid.* **Wheeler v. Howell** (1857), 3 K. & J. 198. *Apld.* **Greville v. Browne** (1859), 5 Jur. N. S. 849. *Distd.* **Castle v. Gillett** (1873), L. R. 16 Eq. 530. *Consd.* **Gainsford v. Dunn** (1874), L. R. 17 Eq. 405. *Refd.* *Rz p.* **M'Dowal** (1859), 5 Jur. N. S. 553; **Wells v. Row** (1879), 48 L. J. Ch. 476.

5737. ——**HARRIS v. WATKINS**, No. 5125, ante.

5738. ——**]**—The principle of the decisions in reference to the question whether a charge on real estate is affected by reason of a residuary devise is the same in the case of legacies as in that of debts, & is this, that where residuary real & personal property is given in one mixed fund, to the exor., who is to pay debts & legacies, there legacies as well as debts are charged upon the real estate.

Testator, after bequeathing a legacy, & expressly charging part of his real estate with an annuity to the legatee, devised & bequeathed all the rest, residue, & remainder of all & singular his real & personal estate, subject to his debts, funeral & testamentary expenses to trustees, whom he also appointed exors., upon certain trusts:—**Held:** the legacy was well charged upon the real estate.—**WHEELER v. HOWELL** (1857), 3 K. & J. 198; 69 E. R. 1079.

Annotations:—*Follid.* **Greville v. Browne** (1859), 7 H. L. Cas. 689. *Mentd.* **Smith v. Hill** (1878), 9 Ch. D. 143; *Re* **Lloyd**, **Lloyd v. Lloyd** (1902), 87 L. T. 541.

5739. ——**]**—Testator, by his will, after bequeathing certain sums of stock for life, & which in certain events he directed should "fall into his residuary estate," & also bequeathing legacies to charities & others, which he directed should be paid out of his personal estate, devised & bequeathed his freehold houses at S., "& all & singular other the residue & remainder of his estate & effects," to his exors., upon trust to pay the income to his daughter M. for life, & after her decease, to "convey, assign, & pay the same residuary estate & effects "to her children as therein mentioned. Testator had no other real estate than the houses at S. The personal estate was insufficient to pay both the debts & legacies:—**Held:** the real estate at S. was part of testator's residuary estate, & as such, it was subject to the payment of the legacies, except the charitable legacies, so far as the personality was insufficient.—**THORMAN v. HILHOUSE** (1859), 33 L. T. O. S. 142; 5 Jur. N. S. 563; 7 W. R. 332.

5740. ——**]**—If there are general gifts of legacies, & then of the rest & residue, real and personal, blending the whole in one mass, though accompanied by a power to the legatee of the residue, "to dispose of the same in any manner he may think proper," the legacies are a charge on the realty.

Testator gave a legacy, which, if not received, was to form "part of the residue of my property." Then followed a legacy to B.; but if the legatee should die before time for payment, it was to be considered "as part of the residue of my property, & to go & merge in the same." After some legacies his will concluded, "All the rest, residue, & remainder of any property I may die possessed of, whether estates, freeholds, etc., bonds, bills, etc.,

annuities, etc., I devise & bequeath to my son, in the fullest manner I can, with liberty to dispose of the same in any manner he may think proper." The son was named as one of the exors., but did not act as such. The will was proved by the other exor. The son mortgaged the real estates:—**Held:** the legacy to B. was a charge on the real estates.—**GREVILLE v. BROWNE** (1859), 7 H. L. Cas. 689; 34 L. T. O. S. 8; 5 Jur. N. S. 849; 7 W. R. 673; 11 E. R. 275.

Annotations:—*Apld.* **Gyett v. Williams** (1862), 2 John. & H. 429. *Distd.* **Browning v. French** (1871), 34 L. T. 649. *Follid.* **Skiller v. Halsman** (1871), 24 L. T. 745. *Apld.* **Gainsford v. Dunn** (1874), L. R. 17 Eq. 405; **Brooke v. Rooke** (1876), 35 L. T. 301; **Re Bellis's Trusts** (1877), 5 Ch. D. 504. *Follid.* **Bray v. Stevens** (1879), 13 Ch. D. 162. *Distd.* **Wells v. Row** (1879), 48 L. J. Ch. 476. *Apld.* **Elliott v. Dearsley** (1880), 16 Ch. D. 322; **Re Bawden**, **National Provincial Bank of England v. Crosswell**, **Bawden v. Crosswell**, [1894] 1 Ch. 693; **Re Adams & Perry's Contract**, [1899] 1 Ch. 554; **Re Smith, Smith v. Smith**, [1899] 1 Ch. 365; **Re Balls**, **Trebvay v. Balls**, [1909] 1 Ch. 791. *Refd.* **Re Ovey**, **Broadbent v. Barrow** (1882), 46 L. T. 613; **Re Stokes**, **Parsons v. Miller** (1892), 67 L. T. 223; **Re Boards**, **Knight v. Knight**, [1895] 1 Ch. 499; **Re Dyson & Fowke**, [1896] 2 Ch. 720; **Re Grainger**, **Dawson v. Higgins**, [1900] 2 Ch. 756; **Re Yater**, **Throckmorton v. Pike** (1907), 96 L. T. 758. *Mentd.* **Re Brooke**, **Brooke v. Brooke**, [1894] 1 Ch. 43.

5741. ——**Real estate acquired after will.]**—Testator at the time of the date of his will possessed only personal estate, but before his death had acquired considerable real estate.

Testator gave legacies to certain persons having previously bequeathed his whole personal estate to the trustees upon trust (*inter alia*) to convert, etc., & pay the legacies:—**Held:** that the legacies were charged on the real estate of testator, with certain priorities.—**GYETT v. WILLIAMS** (1862), 2 John. & H. 429; 6 L. T. 279; 70 E. R. 1126.

Annotations:—*Consd.* **Gainsford v. Dunn** (1874), L. R. 17 Eq. 405; **Bray v. Stevens** (1879), 13 Ch. D. 162. *Refd.* **Re Hardy**, **Wells v. Borwick** (1881), 17 Ch. D. 798.

5742. ——**]**—Testator gives all his property by description, except his estate in Norway, to trustees on trust, to possess themselves of all, pay debts & the money legacies & incumbrances affecting his estate, & also his estate in Norway, with a general power to sell his English property. He then gives all his said residue, not including his estates in Norway, directing payment thereof of various money legacies. There is then a gift of the Norway estates to his trustees on trust to manage, cut timber, pay debts & incumbrances affecting the estates, if not extinguished out of the other property; & immediately after the payment of his debts, & the legacies thereinbefore given, testator directs his trustees to divide the rents equally among his children & the survivor for life, with a devise of the Norway estates to his sons & their male issue, with the ultimate remainder to his own right heirs:—**Held:** the money gifts were legacies, & were chargeable on the English property in the first instance, & if that should be insufficient, then on the Norway estates in aid of the English.—**HAKEWILL v. WHITE** (1863), 8 L. T. 529; 11 W. R. 609.

5743. ——**]**—**PEACOCK v. PEACOCK**, No. 5915, post.

5744. ——**]**—**HENSMAN v. FRYER**, No. 4581, ante.

5745. ——**Legacy described as being part of personal estate.]**—Testator, after directing his debts etc. to be paid by his exors. out of his personal estate, & making a specific bequest, gave all his realty & personalty to trustees upon trusts for the conversion, getting in, & investment of his

residue are a charge on land.—**YOUNG v. PUGH** (1886), 11 O. R. 597.—**CAN.**
e. — *Gift of residue of estate subject to payment of legacies.]*—Testator

after devising pecuniary legacies to his children provided as follows: "I bequeath unto J., all my real & the remainder of my personal estate

after the above legacies are paid":—**Held:** the legacies were charged upon the real estate.—**JOHNSON v. DENMAN** (1889), 18 O. R. 66.—**CAN.**

personality; & the testator, by five clauses in his will, directed his trustees to stand possessed of five portions of his real estate, in each case giving the specific description, & five sums of £1,300, in each case describing the sum of money as "part of my personal estate" upon certain trusts for the benefit of his five children & their issue; & as to all the residue of his realty & personality not thereinbefore specifically or otherwise disposed of, upon trust, to release, assign, pay, & transfer the same to his children:—*Held*: the rule in *Greville v. Brown*, No. 5740, *ante*, did not apply, & the five legacies were not charged upon the residuary realty.—*BROWNING v. FRENCH* (1871), 24 L. T. 649.

5746. — *Previous interest in realty given.*—Testatrix after giving some pecuniary legacies, devised & bequeathed all her real & leasehold estates to trustees upon trust to pay the rents & profits of her freehold house at G., specifically describing it, to A. for life, with remainder to his children in equal shares, & as to all the residue of her real & personal estate testatrix directed her trustees to pay the rents & income thereof to B. for life with remainder to his children in equal shares. The personal estate proved insufficient for the payment of the legacies:—*Held*: the legacies were a charge on the residuary real estate, notwithstanding that a previous interest in real estate was given by the will.—*SKILLER v. HAISMAN* (1871), 24 L. T. 745; 19 W. R. 693.

5747. — *Testator, after giving certain pecuniary legacies, devised as follows:* "As to all my messuages, farms, & lands at N., consisting of about 180 acres, my stock, crops, implements of husbandry, moneys, securities for money, & all the residue of my estate & effects, real & personal, I bequeath & devise the same unto my said wife to hold unto my said wife until my youngest child shall attain twenty-one years," with limitations over in favour of the children:—*Held*: the pecuniary legacies were not charged on the farm at N., or on the residuary real estate.—*CASTLE v. GILLET* (1873), L. R. 16 Eq. 530.

Annotation:—*Consd. Bray v. Stevens* (1879), 12 Ch. D. 162.

5748. — *Property over which testator has power of appointment.*—The doctrine of *Greville v. Browne*, viz., that a gift of legacies, followed by a gift of the residue of the real & personal estate, charges the legacies on the residuary real estate, is applicable to a gift of legacies followed by a gift of the residue of all the property of testator, & over which testator has a power of appointment, though the power be special & non-exclusive; & in such a case the legacies are charged on property subject to a power of appointment.—*GAINSFORD v. DUNN* (1874), L. R. 17 Eq. 405; 43 L. J. Ch. 403; 30 L. T. 283; 22 W. R. 499.

Annotations:—*Consd. Re Bowden, National Provincial Bank of England v. Cresswell, Bowden v. Cresswell*, [1894] 1 Ch. 693. *Re Bards, Knight v. Knight*, [1895] 1 Ch. 499. *Mentd. Blann v. Bell* (1877), 7 Ch. D. 382.

5749. — *Direction for payment of debts & legacies by executors.*—The rule that legacies followed by a gift of real & personal residue in one mass are charged on the real estate applies although preceded by a direction that the debts & legacies shall be paid by the exors. Testatrix by her will directed her debts & funeral & testamentary expenses, & the legacies thereby bequeathed, to be paid by her exors. thereafter named, & after bequeathing specific & pecuniary legacies & making a specific devise, she gave the residue of her real & personal estate to A. & B. upon certain trusts, & appointed A. & C. exors.:—*Held*: the legacies were charged on the residuary real estate of testatrix.—*Re BROOKE, BROOKE v.*

ROOKE (1876), 3 Ch. D. 630; 45 L. J. Ch. 730; 35 L. T. 301; 24 W. R. 959.

Annotation:—*Reid. Re Brooke, Brooke v. Brooke* (1893), 63 L. J. Ch. 159.

5750. — *Testator gave pecuniary legacies out of his unsettled property, & then gave "the rest & residue of his unsettled property" to A. The will contained no devise of trust estates:—Held*: although by this disposition testator's own real estate was charged with legacies, an estate of which he was trustee passed under the residuary devise.—*Re BROWN & SIBLY'S CONTRACT* (1876), 3 Ch. D. 156; 35 L. T. 305; 24 W. R. 782.

Annotations:—*Dbtd. Re Bellis's Trusts* (1877), 5 Ch. D. 504. *Mentd. Re Smith's Estate* (1876), 4 Ch. D. 70.

5751. — *A testator gave various pecuniary legacies & all the rest & residue of his estate, real & personal, he gave devised, & bequeathed to his wife, her heirs, exors., administrators, & assigns, absolutely:—Held*: the legacies were charged on the real estate, & therefore that the general devise did not pass property of which testator was seised in fee as trustee.—*Re BELLIS'S TRUSTS* (1877), 5 Ch. D. 504; 46 L. J. Ch. 353; 36 L. T. 644; 25 W. R. 456.

5752. — *Testator, having four daughters & two sons, by his will directed that his just debts & funeral & testamentary expenses should be paid by his exors., thereafter named, & appointed W. & testator's son, J., exors. & trustees. He separately & specifically devised & bequeathed certain properties to his trustees in trust for each daughter for life, & afterwards for her children, & specifically devised one estate to his son, J., for his absolute use & benefit, & another estate to his son, T. B., for his absolute use & benefit, & devised & bequeathed his residuary realty & personality to his trustees in trust for sale & conversion & to divide the net proceeds among testator's six children as tenants in common:—Held*: neither the properties given in trust for the daughters, nor those given to the sons were charged with the payment of testator's debts, but the residuary estate was charged with the payment thereof by force of the word "residue."—*Re BAILEY, BAILEY v. BAILEY* (1879), 12 Ch. D. 268; 48 L. J. Ch. 628; 41 L. T. 157; 27 W. R. 909.

Annotations:—*Consd. Re Tanqueray-Williaume & Landau* (1882), 20 Ch. D. 465. *Reid. Re De Burgh Lawson, De Burgh Lawson v. De Burgh Lawson* (1889), 41 Ch. D. 568; *Re Stokes, Parsons v. Miller* (1892), 67 L. T. 223.

5753. — *Testator directed that all his debts & funeral & testamentary expenses, not mentioning legacies, should be paid out of his personal estate. He then gave a number of legacies, & directed that, if one of the legacies should fail, it should fall into his "residuary estate." He then devised all his freehold & leasehold hereditaments in the parishes of B., L., & R., " & all the rest, residue, & remainder of " his real & personal estate, to trustees, upon trust to make a weekly payment to his wife during her life, & subject thereto to invest the residue, & after his wife's decease, as to all his freeholds & all his leaseholds, & all the residue & remainder of his estate & effects, to stand possessed thereof upon certain trusts. The personal estate, & the real estate other than the real estate in the parishes of B., L., & R., were insufficient to pay the legacies:—*Held*: the case was within the rule of *Greville v. Browne*, No. 5740, *ante*, & the legacies were a charge on the real estate in the parishes of B., L., & R.—*BRAY v. STEVENS* (1879), 12 Ch. D. 162.*

5754. — *Testator by will made in 1866, after specifically disposing of certain parts of his property & giving certain real estate to his wife during widowhood, gave the rest & residue of*

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his real & personal estate to trustees upon trust to convert the same into money & thereout pay his debts, including debts due on mtge. of the property given to his wife during widowhood, & his funeral & testamentary expenses, & the costs of proving & executing his will. He directed his trustees to pay the income of the fund to his wife during widowhood, & after the death or second marriage he gave as much of the fund as consisted of pure personality to charitable purposes, & bequeathed the rest of it to his wife. In a subsequent part of his will he appointed exors., & gave a legacy to each of them who accepted the trusts. At his death part of the residuary real estate was subject to mortgages:—*Held*: (1) the legacies were charged on the real estate, but only in aid of the personality, the principle of *pro rata* payment only applying to payments which testator had expressly directed to be made out of the mixed fund; (2) the will did not indicate any such "contrary intention" as to exclude the mtges. on the residuary real estate from the operation of 1854 Act, & they must be paid out of the proceeds of the mortgaged estate.—*ELLIOTT v. DEARSLEY* (1880), 16 Ch. D. 322; 44 L. T. 198; 29 W. R. 494, C. A.

Annotations:—*As to* (1) *Folld. Re Boards, Knight v. Knight*, [1895] 1 Ch. 499. *Refd. Re Bawden, National Provincial Bank of England v. Cresswell, Bawden v. Cresswell*, [1894] 1 Ch. 693; *Re Grainger, Dawson v. Higgins*, [1900] 2 Ch. 756; *Re Balls, Trewby v. Balls*, [1909] 1 Ch. 791.

5755. — *Legacy given by codicil.*—The principle that where a will contains a gift of legacies & residue the legacies are in the event of the personal estate proving insufficient for their payment to be deemed to be charged upon the real estate applies in favour of an additional legacy given by a codicil to a legatee named in the will.

Testator, by his will, gave £300 to his wife, & "all the residue of his property, of whatever description," to his sister. By a codicil he left to his wife "the sum of £700 in addition to what he had already left by his will."

The personal estate proved insufficient for the payment of debts & legacies in full:—*Held*: the £700 as well as the £300, was charged on the real estate.—*Re HALL, HALL v. HALL* (1884), 51 L. T. 88.

5756. — *Testator, after directing his exors. whom he also appointed trustees to pay his debts & funeral & testamentary expenses, & giving various pecuniary legacies, gave all his personal estate & effects, except money or securities for money, to R. He gave & devised all the rest, residue, & remainder of his estate, both real & personal, to his trustees, upon trust thereout, in the first place, to pay two specified sums, & as to the residue thereof, or such part or parts thereof as might lawfully be appropriated for the purpose, for such one or more or any hospital of a charitable nature, & in such proportions as they in their uncontrolled discretion should think fit. It was held by the Ct. of Appeal that the gift to R. was not specific but that all the pecuniary legacies were payable in full before she could be entitled to anything under the bequest to her. The personal estate including that bequeathed to R. was insufficient for the payment of the legacies, & the real estate had to be sold to make good the deficiency. After the legacies had been paid there remained a surplus of the proceeds of the sale of the real estate:—*Held*: the real estate was charged with the payment of the legacies only in aid of the personal estate, & R. was not entitled to be recouped *pro**

tanto out of the surplus the loss which she had suffered by the application of the personal estate bequeathed to her in the payment of legacies.—*Re OVEY, BROADBENT v. BARROW* (1885), 31 Ch. D. 113; 55 L. J. Ch. 103; 53 L. T. 723; 34 W. R. 100

5757. — *The principle of Greville v. Browne, No. 5740, ante*, whereby under a gift of legacies, followed by a gift of residuary real & personal estate, the legacies are held to be charged on the residuary real estate, is not confined to cases in which the residuary real & personal estate are given together as "residue" or "the rest" or the like.

Testator, after making specific devises & bequests, bequeathed pecuniary legacies, & then gave, devised, & bequeathed all the real & personal estate to which at his death he should be beneficially entitled " & not otherwise disposed of " to his exor. absolutely. The personal estate was insufficient for the payment in full of the debts & pecuniary legacies:—*Held*: (1) the principle of *Greville v. Browne* applied, & the legacies were charged on the residuary real estate; (2) the pecuniary legacies were not liable to contribute to the debts, but the residuary real estate must contribute to the debts ratably with the specific devises & legatees, according to its full value without deducting the amount of the pecuniary legacies.—*Re BAWDEN, NATIONAL PROVINCIAL BANK OF ENGLAND v. CRESSWELL, BAWDEN v. CRESSWELL*, [1894] 1 Ch. 693; 63 L. J. Ch. 412; 70 L. T. 526; 42 W. R. 235; 8 R. 76.

Annotation:—*Refd. Re Margetts, Smith v. Margetts* (1906), 50 Sol. Jo. 290.

5758. — *When testator bequeaths legacies & then bequeaths the residue of his real & personal estate, the legacies are charged upon the real estate or its proceeds but they are payable primarily out of the personality, unless testator directs that they are to be paid out of the mixed fund, in which case they are payable ratably out of realty & personality.*—*Re BOARDS, KNIGHT v. KNIGHT*, [1895] 1 Ch. 499; 64 L. J. Ch. 305; 72 L. T. 220; 43 W. R. 472; 13 R. 278.

5759. — *Re SMITH, SMITH v. SMITH, No. 5601, ante.*

5760. — *Testator by his will dated in 1868 appointed his wife extrix. thereof, & directed payment of his debts without saying by whom, & after bequeathing certain pecuniary legacies, he gave the residue of his real & personal estate to two other persons upon trust as to his real estate to pay to or permit & suffer his wife to receive the rents & profits for her life, & after her death upon trust to pay to or permit & suffer his niece to receive the rents & profits for her life for her separate use; & after declaring certain trusts with regard to his personal estate, he directed his trustees after the death of the survivor of his wife & niece to pay two pecuniary legacies, & after payment thereof to stand possessed of his real estate & the residue of his personal estate upon certain other trusts. The trustee asked for a declaration that they had power under Law of Property Amendment Act, 1859 (c. 35), s. 14 to sell the real estate:—*Held*: upon the principle of *Greville v. Browne, No. 5740, ante*, there was a charge upon the real estate of the debts & immediate legacies, & also of the two future legacies.—*Re ADAMS & PERRY'S CONTRACT*, [1899] 1 Ch. 554; 68 L. J. Ch. 259; 80 L. T. 149; 47 W. R. 326; 43 Sol. Jo. 278.*

5761. — *Re BALLS, TREWBY v. BALLS, No. 4338, ante.*

5762. — *Re MAJOR, TAYLOR v. MAJOR, No. 5517, ante.*

iii. *Appointment of Devisee as Executor.*

5763. Whether realty liable for legacy.]—Real estate decreed to be charged with an annuity given by the will, though no express words to charge the land, the exor. being devisee of the land.—*ELLIOT v. HANCOCK* (1690), 2 Vern. 143; 23 E. R. 699.

*Annotation:—***Reid.** *Peacock v. Peacock* (1865), 34 L. J. Ch. 315.

5764. —.]—S. by will devises his lands to his brother who was his heir at law, in fee, gives legacies & makes his brother exor., desiring him to see his will performed. The real estate is charged with the legacies.—*ALCOCK v. SPARHAWK* (1691), 2 Vern. 228; 1 Eq. Cas. Abr. 198; 23 E. R. 748.

*Annotations:—***Folld.** *Lypet v. Carter* (1750), 1 Ves. Sen. 499; *Preston v. Preston* (1856), 2 Jur. N. S. 1040. **Reid.** *Alexander v. Holland* (1753), 3 Keny. Ch. 4. **Mentd.** *Portman v. Seymour* (1742), 9 Mod. Rep. 280; *Sherratt v. Sherratt* (1833), *Coop. temp. Brough.* 35.

5765. —.]—*QUINTINE v. YARD* (1702), 1 Eq. Cas. Abr. 74; 21 E. R. 886.

*Annotation:—***Mentd.** *Meux v. Maltby* (1818), 2 Swan. 277.

5766. — Promise by executor to pay.]—A. devises land to his brother & makes him exor. & wills that out of his personal estate & half a year's rent of his real estate, he should pay his legacies, & gives an annuity to his nephew to maintain him at college. It being proved that the brother promised testator to pay the annuity, otherwise he would have charged his real estate therewith; decreed the real estate to be charged with the annuity.—*OLDHAM v. LITCHFIELD* (1705), 2 Vern. 506; 1 Eq. Cas. Abr. 231; *Freem. Ch.* 285; 23 E. R. 923.

*Annotations:—***Mentd.** *Whitton v. Russell* (1739), 1 Atk. 448; *Reech v. Kennigete* (1748), *Amb.* 67.

5767. —.]—A. devises £500 apiece to his three daughters, at their ages of twenty-one, or marriage, to be paid out of his stock, & devises the rents of his real estate to his wife, for life, in lieu of dower, & for the maintenance of his children, & towards making up their portions; & after his debts & legacies paid, devises the lands to his son, who, together with his wife, he made exors. The stock was but for £100 value; the wife being dead, & the two eldest daughters having had their portions paid them:—*Held*: the lands were liable in the hands of the son to the youngest daughter's portion.—*TOMPKINS v. TOMPKINS* (1715), *Prec. Ch.* 397; 24 E. R. 178; *sub nom.* *THOMPSON v. THOMPSON*, *Gilb. Ch.* 90.

5768. —.]—*BRUDENELL v. BOUGHTON*, No. 5701, *ante*.

5769. —.]—Devise of £100 to a daughter, to be paid by exor. in a month after death of the widow, to whom the real estate was devised for life, & afterward to his son, the exor. in fee; appointing two trustees or overseers to see the will performed. On deficiency of assets, the real charged with the £100.—*LYPET v. CARTER* (1750), 1 Ves. Sen. 499; 27 E. R. 1166.

5770. — Personal liability of executor.]—P. devised real estate to his son B. in fee, & also gave to B. the residue of his effects, & directed that his son, B., should pay unto his, J.'s, grandson a certain sum by instalments. B. paid several sums on account of the instalments, & then refused to pay any more, on the ground that the

personal estate was insufficient:—*Held*: under the terms of the will the legacy was charged on the real as well as on the personal estate, & B. himself was personally liable in case the assets should be deficient.—*PRESTON v. PRESTON* (1856), 2 Jur. N. S. 1040; 4 W. R. 455.

— Where personality wasted.]—*See* Sub-sect. 2, C. (f), *post*.

(d) *Extent of Charge.*

5771. General rule—Liability of estates preceeding absolute estate.]—Devise of lands to A. for life, remainder to such child or children as should be living at his death, & to their heirs, A. paying £40 to B. This is a charge not only on A.'s estate for life, but also on the remainder.—*SADD v. CARTER* (1691), *Prec. Ch.* 27; 2 Eq. Cas. Abr. 370; 24 E. R. 15.

5772. —.]—Devise to trustees from & immediately after determination of precedent estates, to use of A. in fee, charged & chargeable with legacies, to be paid in twelve months: they run over all the precedent estates as well as the fee.—*CARTER v. CARTER* (1748), 1 Ves. Sen. 168; 27 E. R. 961.

5773. Right to contribution—As between tenant for life & remainderman.]—Lands charged with the payment of legacies were devised afterwards to A. for life, remainder to B. & his heirs:—*Held*: B. should contribute two-thirds towards the payment.—*PEACHY v. COLT* (1677), *Cas. temp. Finch.* 304; 23 E. R. 166.

5774. —.]—Testator gave all his real & personal estate to his wife for life, & after her decease to his son absolutely, chargeable with the payment of a legacy of £200 to testator's daughter, within six months after his decease, & with the payment of testator's debts & funeral & testamentary expenses. There was no personal estate:—*Held*: the legacy was charged on the life interest as well as on the remainder of the real estate, & ought, with the arrears of interest for six years, to be raised by mtge. of the property, & the remainderman ought to be recouped out of the rents & profits to the full amount of the arrears of interest raised out of the estate.—*MAKINGS v. MAKINGS* (1860), 1 De G. F. & J. 355; 45 E. R. 396.

(e) *Effect of Charge.*i. *In General.*

5775. Where personality primary fund—Primary fund insufficient.]—Where there is a charge in the will of legacies upon real estate, they shall be so charged, though they are first directed to be paid out of the residue of the personality, the personal fund proving deficient.—*MINOR v. WICKSTEED* (1792), 3 Bro. C. C. 627; 29 E. R. 736, L. C.

*Annotations:—***Consd.** *Scoley v. Cartledge* (1835), 4 L. J. Ch. 85. **Reid.** *Gyett v. Williams* (1862), 2 John. & H. 429.

— **Marshalling.]—***See* Sect. 7, sub-sect. 9, *post*.

5776. —.]—Devise of freehold estate in trust to sell & apply the money towards payment of the legacies; the residue of the personal estate after payment of debts, legacies, etc., upon trust to convert all the said residue of his personal estate into ready money, to be laid out in freehold property, to be settled. The personal estate leaving

PART IV. SECT. 7, SUB-SECT. 2.—C. (d).

d. *Not affected by discretion given to executors.]—*Testator, after a bequest of a legacy to pttf., devised to a daughter two farms, & desired his exors. to pay the legacies out of the annual produce of the farms, or as

to them should seem best. The exors. renounced & no one administered. The daughter took possession of the whole estate, paid the debts & received the rents of the farms which she subsequently mortgaged, & they were sold by the first mtgee., & the balance of the purchase money

was paid into ct., & was claimed by a subsequent mtgee.:—*Held*: pttf.'s legacy was a charge upon the annual produce of the farms, & was not affected by the words, "or" as to the exors. "should seem best."—*CAL. LAGHAN v. HOWELL* (1897), 29 O. R. 329.—*CAN.*

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a residue beyond the charges, the real estate, a resulting trust for the heir-at-law; & charged with the legacies, not primarily, but only as an auxiliary fund to the personal estate.—**MAUGHAM v. MASON** (1813), 1 Ves. & B. 410; 35 E. R. 159.

*Annotations:—*Consd. **Spencer v. Wilson** (1873), L. R. 16 Eq. 501. *Reid.* **Amphlett v. Parke** (1831), 2 Russ. & M. 221.

5777. — Bequest of annuities—Right of heir or devisee to income of realty.]—Where realty is charged in aid with annuities primarily payable out of personality, the person who would, but for the annuities, be entitled to the income of the realty, must prove that the annuities are properly secured before she can call for payment to her of the income of the realty.—*Re* **EARLE, TUCKER v. DOWNE** (1923), 131 L. T. 383; 68 Sol. Jo. 386.

5778. On vesting of legacy.]—T. devised all his lands to T. & J. & their heirs in trust, that they should sell his lands in M. & P., & out of the purchase money pay his debts, & as to the rest in trust, to receive the rents & to make leases for 99 years, determinable, etc., & therewith to pay his debts & legacies, then to the use of A. wife of C., for life, remainder to the issue male & female of her body, & makes the trustees exors.; he likewise gives a legacy of £500 to his nephew P., to be paid at 21, or marriage, who died before 21. Personal estate of the value of £700, the lands in M. & P., not sufficient to pay the debts. Bill brought by the administrator of P. to have the £500 raised:—*Held*: as the legacy was charged upon the real as well as personal estate, it could not be raised, as the legatee died before the time of payments & the bill should be dismissed.—**PROWSE v. ABINGTON** (1738), 1 Atk. 482; *West. temp. Hard.* 312; 26 E. R. 306, L. C.

*Annotations:—**Reid.* **Hutchins v. Foy** (1740), 2 Com. 716; **Nicholls v. Judson** (1742), 2 Atk. 300; **Pearce v. Loman** (1796), 3 Ves. 135.

5779. —.]—Legacies to be paid at 21 or marriage to infants, two of whom did not attain 21 or marry; if the personal estate had been sufficient, which was not the case, it was contended that the legacy would have vested, & therefore it was proposed to throw another legacy on the real estate, in order to leave a sufficient personal fund. The ct. refused so to do, & declared that the representatives of deceased legatees were not entitled to have their legacies raised out of the real estate.—**ORD v. ORD** (1771), 2 Dick. 439; 21 E. R. 340, L. C.

5780. —.]—Legacy charged upon land, payable at a certain time; the legatee died before that time; but being charged, & the estate devised subject to that charge, the devisee must take it *cum onere*, & the legacy shall be raised.—**CLARK v. ROSS** (1773), 2 Dick. 529; 21 E. R. 375, L. C.

5781. On payment of legacy—Enforcement of payment—By order for sale—Although legacy directed to be raised out of profits.]—Where money is devised to be raised out of the profits of land, & the profits will not raise it in a convenient time, the ct. will decree a sale.—**HEYCOCK v. HEYCOCK** (1684), 1 Vern. 256; 23 E. R. 452.

5782. —.]—By order to cut timber.]—Devise of land upon which timber is growing, to A. for life, remainder to B. in fee, paying several legacies within a limited time, & in default of payment the remainder in fee is devised over to C., he paying the legacies. Upon a bill brought by B. the ct. gave leave to B. to cut down timber for the payment of the legacies, though it was opposed by the tenant for life, & the devisee over.—

CLAXTON v. CLAXTON (1690), 2 Vern. 152; *Prec.* Ch. 15; 23 E. R. 705.

5783. —.]—By order for security to be given by lien—**Mortgage of estate.]—**Land was devised to the heir-at-law, paying a sum of money to B.:—*Held*: if the heir should sell to a purchaser without notice of the will, as he might make a title without the will, being heir-at-law, the money might be lost; & therefore the money being not payable until some years hence, the heir was decreed to give security, by mortgaging the estate.—**ANON.** (1704), *Freem.* Ch. 278; 22 E. R. 1209.

5784. —.]—Against land extended by Crown.]—The ct. will decree payment of legacies charged on land though extended into the Queen's hands.—**POOLE v. A.-G.** (1708), *Park.* 272; 145 E. R. 777.

5785. —.]—By action against mortgagee—**Costs of mortgagee.]—**If the devisee of lands, subject to the payment of legacies mortgages them; upon a bill filed by the legatees for the payment of their legacies, the mtgee. is not entitled to his costs as against the legatees.—**ANON.** (1825), 3 L. J. O. S. Ch. 141.

—.]—*See, generally*, *Sect.* 5, sub-sect. 4, *ante*.

5786. Effect of direction for conversion—On surplus—Surplus undisposed of.]—**RANDALL v. BOOKER**, No. 5648, *ante*.

5787. —.]—Testator directed a sale of his estate & a sufficient sum to be laid out in the funds to produce annuities for his nieces, & he gave his residue to his wife for life:—*Held*: the surplus income after paying the annuities which occurred prior to the sale & investment being made, was liable to make up the fund necessary to produce the annuities & it did not belong to the widow.—**ANDERSON v. ANDERSON** (1863), 33 Beav. 223; 55 E. R. 353.

5788. Continuation of charge—Effect of collateral security.]—**MATTHESON v. HARDWICKE** (1789), 2 P. Wms. 665, n.; 24 E. R. 911.

5789. —.]—& purported release by legatee.]—A person entitled to a legacy charged upon testator's real estate, received from the exor., who was also devisee of the real estate, a promissory note for the amount of the legacy. The legatee subsequently, at the request of the exor., & to enable him to borrow money upon the land, executed a deed reciting payment of the legacy, & purporting to release the exor. & the real & personal estate of testator from the legacy. The legacy remained unpaid, & no interest was paid upon the legacy, or upon the promissory note, for twelve years:—*Held*: as between the devisee & the legatee, the land still remained charged with the legacy.—**HORNOR v. HEATH** (1856), 27 L. T. O. S. 330, L. J.

5790. —.]—In respect of arrears of annuity.]—Where a party enters into a voluntary covenant to pay an annuity, his real estates will be chargeable in the hands of his devisees, with the arrears of the annuity although such arrears did not accrue till after his death.—**JENKINS v. BRIANT** (1836), 6 Sim. 603; *Donnelly*, 101; 5 L. J. Ch. 348; 58 E. R. 719.

*Annotations:—*Consd. **Morse v. Tucker** (1846), 5 Hare. 79. *Apd.* **Coope v. Cresswell** (1866), L. R. 2 Eq. 106. *Reid.* **Patch v. Shore** (1862), 11 W. R. 142.

5791. Whether specifically devised real estate charged—By general charge—On whole of testator's real & personal estate.]—J. S., by a will properly executed, gave a sum of £4,000 to be laid out in Govt. or real securities, in trust for L. the wife of S., for her separate use for her life; remainder to J. for his life; remainder to the

children of L. by S. He then devised certain lands & tenements specified to various persons named in the will, & after bequeathing several pecuniary legacies, he concluded thus: " & I do hereby expressly charge & make liable my real & personal estate to & with the payments of the aforesaid several legacies " :—*Held*: the lands specifically devised were not liable to the payment of the legacies on a deficiency of the personal estate.—*SPONG v. SPONG* (1829), 3 Bli. N. S. 84; 1 Dow. & Cl. 365; 4 E. R. 1271, H. L.

Annotations:—*Consd. Mirehouse v. Scaife* (1837), 2 My. & Cr. 895. *Apud. Conron v. Conron* (1855), 7 H. L. Cas. 168. *Distd. Re Emmerton's Estate, Maskell v. Farrington* (1862), 3 De G. J. & Sm. 338. *Consd. Mannox v. Greener* (1872), L. R. 14 Eq. 456. *Distd. Bank of Ireland v. McCarthy*, [1898] A. C. 181. *Reid. Creed v. Creed* (1841), 11 Cl. & Fin. 491. *Cogswell v. Armstrong* (1855), 2 K. & J. 227; *Ex p. M'Dowal* (1859), 5 Jur. N. S. 553.

5792. ———.]—Testatrix charged the whole of her real & personal estate with the payment of her debts & legacies, including both in the same sentence:—*Held*: the legacies were a charge upon real estate specifically devised.—*Re EMMERTON'S ESTATE, MASKELL v. FARRINGTON* (1862), 3 De G. J. & Sm. 338; 1 New Rep. 37; 7 L. T. 301; 8 Jur. N. S. 1198; 11 W. R. 127; 46 E. R. 666, L. C.

Annotation:—*Apud Mannox v. Greener* (1872), L. R. 14 Eq. 456.

5793. ———.]—Where there is a specific devise, or a specific legacy in a will, the presumption is that it is the intention of testator that the devisee or legatee shall have it, as it is given, in its integrity & without derogation; & a general charge subsequently introduced in the will, which may in terms be capable of comprehending the specific devise or bequest, is not alone insufficient to take it away.

Testator residing in Ireland, who was possessed of real & personal property, made his will in June, 1836, by which he devised certain freehold estates to trustees for a term of 99 years, to pay an annuity to his wife, & another annuity to one of his sons for life; the estate after the death of his son to go to the sons of that son in tail male. He gave other lands, some freehold, some leasehold, to other sons. He created annuities & gave legacies, directed the different properties devised & bequeathed to fall, in certain events, into his residuary estate, & at the end of his will directed that, " in case my personality & chattel property shall be inadequate to the payment of the pecuniary legacies bequeathed by this my will, the deficiency shall be paid out of my real & freehold estates, & I hereby charge & incur the same with the payment thereof." In a codicil he said, " I charge & incur all my estates of every description, both real & personal, with the following legacies "; & he gave to these legatees a power to distrain on any part of his estates or property of every description for the arrears of the interest due on the annuities given by the codicil:—*Held*: the legacies were not charges on the specifically devised estates.—*CONRON v. CONRON* (1858), 7 H. L. Cas. 168; 11 E. R. 67, H. L.

Annotations:—*Distd. Re Emmerton's Estate, Maskell v. Farrington* (1862), 3 De G. J. & Sm. 338. *Consd. Mannox v. Greener* (1872), L. R. 14 Eq. 456. *Distd. Bank of Ireland v. McCarthy*, [1898] A. C. 181.

5794. ———.]—On real estate if personal estate insufficient.]—Testator bequeathed pecuniary legacies to be charged in the first place upon his personality, & if the same should be insufficient to be charged upon his real & personal estates. He then specifically devised lands at A. to G. & other lands at other places, naming them, to F. There was no residuary devise. The lands at A.

& the lands specifically devised to F. formed the whole of testator's realty. The personality being insufficient the pecuniary legatees claimed a charge upon the lands at A.:—*Held*: upon the true construction of the will testator's intention was that the lands at A. should be charged with the legacies & the presumption of law *contra* was therefore rebutted.—*BANK OF IRELAND v. MCCARTHY*, [1898] A. C. 181; 67 L. J. P. C. 13; 77 L. T. 777, H. L.

5795. Right of creditors to proceed against specific devisee.—Debts-exhausting whole realty.]—*HARRIS v. INGLEDEW*, No. 5699, *ante*.

5796. Charge on rents & profits.—Whether deficiency charged on corpus.]—Testator bequeathed several pecuniary legacies, & directed them all to be paid as soon after three years from his decease as the means by his will thereafter provided would allow. He subsequently by his will, provided those means, & then added, that in case of those means being insufficient, the unpaid legacies should be raised out of the annual rents & profits of his estates at U. from & after his decease, & the accumulations thereof. The means provided by testator were insufficient for the payment of all the legacies:—*Held*: the deficiency was a charge not upon the corpus, but on the annual rents & profits only of the U. estate.—*MARSH v. MARSH* (1856), 26 L. T. O. S. 323; 2 Jur. N. S. 348.

5797. On debts & legacies inter se.—Whether legacies postponed to debts.]—Where testator charges lands with payment of debts & legacies, the legacies must be postponed to the debts, if the charge be not sufficient to satisfy both: but, under such a provision for payment of debts, equity makes no distinction between specialty & simple contract debts.—*HICKSON v. WITHAM* (1875), *Freem. K. B.* 305; *Cas. temp. Finch*, 195; *Freem. Ch.* 305; 89 E. R. 222; *sub nom. HIXON v. WYTHAM*, 1 *Cas. in Ch.* 248.

Annotations:—*Consd. Gosling v. Dorney* (1887), 1 Vern. 482. *Reid. Foly's Case* (1879), *Freem. Ch.* 49; *Anon.* (1700), 2 Vern. 405.

5798. ———.]—Where lands are devised for payment of debts & legacies, the debts & legacies shall be paid *pari passu*.—*GOSLING v. DORNEY* (1887), 1 Vern. 482; 23 E. R. 607, L. C.

Annotation:—*Reid. Lloyd v. Williams* (1740), 2 Atk. 108.

5799. ———.]—Where lands were devised for payment of debts & legacies, the debts being such as had no lien upon the land, as debts by simple contract, etc., the debts should have no preference; but if there be not sufficient to pay all, they shall be paid in proportion.—*HERBERT v. HERBERT* (1703), *Freem. Ch.* 270; 22 E. R. 1204.

5800. ———.]—Testator devised his estates to his eldest son, but charged certain of them with legacies to his younger children, specifically charging one of such legacies amounting to \$10,000 upon one of his estates, & another legacy of \$20,000 upon a different estate. He then made other devises & bequests, & directed that a certain house & his residuary property, should be sold in payment of his debts & in case of his real estates. The legatee of the \$10,000 filed a bill to have the trusts of the will declared & executed. Creditors were directed to come in, & the estates specifically charged with payment of the debts were found not sufficient for that purpose. The ct. afterwards directed a reference to the master to take an account of the debts, & that in taking such account he should report the order & priority of such debts & incumbrances, & particularly that he should inquire & report whether any & what sum

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remained due to the person entitled to the legacy of \$20,000 & the priority thereof. This legacy had been assigned to trustees under a marriage settlement, & they were not parties to the suit, but went in with others upon the reference to the master. The master made a report of the amount of the debts, & found that this legacy was a charge affecting this particular estate, but was only next in priority after the payment of the judgment & bond debts of testator:—*Held*: such finding was right.—*BOUVIERE v. NORBURY* (1835), 3 Cl. & Fin. 247; 9 Bl. N. S. 611; 6 E. R. 1490, H. L.

ii. Extent of Exoneration of Personal Estate.

5801. Insufficiency of real estate.]—Where a real estate is expressly devised for payment of debts, the personal estate is exempted, but if the real is not sufficient, the personal must be applied.—*BICKNET v. PAGE* (1740), 2 Atk. 79; 26 E. R. 448, L. C.

5802. —.]—Testator gave certain portions of his real & personal estate to trustees, for payment of his debts; & he specifically gave several portions of his real & personal estate to different parties "freed from his debts": & also bequeathed his residuary personal estate "freed from his debts." One of the devised estates was subject to a mtge. The funds primarily applicable being insufficient to discharge all the debts:—*Held*: the property which passed under the residuary clause was the next fund which ought to be resorted to for that purpose; & the devisee of the mortgaged estate was entitled to have the mtge. paid off out of the residuary estate.—*BROOKE (LORD) v. WARWICK (EARL)* (1849), 1 H. & Tw. 142; 18 L. J. Ch. 137; 13 L. T. O. S. 5; 13 Jur. 547; 47 E. R. 1360, L. C.

Annotations:—Mentl. Lane v. Sewell (1874), 43 L. J. Ch. 378; *Re Zouche, Dugdale v. Zouche*, [1919] 2 Ch. 178.

5803. —.]—Testator bequeathed certain pecuniary legacies, & he gave his leasehold estates to his exors., to sell & apply the proceeds in part payment of the legacies:—*Held*: the leaseholds were to be applied, as far as they would extend, in payment of the legacies, & the deficiency was to be paid out of the general personal estate.—*BUNTING v. MARRIOTT* (1854), 19 Beav. 163; 52 E. R. 311.

Annotation:—Mentl. Chandler v. Howell (1876), 4 Ch. D. 651.

5804. —.]—Testator gave his real & personal estate to trustees, & directed them to pay the income to his wife for life, & after her death, to sell his real estate, " & out of the money to arise therefrom, in the first place," to pay to A., B. & C. the following sums, specifying them, & upon trust to invest "the remainder of the money to arise from such sale," & stand possessed thereof & of his personal estate, in trust to pay certain annuities, & he gave the residue to the pltf.

ROMILLY, M.R., having decided that the bequests to A., B. & C. were payable solely out of the real estate:—*Held*: the legacies were all payable out of the proceeds of the real estate & the general personal estate not specifically bequeathed:—*FREEM v. DOWLING* (1855), L. R. 4 Eq. 145, n.; 20 Beav. 625; 52 E. R. 744, L. JJ.

Annotation:—Mentl. Hodges v. Grant (1867), L. R. 4 Eq. 140.

5805. —.]—Bequest of annuity, followed by a declaration that it should be paid by the trustees of the will out of the rents of realty devised by the will:—*Held*: the annuity was not charged exclusively on the realty, but the rents being insufficient, it was payable out of the personalty.—*PAGET v. HURST* (1868), 9 Jur. N. S. 906.

5806. Charge of legacies on real estate—What estate charged with debts.]—One seized in fee of a real estate, & possessed of a personal estate by will directed that his legacies be paid out of his real estate, & devised his personal estate to his children:—*Held*: his children should have his personal estate free from the legacies, but charged with the debts, & the real estate only should be charged with the legacies.—*HEATH v. HEATH* (1728), 2 P. Wms. 366; 2 Eq. Cas. Abr. 375; 24 E. R. 768.

Annotations:—Distl. Davies v. Ashford (1845), 15 Sim. 42. *Mentl. Ion v. Ashton* (1860), 3 L. T. 686.

5807. Charge of debts on real estate—Whether costs of resisting unfounded claims of creditors included.]—A. by will devised his real estate to F., under the burden of his just debts due at his decease, which debts were not to diminish his personal estate. F. was also appointed exor., & as such paid debts of testator amounting to £6,186, but incurred costs amounting to £2,791, in defending the personal estate against unjust demands of creditors:—*Held*: F. could not charge the sum of £2,791 on the real estate, because costs incurred in resisting unfounded claims of debt were not comprehended in the description of just debts of testator due at his decease.—*LOVAT v. FRASER* (1866), L. R. 1 Sc. & Div. 24; 15 L. T. 77, H. L.

5808. For whose benefit exoneration enures—Lapse of exonerated gift.]—*DACRE v. PATRICKSON*, No. 5616, ante.

5809. —.]—Testatrix devised her real estate to trustees in trust for sale, & directed them out of the proceeds to pay her funeral & testamentary expenses, debts, & legacies, & pay the residue to a class of persons. She then directed her trustees, who were also her exors., to sell her leaseholds, & if the sale moneys of the real estate were insufficient to pay her debts, funeral & testamentary expenses, & legacies, to apply so much of the proceeds of the sale of the leaseholds as should be sufficient for that purpose, & to pay the residue, or if no part was required for the above purpose the whole, of the proceeds to another class of persons. She then bequeathed to her trustees "all my personal estate," upon trust to call it in & convert it into money, & after payment of the

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e. Where clear intention to charge real estate.]—Where there is a general direction to pay all debts & legacies, & a clear intention to throw particular debts or legacies on the real estate, the ct. is bound to effectuate that intention, & to exonerate the rest of the property.—*BATEMAN v. RODEN (EARL)* (1844), 7 I. Eq. R. 240; 1 Jo. & Lat. 356.—*IR.*

i. Debts subject to charge of debts—Personally also applicable for payment of debts.]—H. being owner of the freehold lands of B., subject to

two rentcharges, & being also owner of an undivided seventh of the freehold lands of D., which share was subject to charges, & being also absolutely seized of certain freeholds in A., made his will & gave to his two sons, M. & R., & to the survivor & the heirs of such survivor, the township of B., they first paying his lawful debts; or, if they did not agree to do this, then M. to have the \$100 per annum settled on him at his marriage, & R. to have the residue on paying his debts, as he considered the plantations were worth more than his debts would amount to. He further directed that his chattels should be disposed of to

the best advantage, & the amount they brought in should be applied at interest for the benefit of his children & towards payment of his debts, & that the insurance on his life might go towards payment of his debts, or be put at interest for the use of his family as his exors. might think best:—*Held*: the personal estate was not exonerated from payment of testator's debts.—*HENRY v. HENRY* (1872), 6 I. R. Eq. 286.—*IR.*

g. Charge of debts on real estate—Exoneration of residue of undisposed-of personalty.]—Testator gave a farm to F., & having given legacies, made this

expenses of such calling in & conversion, to pay the proceeds to the churchwardens of C. for charitable purposes. Part of the personal estate consisted of a mortgage debt, as to which the charitable bequest failed, & the Crown became entitled, there being no next of kin:—*Held*: there was upon the will a sufficient indication of intention that the general personal estate should be exonerated from debts, funeral & testamentary expenses, & legacies out of the real estate; & if that was insufficient, out of the leaseholds, but this right to exoneration failed as regarded the property which went to the Crown, & there was no distinction in this respect between the freeholds & leaseholds; the debts, funeral & testamentary expenses, & legacies, must be apportioned ratably between the pure & impure personalty, including the leaseholds; the real estate & then the leaseholds were to be applied in exonerating the pure personalty from its proportion of debts, etc., & the charity took the pure personalty, subject to so much of that proportion as the freehold & leasehold estates were insufficient to satisfy, & the Crown took the impure personalty, other than leaseholds, subject to its proportion of debts, etc.—*Re MERRE, KILFORD v. BLANEY* (1885), 31 Ch. D. 56; 55 L. J. Ch. 185; 54 L. T. 287; 34 W. R. 109, C. A.

Annotations:—*Reid. Re Hastings, Hallett v. Hastings* (1886), 55 L. J. Ch. 278; *Re Smith, Smith v. Smith*, [1913] 2 Ch. 216.

(f) Effect of Wasting of Personalty.

5810. Whether legacy charged on realty.]—The exor. wastes the fund for younger children; this is a *devastavit* in him, for which he shall be accountable; but the younger children have no remedy over out of the real estate, as there was a sufficient personalty, or would have been, had it not been for the exor.'s wilful neglect.—*MORGAN v. MORGAN* (1736), 2 Eq. Cas. Abr. 7; 22 E. R. 6, H. L.

5811. Will charging realty if personalty deficient.]—A legacy was charged on testator's personal, & if that should prove deficient, on real estate. The personal estate was sufficient at testator's death, but was distributed without any provision being made for the legacy. The legatee by her marriage settlement settled a portion of the legacy on trusts for herself, her husband & the children of the marriage, who should be living at the death of the survivor of the husband & wife. Afterwards the wife became entitled to the real estate charged by descent, & she & her husband sold it to different purchasers. A bill, filed by her & an infant son, praying to have the legacy declared a charge on the real estate & to have the money raised, dismissed as against the purchasers.—*BEYNON v. GOLLINS* (1783), Rom. 152, L. C.

5812. ———.]—Where a legacy to an infant, with interest for maintenance till 21, was charged on testator's real estate, if the personal estate should be inadequate, & the personal estate was sufficient for all the purposes of the will at the time of testator's death, but was subsequently wasted

by testator's personal representative:—*Held*: the legacy could not, on the infant attaining 21, be made chargeable on the real estate.—*RICHARDSON v. MORTON* (1871), L. R. 13 Eq. 123; 41 L. J. Ch. 8.

Annotation:—*Reid. Bank of Ireland v. McCarthy*, [1898] A. C. 181.

5813. ———.]—*Executor & devisee same person.*—Testator devised his real estate to trustees for a term, in trust to pay debts & legacies, if his personal estate should be deficient, & subject to the term, he gave his real estates, & the residue of his personalty, to A., B., & C. absolutely, & named them his exors. The personalty which came to the hands of the exors. was more than sufficient to pay all the debts & legacies, but was misappropriated by them:—*Held*: the legatees were entitled to the benefit of the term in priority to the claims of the creditors of one of the exors., who was dead.—*HUMBLE v. HUMBLE* (1838), 2 Jur. 696.

Annotations:—*Widd. Howard v. Chaffers, Howard v. Robinson* (1863), 3 Drew. & Sm. 236. *Reid. Richardson v. Morton* (1871), L. R. 13 Eq. 123.

5814. ———.]—Testator devised a real estate to A. for life, in terms which gave him the legal estate, & he bequeathed to him his personal estate, subject to some annuities bequeathed to plifs., & appointed him an exor. A. wasted the assets:—*Held*: his life estate in the realty was not liable to make good the annuities.—*EGBERT v. BUTTER* (1856), 21 Beav. 560; 52 E. R. 976.

Annotations:—*Apld. Fox v. Buckley* (1876), 3 Ch. D. 508. *Reid. Re Milnes, Milnes v. Sherwin* (1885), 53 L. T. 534.

5815. ———.]—Testator devised certain real estate for life to one of his exors. & trustees: the devisee afterwards committed breaches of trust & then filed a petition for liquidation:—*Held*: as against the trustee in the liquidation, the life estate of the exor. & trustee being legal, could not be taken & applied in replacing losses occasioned by the breaches of trust.—*FOX v. BUCKLEY* (1876), 3 Ch. D. 508; 25 W. R. 170, C. A.

Annotations:—*Reid. Re Milnes, Milnes v. Sherwin* (1885), 53 L. T. 534; *Re Brown, Dixon v. Brown* (1886), 32 Ch. D. 597; *Doering v. Doering* (1889), 42 Ch. D. 203. *Mentd. Re Moore, Moore v. Moore* (1881), 45 L. T. 466; *Re Weston, Davies v. Tagart*, [1900] 2 Ch. 164.

5816. ———.]—Testator gave his real estate for a term of 800 years to A., his son, & B., a stranger, to secure payment of so much of his debts & legacies as his personal estate should be insufficient to pay. Subject thereto, he gave his residuary real estate to A. & C., another son. A. & C. were his exors.; they paid his debts & legacies except two legacies of £1,500 each. At testator's death his personal estate was sufficient to pay the two £1,500 legacies; but the exors. wasted it, & the two legacies of £1,500 were not paid. A. & C., B. being dead, made two mtges.; one to persons who knew, or had the means of knowing, that the advance was for the personal use of A. & C., but the money was paid into the hands of A. alone, the surviving trustee of the term; the other mtge. was to a person without notice of any improper application of the money, & the deed recited truly that the debts were paid, but untruly that the two

provision: "F. shall pay my debts." There was a residue of undisposed of personalty:—*Held*: F. took on condition that he paid testator's debts; having accepted the bequest he was bound to fulfil the condition, & the undisposed of residue was exonerated from liability.—*DUFFY v. DUFFY*, [1920] 1 L. R. 122.—IR.

PART IV. SECT. 7, SUB-SECT. 2.—C. (1).

5811.1. Whether legacy charged on realty.—Will charging realty if personalty

insufficient.]—A legacy was charged on realty, falling sufficient personal assets. At testator's death the personal assets were sufficient. Owing to a *devastavit* by the exors., the assets became inadequate:—*Held*: the real estate was liable for the legacy.—*Re MARRY'S ESTATE* (1863), 14 L. Ch. R. 355; 15 Ir. Jur. 374.—IR.

5811.1. ———.]—Testator bequeathed his personal estate to S. & two exors., upon trust to pay legacies, & subject thereto for S. & devised all his lands to S. He

directed that if the personal estate should prove insufficient to pay the legacies the deficiency should be a charge upon the property devised to S. Testator died, & S. became possessed of the entire estate. The personal estate was sufficient to pay the legacies, but was misappropriated by S., & certain legacies were left unpaid:—*Held*: although the personal estate was originally sufficient, the unpaid legacies became charged on the lands.—*Re BRADFORD'S ESTATE*, [1895] 1 L. R. 251.—IR.

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legacies not paid were provided for, & the trusts satisfied:—*Held*: the legacies were charged on the term, though testator's personal estate was sufficient at his death.—*HOWARD v. CHAFFERS, HOWARD v. ROBINSON* (1863), 2 Drew. & Sm. 236; 2 New Rep. 381; 32 L. J. Ch. 686; 9 L. T. 243; 9 Jur. N. S. 767; 11 W. R. 1057; 62 E. R. 612. *Annotation*.—*Reid. Richardson v. Morton* (1871), L. R. 13 Eq. 123.

5817. Where mixed fund created.]—*TATLOCK v. JENKINS*, No. 5510, *ante*.

(g) Other Cases.

5818. Devise of residue of personalty to one not made executor.]—*HALL v. BROOKER* (1711), Gilb. Ch. 72; 25 E. R. 50.

Annotation.—*Mantl. Walker v. Jackson* (1743), 2 Atk. 624.

5819. Provision for debts out of realty.]—*HALL v. BROOKER* (1711), Gilb. Ch. 72; 25 E. R. 50.

Annotation.—*Reid. Walker v. Jackson* (1743), 2 Atk. 624.

5820. —.]—*BRYDGES v. PHILLIPS*, No. 5632, *ante*.

5821. Devise of particular land "in aid" of personal estate.]—Devise of particular lands in aid of testator's personal estate, to trustees, for the payment of debts, legacies, & funeral expenses; "all the rest, residue, & remainder of his real & personal estate to his wife, her heirs, exors. & administrators." The personal estate is sufficient. The lands devised in aid, pass to the wife under the residuary clause. So if the personal estate had proved deficient in part only, the wife would have been entitled to the remainder.—*GOODTITLE d. HART v. KNOT* (1774), 1 Cowp. 43; 98 E. R. 958.

5822. Creation of term for payment.]—*TOWER v. ROUS* (LORD), No. 5634, *ante*.

5823. Direction to sell.]—*TOWER v. ROUS* (LORD), No. 5634, *ante*.

5824. Devise of rest & residue of realty following direction to pay debts & legacies.]—Testator, after bequeathing a number of pecuniary legacies to different persons, & giving a certain field to his godson, directed that all his debts & the above legacies should be paid & discharged within six months after his decease; & all the rest & residue of his estate, both real & personal, he gave to N. The personal estate proving insufficient to pay the debts & legacies, upon demurrer to a bill by some of the legatees, seeking to charge their legacies on the real estate which passed under the residuary devise to N.:—*Held*: (1) there was no equity, in favour of pecuniary legatees, to have the assets marshalled, so as to throw the debts upon the real estate devised to N.; (2) but both the debts & legacies were, by the words of the will, effectually charged upon that estate.—*MIREHOUSE v. SCAIFE* (1837), 2 My. & Cr. 695; 7 L. J. Ch. 22; 40 E. R. 805, L. C.

Annotations.—As to (1) *Consd. Farquharson v. Floyer* (1876), 3 Ch. D. 109. *Reid. Paterson v. Scott* (1852), 21 L. J. Ch. 346; *Henson v. Fryer* (1867), 3 Ch. App. 430. As to (2) *Consd. Farnam v. Wiggins* (1847), 9 L. T. O. S. 243; *Conron v. Conron* (1858), 7 H. L. Cas. 163; *Thorman v. Hilhouse* (1859), 33 L. T. O. S. 142. *Reid. Ball v. Harris* (1839), 4 My. & Cr. 264; *Tombs v. Roach* (1846), 2 Coll. 490; *Francis v. Clemow* (1854), Kay, 435; *Harris v. Watkins* (1854), Kay, 438; *Fream v. Dowling* (1855), 20 Beav. 624; *Wheeler v. Howell* (1857), 3 K. & J. 198; *Greville v. Browne* (1859), 7 H. L. Cas. 690; *Barrs v.*

Fewkes (1884), 33 L. J. Ch. 424; *Peacock v. Peacock* (1845), 24 L. J. Ch. 318; *Re Bailey's Estate, Bailey v. Bailey* (1879), 41 L. T. 157; *Re Bawden, National Provincial Bank of England v. Crosswell, Bawden v. Crosswell*, [1894] 1 Ch. 693. *Generally, Mantl. Walker v. Jeffreys* (1843), 1 Hare, 341; *Tatham v. Williams* (1844), 3 Hare, 347.

5825. Debts & legacies charged on real & personal estate.—Subsequent devise of particular real estate to devisee for life.—Direction in will for sale after death of devisee for payment of legacies.]—Devise to A., B., & C. of real & personal estate, upon trust, to pay debts & then the legacies bequeathed by any codicil, & the residue to A., B., & C., her exors. By a codicil testatrix devised her F. estate to her sister for life, & after her death, to be sold for the payment of legacies; & she then bequeathed legacies to a considerable amount:—*Held*: the personal estate was not exonerated, so as to make the F. estate primarily applicable to the payment of the legacies.—*WHIELDON v. SPODE* (1852), 15 Beav. 537; 21 L. J. Ch. 913; 19 L. T. O. S. 240; 16 Jur. 281; 51 E. R. 646.

D. Charge of Debts and Legacies on Specific Real Estate.

5826. Whether personal estate exonerated.—Insufficiency of real estate.]—If a man gives a legacy; & charges it upon Blackacre, although this be not sufficient to answer the full value of the legacy, yet it shall not be charged upon the personal estate.

If a man devises £100 out for a lease for years, & the lease be determined, yet the legatee shall never resort to the personal estate for this legacy.—*ANON.* (1677), *Freem. Ch.* 22; 22 E. R. 1033.

5827. —.]—*WEBB v. SUTTON* (1691), *Nels.* 175; 21 E. R. 819.

5828. —.]—E. W. devised to his second son T. W. & his heirs, certain lands, upon condition to pay to his grandchildren, the children of the said T. W., £90, to be equally divided amongst them, & on default of payment, then that they might enter, hold, & enjoy the premises. T. W. died in testator's lifetime; the son of the eldest son of testator entered on the lands as heir-at-law, & sold them:—*Held*: the legacy to the children of T. W., testator's second son, was a continuing charge on the lands in the hands of the purchaser, & they were entitled to be satisfied for the same with interest.—*WIGGE v. WIGGE* (1739), *West temp. Hard.* 677; 1 Atk. 382; 25 E. R. 1145, L. C. *Annotations*.—*Apld. Re Kirk, Kirk v. Kirk* (1882), 21 Ch. D. 431. *Reid. Cowper v. Mantell* (1856), 22 Beav. 223.

5829. —Residuary estate disposed of.]—Testator by his will charged his whole estates with payment of all his debts, legacies, & funeral expenses, & for that purpose, he devised particular lands to trustees, in trust to sell the same, & pay his debts, legacies, & funeral expenses, & he gave to his wife all his personal estate whatsoever, & constituted her sole extrix. The debts exceeded the personal estate:—*Held*: the personal estate was exempt.—*KYNASTON v. KYNASTON* (circa 1775), cited, 1 Bro. C. C. at p. 457, n.; 28 E. R. 1244.

Annotations.—*Reid. Greene v. Greene* (1810), 4 Madd. 148; *Gilbertson v. Gilbertson* (1865), 13 L. T. 816.

5830. —.]—Testator devised lands to R. in fee, & reciting that he had executed a bond

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h. Personal estate insufficient.—Duty of executors.—Under Administration & Probate Act, 1890, it is the duty of exors., where the personal estate is insufficient to pay legacies

which are charged upon specifically devised real estate, to sell such real estate in order to pay such legacies.—*GRAY v. GRAY* (1904), 39 V. L. R. 1000.—*AUS.*

k. Effect of specific charge following general direction to pay.—Testator

directed his exors. to pay his debts out of his estate. Then followed specific devise. By a codicil he directed his exors., if necessary, to sell in the first place lot A. specifically devised as aforesaid, to pay off any debts, & if such sale were insufficient to pay the

for the due payment of a certain annuity, he charged the lands so devised, & also the said R., his heirs, exors. & administrators, with the payment of that annuity; he then gave divers pecuniary legacies, & directed the residue of his personal estate to be divided equally between R. & W. :—*Held*: the annuity was primarily a charge upon the lands devised, & upon R. personally, in exoneration of the personal estate.—*WELBY v. ROCKCLIFFE* (1830), 1 Russ. & M. 571; 8 L. J. O. S. Ch. 142; 39 E. R. 219, L. C.
Annotation.—*Reid. Williams v. Hughes* (1857), 24 Beav. 474.

5831. ———.]—Testator directed the sum of £2,000 to be raised out of a certain freehold estate, & paid in satisfaction of certain specified debts, & all such other debts as he should owe at his decease; & he gave the rest, residue & remainder of his estate & effects, real & personal, to his wife, her heirs, etc. :—*Held*: the £2,000 was the primary fund for the payment of the debts.—*CLUTTERBUCK v. CLUTTERBUCK* (1832), 1 My. & K. 15; 2 L. J. Ch. 113; 39 E. R. 587.

Annotation.—*Fold. Price v. Price* (1835), 4 L. J. Ch. 243.

5832. ———.]—Testator gave a legacy of £2,000, & he charged it, & his debts, & funeral & testamentary expenses, on the D. estate. He subsequently gave all his personal estate to one for life, & directed an inventory to be taken thereof :—*Held*: the D. estate was primarily liable for the legacy & debts, etc.—*PRICE v. PRICE* (1835), 4 L. J. Ch. 243.

5833. ———.]—Testator devised his estate to a trustee upon certain uses, & directed him to raise, by sale of the timber & other trees growing thereon, £1,000, which he bequeathed to pltf. to be paid at his age of 24, without interest in the meantime; & after giving other pecuniary legacies, testator bequeathed the residue of his personal estate, subject to the payment of his legacies, debts, funeral & testamentary expenses, to certain legatees therein named. On demurrer by the exor. to a bill by pltf. to have the legacy of £1,000 raised by sale of the timber, & if the same should be insufficient, out of the personal estate :—*Held*: the legacy of £1,000 was not charged upon the personal estate.—*DICKIN v. EDWARDS* (1844), 4 Hare, 273; 67 E. R. 651; *sub nom. DICKINS v. BARKER*, 14 L. J. Ch. 22; 4 L. T. O. S. 193; 8 Jur. 1089.

Annotations.—*Reid. Williams v. Hughes* (1857), 24 Beav. 474; *Paget v. Hulsh* (1863), 1 Hem. & M. 663.

5834. ———.]—*Lapse of specific devise*.]—Testator devised land at M. to his son R. in fee, on the express condition that R., his exors. or administrators, should, within three months after testator's death, relinquish all claim to a sum of £3,400 due to him by testator; & he devised other land to trustees, on trust for sale, & to stand possessed of the proceeds of sale, after payment of the deficiency, if any, of his residuary personal estate to pay his debts as thereafter mentioned, on trust for his wife for her life, with remainder in trust for some grandchildren; & he devised all other his real estate not thereinbefore disposed of to his sons J. & R. in fee, in equal shares; & after making some specific bequests of personal estate, he bequeathed the residue of his personal estate to trustees upon trust for conversion, & to stand possessed of the proceeds upon trust to pay his debts, except the debt of £3,400 due to R., & two other specified debts, & on trust to retain the surplus for the benefit of his sons J. & R. in

equal shares. But, in case his residuary personal estate should be insufficient to pay his debts, except as aforesaid, he directed that the deficiency should be paid out of the proceeds of the sale of the real estate which he had directed to be sold. R. died before testator without issue :—*Held*: the condition bound the land at M. notwithstanding the lapse of the devise, & the debt of £3,400 must be discharged out of it.—*Re KIRK, KIRK v. KIRK* (1882), 21 Ch. D. 431; 47 L. T. 36; 31 W. R. 94, C. A.

5835. ———.]—(1) Testator had mortgaged his estate S. By his will, he directed his debts, other than the mtge., to be paid out of a specified part of his personal estate; he recited his intention of forthwith paying off a great part of the mortgage debt, & he directed, that "the balance of such mtge. should be paid by sale of timber on the S. estate. He made no bequest of his general personal estate :—*Held*: the mtge. was payable first out of the general personal estate; secondly, out of the descended real estate; & thirdly, out of the timber money.

(2) Testator gave several life annuities, one of which was, expressed in the alternative, either £10 a year or £5 & a tenement, part of the N. estate, & he charged them all on the N. estate :—*Held*: all the annuities were charged exclusively on that estate.—*LOMAX v. LOMAX* (1849), 12 Beav. 285; 19 L. J. Ch. 137; 14 L. T. O. S. 482; 13 Jur. 1064; 50 E. R. 1070.

Annotations.—*As to* (1) *Reid. Phillips v. Parry* (1856), 22 Beav. 279. *As to* (2) *Reid. Re Trenchard, Trenchard v. Trenchard*, [1905] 1 Ch. 82.

5836. ———.]—Testator, by his will, directed his trustees to set apart or purchase a sum of consols for a legacy; & by a codicil he directed that, if at his death he had not so much consols, his trustees should purchase the deficiency out of the rents & profits of his freehold estates :—*Held*: the general personal estate was thereby exonerated.—*BESSANT v. NOBLE* (1856), 26 L. J. Ch. 236; 27 L. T. O. S. 116; 4 W. R. 475, L. C.

5837. ———.]—S. by his will gave pltf. an annuity of £200 for the benefit of E. By a codicil he appointed one-fourth share of certain real estate, part of which was liable to be sold, to E., & appointed the same share to pltf. & another, upon trust to apply the rents or the money when the estate was sold towards the payment of E.'s annuity, & on the death of E. he gave her share of the real estate over :—*Held*: the annuity was charged in the first instance on the income of E.'s share in the real estate, & then on testator's residuary personal estate in priority to the corpus of E.'s share.—*SKIRROW v. SKIRROW* (1869), 17 W. R. 759.

5838. ———.]—(1) Where testator bequeathed annuities & immediately afterwards devised an estate, "subject to the payment of the annuities," & gave the annuitants a power of distress :—*Held*: the personalty was exonerated from being the primary fund for payment of the annuities.

(2) *Qu.*: whether the personalty was altogether exonerated.—*POOLE v. HERON* (1873), 42 L. J. Ch. 348.

Annotation.—*As to* (1) *Reid. Patching v. Barnett* (1880), 49 L. J. Ch. 665.

5839. *Effect of specific charge following general charge*.]—(1) Testator began his will by directing that all his just debts, funeral & other incidental expenses, should be paid with all convenient speed after his decease. By a codicil he devised a

debts to sell lot B, also so specifically devised. The exors. before disposing of lots A & B, sold to deft. the

growing timber on lot C, also so specifically devised :—*Held*: the exors. had no power to sell the timber, &

even if a power of sale was given to the exors. it could not be exercised until after the lands specifically

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particular estate, upon trust, in the first place, to pay the annuity to his wife, &c, after certain payments, to apply the surplus to the discharge of his simple contract debts:—*Held*: the real estate was not charged with the payment of debts.

(2) *Qu.*: whether the introductory words, without more, would have charged the real estate.—*DOUCE v. TORRINGTON (LADY) (1833)*, 2 My. & K. 600; 39 E. R. 1073.

Annotations:—*As to* (1) *Fidd. Palmer v. Graves (1837)*, 1 Keen, 545. *Reid. Graves v. Graves (1836)*, 8 Sim. 43; *Price v. North (1841)*, 1 Ph. 35; *Jones v. Williams (1844)*, 1 Coll. 156; *Corser v. Cartwright (1873)*, 8 Ch. App. 971.

5840. —[—*PALMER v. GRAVES*, No. 4057, *ante*.

5841. —[—*G.* by his will directed that all his debts, etc., should be paid, & then in the residuary clause devised certain specific properties, subject to the payment of debts, etc., & legacies:—*Held*: the last charge overruled the first, & the devisee under the last gift was the proper person to raise the money to pay the debts, etc., & not the exor.—*CORSER v. CARTWRIGHT (1875)*, L. R. 7 H. L. 731; 45 L. J. Ch. 605, H. L.

Annotations:—*Reid. Ricketts v. Lewis (1882)*, 46 L. T. 368; *West of England & South Wales District Bank v. Murch (1883)*, 23 Ch. D. 138; *Re Venn & Furze's Contract, [1894] 2 Ch. 101*; *Re Henson, Chester v. Henson, [1908] 2 Ch. 356*; *Re Major, Taylor v. Major, [1914] 1 Ch. 378*.

5842. Charge followed by devise over—Rights of devisees.—(1) Where testator has created a particular trust out of particular lands for the payment of debts, & subject to the trust devised it over, the devisees can take no benefit till after the whole burden is discharged upon it.

(2) Assets descended on the heir-at-law must be applied to the payment of debts before the lands can be charged, which are specifically devised.—*POWIS v. CORBET (1747)*, 3 Atk. 556; 26 E. R. 1120, L. C.

Annotations:—*As to* (1) *Reid. Re Balls, Trewby v. Balls, [1909] 1 Ch. 791*. *As to* (2) *Consd. Donne v. Lewis (1787)*, 2 Bro. C. C. 257. *Reid. Davies v. Topp (1780)*, 1 Bro. C. C. 524; *Milnes v. Slater (1803)*, 8 Ves. 295.

5843. Effect of revocation of so much of devise as relates to particular estate.—[Testator devised an estate X. & other estates to A. charged with annuities & an estate Y. & his residuary real & personal estate to B. subject to the payment of his debts, funeral expenses, & legacies. He afterwards revoked so much of the second devise as included Y. & devised it, subject to the same annuities, & in the same manner as the estate X.:—*Held*: the charge of debts, etc., on Y. was revoked.—*RAVENS v. TAYLOR (1841)*, 4 Beav. 425; 49 E. R. 403.

5844. Whether on corpus or income.—*WASTELL v. LESLIE, CARTER v. LESLIE*, No. 5711, *ante*.

SUB-SECT. 3.—LIABILITY OF REAL ESTATE DESCENDED.

5845. Whether applied before real estate devised.—[A bill was to have satisfaction out of assets descended & devised:—*Held*: if the personal were not sufficient, an account should be taken of assets descended, & if that was deficient, then of the devised estate.—*PITT v. RAYMOND (1734)*, cited in 2 Atk. at p. 434; 26 E. R. 661; *sub nom.*

TINT v. RAYMOND, cited in *Ridg. temp. H.* at p. 315, L. C.

Annotation:—*Reid. Galton v. Hancock (1745)*, 2 Atk. 427.

5846. —[—*A.* died indebted by bond, & seized in fee of divers lands, part of which he devised to J. S. & other part he permitted to descend to his heir:—*Held*: the lands descended were in the first place liable to pay the bonds.—*CHAPLIN v. CHAPLIN (1735)*, 8 P. Wms. 365; 24 E. R. 1103, L. C.

Annotation:—*Mentl. Price v. Carver (1837)*, 3 My. & Cr. 157.

5847. —[—Where there is a specific devise of lands, the specific legatee shall never contribute upon an average with the heir-at-law towards satisfaction of creditors while the real assets of the heir are sufficient.—*PALMER v. MAYSENT (1737)*, as reported in *West temp. Hard.* 161; 1 Atk. 505; 25 E. R. 873, L. C.

Annotation:—*Mentl. Green v. Pigot (1781)*, 1 Bro. C. C. 103.

5848. —[—*POWIS v. CORBET*, No. 5842, *ante*.

5849. —[—Testator gave all & every part of his real & personal property to his exors. & trustees, to be disposed of by them according to the directions contained in his will. He directed his exors. & trustees, as soon as possible after his death, to pay all his debts, funeral & testamentary expenses; he then gave all his personal estate to his brother absolutely, & he devised specifically various freehold estates, leaving other freehold estates undisposed of, which descended to his heir. The personal estate was insufficient for payment of his debts:—*Held*: the specifically devised estates & the descended estates were liable ratably to the payment of debts.—*STEAD v. HARDAKER (1873)*, L. R. 15 Eq. 175; 42 L. J. Ch. 317; 21 W. R. 258.

Annotations:—*Apld. Jackson v. Pease (1874)*, 23 W. R. 43. *Expld. Scott v. Cumberland (1874)*, L. R. 18 Eq. 578.

5850. —[—Testator devised his freehold property at M. & at T. to his two children equally. He never had freehold property at M., but he had a share in real estate at R., which adjoined M., & in the parish of which M. was situate:—*Held*: the real estate at R. did not pass by the will, but descended to the heir-at-law, & such descended estate was primarily liable, in the insufficiency of the personal estate, to the payment of debts to the exclusion of the devised estate at T.—*BARBER v. WOOD (1877)*, 4 Ch. D. 885; 46 L. J. Ch. 728; 36 L. T. 373.

5851. —[—In equity, in case of a debt by specialty, the personal assets shall be first applied, & if deficient, the heir shall be charged for assets descended.—*GALTON v. HANCOCK (1745)*, 2 Atk. 427; 26 E. R. 658; *sub nom. GORTON v. HANCOCK*, *Ridg. temp. H.* 301, 310, L. C.

Annotations:—*Expld. & Apld. Davies v. Topp (1780)*, 1 Bro. C. C. 524. *Consd. Donne v. Lewis (1787)*, 2 Bro. C. C. 257. *Expld. Manning v. Spooner (1796)*, 3 Ves. 114. *Reid. Powis v. Corbet (1747)*, 3 Atk. 556; *A.-G. v. Tomkins (1754)*, Amb. 216; *Ancestor v. Mayer (1785)*, 1 Bro. C. C. 454; *Cornwall v. Cornwall (1841)*, 15 Sim. 398; *Goodwin v. Lee (1855)*, 36 L. T. O. S. 1; *West v. Lawday (1868)*, 16 W. R. 916; *Gowan v. Broughton (1874)*, 31 L. T. 533; *Scott v. Cumberland (1874)*, L. R. 18 Eq. 578. *Mentl. Parsons v. Freeman (1751)*, Amb. 115; *Goodtitle d. Holford v. Otway (1796)*, 1 Bos. & P. 576; *Cave v. Holford (1798)*, 3 Ves. 550; *Tombs v. Roach (1846)*, 2 Coll. 490; *Re Stephenson, Ex p. Stephenson (1847)*, 17 L. J. Boy. 5; *Re Lacey, Howard v. Lightfoot, [1907] 1 Ch. 330*.

5852. —[—Lapse of specific devise.—*WILLIAMS v. CHITTY, CHITTY v. CHITTY*, No 5705, *ante*.

appropriated had been sold.—*BAKER v. MILLS (1886)*, 11 O. R. 253.—*CAM.*

1. Specific devise directed to pay

debts & legacies.—[Testator devised land to his son, & directed the son to pay debts & legacies:—*Held*: the effect was to charge the payment of both

debts & legacies upon the land devised.—*Re THOMAS (1891)*, 31 C. L. T. 584; 3 O. L. R. 660.—*CAM.*

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simple contract creditors to have their debts satisfied out of his real estate, which had descended to his heiress-at-law, had not been defeated by articles executed by her while still a minor, previously to & in contemplation of her marriage.—*PIMM v. INSALL* (1849), 1 Mac. & G. 449; 1 H. & Tw. 487; 19 L. J. Ch. 1; 15 L. T. O. S. 177; 14 Jur. 357; 41 E. R. 1338, L. C.

Annotations:—*Mentd. Morley v. Morley, Harland v. Morley* (1855), 5 De G. M. & G. 610; *Dilkes v. Broadmead* (1860), 2 Giff. 113; *Re Moutat, Kingston Cotton Mills Co. v. Moutat*, [1899] 1 Ch. 831.

5869. Realty passing by escheat.]—EVANS v. BROWN, No. 4125, *ante*.

What is real estate descended—Realty descending by lapse.]—See Sub-sect. 8, *post*.

5870. — Real estate devised to heir.]—(1) Where real estates are devised to the heir, although for certain purposes he takes by descent, yet, as between him & the devisees of other parts of testator's estates, the estates devised to the former are not to be applied in payment of the debts in priority to the estates devised to the latter.

(2) Though the creditors of a testator have a right to resort to the estate devised to the heir, in priority to the other devised estate, yet the heir is entitled to contribution from the other devisees, to the extent to which his estate may be exhausted by debts.—*BIEDERMAN v. SEYMOUR* (1841), 3 Beav. 368; 10 L. J. Ch. 177; 49 E. R. 144.

Annotation:—*Mentd. Owen v. Gibbons*, [1902] 1 Ch. 636.

5871. — Real estate disclaimed.]—Where it had been held that, leaseholds having been disclaimed, the specifically devised & residuary freeholds must also be disclaimed, & where there was an insufficiency of assets:—*Held*: the rules of marshalling applied in the same way as if there had been an intestacy as to the leaseholds & freeholds disclaimed, & accordingly, in paying testatrix's debts & funeral & testamentary expenses, after exhausting her residuary personal estate, except a fund consisting of so much thereof as would satisfy the pecuniary legacies which had been set aside, resort must be had to the disclaimed freeholds before resorting to the said fund so set aside.—*Re SITWELL, WORSLEY v. SITWELL* (1913), 57 Sol. Jo. 730.

5872. After what period devisee entitled to claim exoneration against heir.]—Devisee in tail of real estate, claiming to be exonerated out of the descended moiety from a mtge., filed his bill against the heir more than thirty years after testator's death, & more than twenty years after the heir's title accrued, but within two years after the deficiency of the personal estate had been ascertained under a decree of the ct.:—*Held*: the devisee was entitled to a decree for exoneration against the heir, with costs.—*NEWHOUSE v. SMITH* (1854), 2 Sm. & G. 344; 2 W. R. 618; 65 E. R. 429.

5873. Effect of resorting to descended realty—Devise of realty & personalty in trust for payment of debts—Right to participate in trust estate.]—Testator devised his real & personal estate upon trust to pay debts; & after the date of his will, made in 1829, acquired real estate which descended. He left personalty to the extent of £1346, & the produce of the sale of his real estate applicable to debts was £4205. His simple contract debts amounted to £8,000 & specialty debts to £10,000:—*Held*: the specialty creditors had a right to

resort to the descended estate as legal assets, but could not participate in the trust estate without bringing into hotchpot what they had taken out of the descended realty.—*CHAPMAN v. ESGAR* (1853), 1 Sm. & G. 575; 22 L. T. O. S. 167; 18 Jur. 341; 2 W. R. 86; 65 E. R. 252.

SUB-SECT. 4.—LIABILITY OF GENERAL PECUNIARY LEGACIES.

5874. Before specific legacies.]—Where there are specific & money legacies the last ought first to be applied to payment of debts.—*COTTERELL v. CHAMBERLAIN* (1718), Bunb. 32; 145 E. R. 584.

5875. In aid of realty.]—TIPPING v. TIPPING, No. 5926, *post*.

5876. Before real estate devised.]—HENSMAN v. FRYER, No. 4581, *ante*.

5877. —.]—Testator gave pecuniary legacies, & then devised his real estate to his wife for life, & after her death in trust for his niece for life, with remainder for her children. The personal estate was insufficient to pay the debts:—*Held*: the pecuniary legatees had no right to make the residuary devisee of the real estate contribute to pay the debts.—*COLLINS v. LEWIS* (1869), L. R. 8 Eq. 708.

Annotations:—*Follid. Tomkins v. Colthurst* (1875), 1 Ch. D. 626; *Farquharson v. Floyer* (1876), 3 Ch. D. 109.

5878. —.]—Testator, after giving a pecuniary legacy, devised his real estate to other persons than the legatee, not charging it with his debt. There being a deficiency of personal estate for payment of debts:—*Held*: the real estate was not bound to contribute ratably with the legacy to meet the deficiency.—*DUGDALE v. DUGDALE* (1872), L. R. 14 Eq. 234; 41 L. J. Ch. 565; 27 L. T. 705.

Annotations:—*Follid. Tomkins v. Colthurst* (1875), 1 Ch. D. 626; *Farquharson v. Floyer* (1876), 3 Ch. D. 109.

5879. —.]—It is still the rule in administering assets that when the residuary personal estate is insufficient to pay the costs of a suit, the deficiency must be made up by the pecuniary legatees in priority to the residuary devisees.—*TOMKINS v. COLTHURST* (1875), 1 Ch. D. 626; 33 L. T. 591; 24 W. R. 267.

Annotation:—*Follid. Farquharson v. Floyer* (1876), 3 Ch. D. 109.

5880. —.]—Where there is a bequest of pecuniary legacies & devises of real & residuary real estates, & an insufficient amount of personalty for the payment of debts, the pecuniary legacies must be first resorted to to make up the deficiency.—*FARQUHARSON v. FLOYER* (1876), 3 Ch. D. 109; 45 L. J. Ch. 750; 35 L. T. 355.

SUB-SECT. 5.—LIABILITY OF SPECIFIC AND RESIDUARY DEVISES AND SPECIFIC LEGACIES.

5881. Realty devised to heir.]—Under the 3 & 4 Will. 4, c. 106, s. 3, an heir to whom lands are devised by his ancestor, takes them as devisee, to all purposes; & therefore, the pecuniary legatees are not entitled to have the assets marshalled as against him.—*STRICKLAND v. STRICKLAND* (1839), 10 Sim. 374; 9 L. J. Ch. 60; 59 E. R. 659.

Annotation:—*Reald. Owen v. Gibbons*, [1902] 1 Ch. 636.

5882. Liability to contribute ratably.]—One seized in fee of some lands, & possessed by lease for years of other lands, devised the fee to A. & the lease to B. & died, indebted by bond:—*Held*: on a deficiency of assets, both the devisees should contribute to the payment of the bond; but if the devise to A. had been of all the rest of his estate, then A. should have paid the debts.—*LONG v. SHORT* (1717), 1 P. Wms. 403; 24 E. R. 445; *sub nom. SHORT v. LONG*, 2 Vern. 756, L. C.

Annotations:—*Folld. Tombs v. Rooh* (1846), 2 Coll. 490; *Gervis v. Gervis* (1847), 14 Sim. 654. *Expld. Re Saunders-Davies*, *Saunders-Davies v. Saunders-Davies* (1887), 34 Ch. D. 482. *Consd. Re Bawden*, *National Provincial Bank of England v. Crosswell, Bawden v. Crosswell*, [1894] 1 Ch. 693. *Reid. Mirehouse v. Scalfie* (1837), 2 My. & Cr. 695; *Cornwall v. Cornwall* (1841), 12 Sim. 298; *Creed v. Creed* (1844), 11 Cl. & Fin. 491; *Paget v. Hinsh* (1863), 1 Hem. & M. 663.

5883. —]—Where jewels are devised as a specific legacy, yet they shall be applied to payment of debts upon simple contract, if the rest of the personal estate falls short, in case of the real estate.—*CLARKE v. CLARKE* (1721), Bunb. 90; 145 E. R. 606.

5884. —]—Where the vendor of an estate would have absorbed the personal assets in payment of his purchase-money, a ratable contribution was decreed as between the devisee of the estate & the legatees & annuitants under the purchaser's will.—*HEADLEY v. READHEAD* (1813), Coop. G. 50; 35 E. R. 474.

Annotations:—*Appld. Sproule v. Prior* (1836), 8 Sim. 189. *Reid. Selby v. Selby* (1828), 4 Russ. 336.

5885. —]—Specific legacies are to be applied in payment of specialty debts in priority to real estates devised.—*CORNEWALL v. CORNEWALL* (1841), 12 Sim. 298; 10 L. J. Ch. 364; 5 Jur. 744; 59 E. R. 1145.

Annotations:—*N.F. Tombs v. Rooh* (1846), 2 Coll. 490; *Gervis v. Gervis* (1847), 14 Sim. 654. *Reid. Jones v. Williams* (1844), 1 Coll. 156.

5886. —]—Testator having made a particular devise of all his real estates, & having bequeathed several specific legacies, died indebted by specialty & simple contract. His personal estate not specifically bequeathed was more than sufficient to pay his simple contract debts, but not sufficient to pay his specialty debts:—*Held*: the amount necessary to complete the payment of the specialty debts should be contributed ratably by the specific legatees & devisees.—*TOMBS v. ROCH* (1846), 2 Coll. 490; 7 L. T. O. S. 428; 10 Jur. 534; 63 E. R. 828; *sub nom. TOOMBS v. ROCH*, 15 L. J. Ch. 308.

Annotations:—*Folld. Hensman v. Fryer* (1867), 3 Ch. App. 430. *Consd. Lancashire v. Iggulden* (1874), L. R. 17 Eq. 556. *Reid. Gervis v. Gervis* (1847), 14 Sim. 654; *Re Stephenson*, *Ex p. Stephenson* (1847), 17 L. J. Boy. 5; *Dugdale v. Dugdale* (1873), L. R. 14 Eq. 234; *Tomkins v. Colthurst* (1875), 33 L. T. 591.

5887. —]—Testator having purchased &

taken a conveyance of a freehold estate, devised the same, but died before he had paid the whole of the purchase-money; & the master by his respect found the unpaid purchase-money to be a charge upon the estate. Testator by his will gave certain specific legacies, & the personal estate not specifically bequeathed being insufficient to pay testator's debts:—*Held*: devisees of real estate & specific legatees must contribute ratably in paying the unpaid portion of the purchase-money of real estate devised.—*GERVIS v. GERVIS* (1847), 14 Sim. 654; 16 L. J. Ch. 422; 9 L. T. O. S. 450; 11 Jur. 578; 60 E. R. 512.

5888. —]—Testator directed all his debts, in the first place, to be paid out of his personal estate, except his leaseholds, if sufficient, & if not, he charged his real estate therewith:—*Held*: the specific legacies were liable to the payment of the debts in priority of the real estate.—*BATEMAN v. HOTCHKIN* (1847), 10 Beav. 426; 16 L. J. Ch. 514; 10 L. T. O. S. 282; 11 Jur. 809; 50 E. R. 646.

Annotations:—*Mentd. Oddie v. Brown* (1859), 4 De G. & J. 179; *Tewart v. Lawson* (1874), L. R. 18 Eq. 490; 25 Stamford & Warrington, Payne v. Grey, [1911] 1 Ch. 255.

5889. —]—Testator devised his E. estate, subject to debts, etc., to his wife for life, with remainders over, & he devised his C. estate, subject to his debts, etc., to his wife absolutely. He afterwards mortgaged his E. estate:—*Held*: on a deficiency of the personal estate, the estates E. & C. ought to contribute ratably towards payment of the mtge.—*MIDDLETON v. MIDDLETON* (1852), 15 Beav. 450; 51 E. R. 612.

Annotations:—*Reid. Stronge v. Hawkes* (1859), 4 De G. & J. 632; *Wisden v. Wisden* (1859), 33 L. T. O. S. 130.

5890. —]—Whether distinction between specific & residuary devise.]—*EDWARDS v. PUGH* (1853), 2 Giff. 135, n.; 66 E. R. 58.

Annotation:—*Reid. Gibbins v. Eyden* (1869), 38 L. J. Ch. 377.

5891. —]—Wills Act, 1837 (c. 26).]—A residuary devise of real estate since above Act is not specific. Therefore, where the personal estate proved deficient for the payment of debts:—*Held*: the real estates devised by way of residue were chargeable with the payment of the debts, in priority to the real estates specifically devised.—*DADY v. HARTRIDGE* (1858), 1 Drew. & Sm. 236; 32 L. T. O. S. 7; 6 W. R. 834; 62 E. R. 369.

Annotations:—*Folld. Rotheram v. Rotheram* (1859), 26 Beav. 465; *Barnwell v. Iremonger* (1860), 1 Drew. & Sm. 242. *N.F. Pearmain v. Twiss* (1860), 2 Giff. 130. *Folld. Hibon v. Hibon* (1863), 1 New Rep. 532; *Rodhouse v. Mold* (1865), 6 New Rep. 287; *Hensman v. Fryer* (1866), L. R. 2 Eq. 627 (see (1867), 3 Ch. App. 420); *N.F. Gibbins v. Eyden* (1869), L. R. 7 Eq. 371. *Reid. Clark v. Clark* (1865), 34 L. J. Ch. 477.

5892. —]—The rule that a

PART IV. SECT. 7, SUB-SECT. 5.

5892 1. Liability to contribute ratably.]—Testator bequeathed all his personal estate to his son, to whom he also specifically devised a farm, & he devised the residue of his real estate to his exors. upon certain trusts, & directed that the debts & funeral & testamentary expenses should be paid out of his estate:—*Held*: the whole personal estate was primarily chargeable with such payments, & the balance remaining unsatisfied should be borne by all the real estate *pro rata*.—*RE MOODY* (1906), 12 O. L. R. 10; 7 O. W. R. 808.—*CAN.*

m. —]—*How value ascertained.*—*Deductions.*]—Testator by his will made a specific bequest to his wife of all his personality, including the proceeds of the sale of certain allot-

ments of vacant land, upon trust thereout to pay & discharge one of two mtges. charged on the real estate. He devised the real estate to his wife for life with remainder to his children. The general estate being insufficient to pay his testator's debts, it was necessary to have recourse to the specifically devised & specifically bequeathed properties:—*Held*: in valuing the real estate for the purpose of contribution there is no difference in principle between a charge on the real estate created by testator in his lifetime, & a direction in the will to pay a specific debt out of a specific property, & there shall be deducted from the real estate the value of the mtge. debt not made subject to the trust of the personality but payable by the devisees under *Locke King's Act*, & from the personality the amount

of the debt specifically directed by the will to be paid thereout.—*RAMSEY v. LOWTHER* (1913), 13 S. R. N. S. W. 430.—*AUS.*

n. Residuary personally sufficient for debts.]—Testator provided: "I charge my real estate devised to my sons with the payment of my debts, & £200 to my wife & a like sum to each of my daughters & the total of such debts & legacies shall be borne by the respective lands in proportion to the average of each & subject thereto I give my real estate to my sons." Testator then devised allotment 26 to two of his sons, allotment 19 to another of his sons, & allotment 18 to a fourth son. Testator next gave the rest of his estate to trustees. Testator, after the date of his will, transferred allotments 26 & 19 to the

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testator's real estate specifically devised, his real estate devised by way of residue, & his personal estate specifically bequeathed, are to contribute in ratable proportions to make up the deficiency of his residuary personal estate for payment of his debts:—*Held*: not to have been altered or affected by above Act.—*EDDELS v. JOHNSON* (1858), 1 Giff. 22; 27 L. J. Ch. 302; 31 L. T. O. S. 35; 4 Jur. N. S. 255; 6 W. R. 401; 65 E. R. 808.

Annotation:—*Reid. Clark v. Clark* (1865), 34 L. J. Ch. 477.

5893. ————.]—Since above Act real estate passing by a residuary devise is subject to debts in priority of specific legacies, that statute rendering a residuary devise no longer specific.—*ROTHERAM v. ROTHERAM* (1859), 26 Beav. 465; 33 E. T. O. S. 159; 5 Jur. N. S. 402; 7 W. R. 368; 53 E. R. 977.

Annotations:—*W.F. Gibbins v. Eyden* (1869), L. R. 7 Eq. 371. *Reid. Pearmain v. Twiss* (1860), 2 Giff. 130; *Clark v. Clark* (1865), 34 L. J. Ch. 477.

5894. ————.]—*Semble*: every devise of lands, whether in particular or general terms, is, since above Act came into operation, as it was before that period, specific.

In the present case the devise over is as specific as any devise can be & the whole of the real estate is bound to contribute (*STUART, V.-C.*).—*PEARMAIN v. TWISS* (1860), 2 Giff. 130; 29 L. J. Ch. 802; 2 L. T. 81; 6 Jur. N. S. 337; 8 W. R. 329; 66 E. R. 56.

Annotations:—*Folld. Gibbins v. Eyden* (1869), L. R. 7 Eq. 371. *Reid. Clark v. Clark* (1865), 34 L. J. Ch. 477.

5895. ————.]—Testator directed payment of his debts, etc. & gave all the residue of his real & personal estate to his wife & another person, appointing them extrix. & exor., upon trust to pay the income to his wife for life, for her own use, & the bringing up & educating his children; & after her decease he made certain specific gifts, one being to his daughter, F., of his messuage & premises situate at T., & there was also a general residuary gift to the wife. The wife borrowed £800 in aid of the personalty & residuary realty, & therewith paid debts & died:—*Held*: in marshalling the assets, the whole income received by the wife during her life, as well as the corpus of the first residuary gift to her, was liable for costs, before resorting to the specific gifts.

The reason for the distinction between realty & personalty formerly made was that a man could only devise what he was actually seized of at the date of the devise; but Wills Act having taken away the reason, there is no object in keeping up the distinction; & a residuary devise of realty in general terms is general, & not specific (*KINDERLEY, V.-C.*).—*HIBON v. HIBON* (1863), 1 New Rep. 532; 32 L. J. Ch. 374; 8 L. T. 195; 9 Jur. N. S. 511; 11 W. R. 455.

Annotations:—*Reid. Clark v. Clark* (1865), 34 L. J. Ch.

477. *Mentl. Re Mid. Ry., Re Otley & Ilkey Branch* (1865), 34 Beav. 525; *Mocatta v. Mocatta* (1865), 49 L. T. 629.

5896. ————.]—Since above Act the residuary devised real estate of a testator is applicable towards the payment of testator's debts before his specifically devised real & his specifically bequeathed personal estate.—*BETHELL v. GREEN* (1865), 34 Beav. 302; 55 E. R. 652.

Annotations:—*Folld. Hensman v. Fryer* (1868), 35 L. J. Ch. 745 (see (1867), 3 Ch. App. 480). *W.F. Gibbins v. Eyden* (1869), L. R. 7 Eq. 371.

5897. ————.]—Every devise of lands, whether in particular or general terms, is equally, where contained in a will governed by above Act, as where contained in a will governed by the old law, specific; & therefore, under the new law as well as the old, realty included in a general or residuary devise is not liable to the payment of testator's debts in priority to realty included in a specific devise, but the two classes of estate are liable *pari passu* to the payment of such debts.—*CLARK v. CLARK* (1865), 4 Giff. 702; 6 New Rep. 86; 34 L. J. Ch. 477; 12 L. T. 485; 11 Jur. N. S. 820; 13 W. R. 735; 66 E. R. 889.

5898. ————.]—*HENSMAN v. FRYER*, No. 4581, *ante*.

5899. ————.]—*GIBBINS v. EYDEN*, No. 5606, *ante*.

5900. ————.]—A residuary devise of real estate is still specific notwithstanding Wills Act, 1837 (c. 26), s. 24. Therefore, where the personal estate of testator is insufficient for the payment of his debts, the specific devisees must contribute ratably with the residuary devisee.—*LANCEFIELD v. IGGULDEN* (Dec. 17, 1874), 10 Ch. App. 136; 44 L. J. Ch. 203; 31 L. T. 813; 23 W. R. 223, L. C. & L. J.; *revers.* (Mar. 10, 1874) L. R. 17 Eq. 556.

Annotations:—*W.F. Jackson v. Pease* (Nov. 7, 1874), L. R. 19 Eq. 96. *Distd. Farquharson v. Floyer* (1876), 3 Ch. D. 109. *Reid. Tomkins v. Colthurst* (1875), 1 Ch. D. 626; *Re Mills, Mills v. Mills* (1886), 34 Ch. D. 186; *Phillips v. Low*, [1892] 1 Ch. 47; *Re Mason, Ogden v. Mason*, [1901] 1 Ch. 819.

5901. ————.]—Where the residuary personalty, after payment of testator's debts, proved insufficient to pay the costs of a suit to administer the trusts of his will:—*Held*: the deficiency must be borne by the specifically bequeathed personalty, the specifically devised realty & the residuary realty, ratably according to value.

The residuary devise is specific, no alteration in this respect having been made by Wills Act. I must, therefore, hold that the specifically bequeathed personalty, the specifically devised realty, & the residuary devised realty, must contribute ratably to make up the deficiency (*HALL, V.-C.*).—*JACKSON v. PEASE* (1874), L. R. 19 Eq. 96; 23 W. R. 43.

Annotations:—*Reid. Farquharson v. Floyer* (1876), 45 L. J. Ch. 750; *Re Price, Williams v. Jenkins* (1886), 31 Ch. D. 485.

sons named in the will as devisees thereof. Allotment 18 remained part of his estate at his death, but he had no other real estate. The residuary personal estate was sufficient to pay the legacies & debts:—*Held*: allotment 18 was not primarily liable for the debts, & these were primarily payable out of the residuary personal estate.—*Re DYMCKE'S TRUSTEES v. DYMCKE*, [1918] V. L. R. 649.—AUS.

c. Expenses attributable to annuity—*Charged on specific devise—Residue insufficient.*—Testator charged an annuity upon a specific devise & directed his testamentary expenses to be paid out of his residuary estate.

The residuary estate was, however, insufficient for the payment of the expenses. As between the specific devisee in question & the other specific devisees:—*Held*: the expenses attributable to the annuity must be borne by the specific devise upon which the annuity was charged so far as the residue was insufficient.—*Re MCINTOSH (No. 3), PERPETUAL TRUSTEE CO., LTD. v. MCINTOSH* (1903), 4 S. R. N. S. W. 59; 21 N. S. W. W. N. 29.—AUS.

p. Rents of Crown lease—Payable after death of testator.—Rents of a Crown lease payable after the death of testator were paid by his executrix:—*Held*: such payments were not

payable out of the fund provided for payment of debts; but were a charge on the land.—*O'NEIL v. HART*, [1905] V. L. R. 107.—AUS.

q. Costs of transferring lands specifically devised.—The costs of transferring lands specifically devised are not testamentary expenses, but are payable, in the absence of a direction to the contrary, by the specific devisees & not out of the general estate.—*LLOYD v. FARE* (1892), 23 S. R. N. S. W. 11.—AUS.

r. Specific legacies charged by will on specific lands—Legacy bequeathed by codicil.—Testatrix devised real

5902. —[—]—A testator gave various annuities for lives with bequest over of them & charged them upon his freehold & leasehold estates. He gave all his real & personal property to trustees in trust to pay the rents of his freehold, copyhold & leasehold estates, & the interest of all mtges., annuities & other securities of which he might die possessed, to his son for life, with a disposition in favour of the son's children, & after his death without any, which happened, testator gave his freehold, leasehold & copyhold estates to one daughter & her issue, & all his funded property & other personal estate to another daughter & her issue:—*Held*: (1) the gift of the leasehold estates to the one daughter was specific, but the gift of the funded property to the other was not, & the latter was consequently chargeable with the annuities in priority to the former; (2) in case of its insufficiency, the freeholds & leaseholds specifically devised & bequeathed must contribute ratably to the payment of the annuities; (3) for the purpose of this contribution, the values of the freeholds & leaseholds must be taken at the death of testator, & not at the death of the tenant for life.—*FIELDING v. PRESTON* (1857), 1 De G. & J. 438; 29 L. T. O. S. 337; 5 W. R. 851; 44 E. R. 793, L. C.

Annotations:—*As to* (1) *Consd. Bothamley v. Sherson* (1875), L. R. 20 Eq. 304; *Re Green, Baldock v. Green* (1888), 40 Ch. D. 610. *Reid. Cook v. Drew* (1863), 2 New Rep. 437.

5903. —[—]—Testator bequeathed all his household goods & furniture, farming stock, money, goods, chattels, & effects, & all other his personal estate, to his wife absolutely; he then devised a freehold estate, called R., for sale & payment of debts, & the surplus to his wife; & he devised another freehold estate to his wife absolutely, & other estates to his wife for life, with remainders over. The R. estate was insufficient for payment of debts:—*Held*: the bequest of personalty to the wife was specific, & such bequest & the specifically devised real estates must contribute ratably to the payment of the surplus debts for which the R. estate was insufficient.—*POWELL v. RILEY* (1871), L. R. 12 Eq. 175; 40 L. J. Ch. 533; 19 W. R. 869.

Annotations:—*Dtd. Re Ovey, Broadbent v. Barrow* (1882), 51 L. J. Ch. 665. *Reid. Re Green, Baldock v. Green* (1888), 40 Ch. D. 610.

5904. —[—]—By her will, dated in Jan. 1897, testatrix appointed trustees & exors., & she appointed & bequeathed to them the one-third share of the sum of £18,000, over which she had a testamentary power of appointment under the will of her father, upon trust to pay the income to W. for life, & after her death to divide the principal of the share among certain charities; & she devised & bequeathed all her real & the residue of her personal estate to W. absolutely. By a subsequent memorandum, attested by W., testatrix requested that all the moneys she had saved should go to other persons therein named. Testatrix died in Dec. 1898. W. did not dispute that the memorandum gave rise to a valid trust in favour of the persons therein named. Testatrix's residuary personal estate, apart from the portion

comprised in the memorandum, was insufficient for the payment of her debts, etc.:—*Held*: in dealing with the residuary real & personal estate given to her by the will she must treat the property comprised in the memorandum as though it had been specifically bequeathed; & therefore the residuary personal estate not comprised in the memorandum must first be exhausted to pay debts, etc., & any deficiency must be borne ratably by the property comprised in the memorandum, & by the real estate devised to W.—*Re MADDOCK, LLEWELYN v. WASHINGTON*, [1902] 2 Ch. 220; 71 L. J. Ch. 567; 86 L. T. 644; 50 W. R. 598, O. A.; *revsg.*, [1901] 2 Ch. 372.

Annotations:—*Mentd. Re Power, Re Stone, Acworth v. Stone*, [1901] 2 Ch. 659; *Re Fearnside, Baines v. Chadwick*, [1903] 1 Ch. 250; *Re Dodson, Re Dodson, Gibson v. Dodson*, [1907] 1 Ch. 284; *Re Orlebar, Wynter v. Orlebar* (1907), 98 L. T. 19; *Re Hadley, Johnson v. Hadley*, [1909] 1 Ch. 20; *O'Grady v. Wilmoth*, [1916] 2 A. C. 231; *Re Gardner, Huey v. Cunningham*, [1920] 1 Ch. 501; *Re Gardner, Huey v. Cunningham*, [1923] 2 Ch. 230.

5905. Whether portions or legacies charged on realty bound to contribute—Portions charged on realty.—Testator devised real estate to one for life, with remainder to trustees for a term to raise the clear sum of £10,000 for his younger son; & subject thereto, he devised the estate in strict settlement. The personal estate, not specifically bequeathed, was insufficient to pay the debts, & thereupon the devised estate & specific legacies became liable to contribute ratably towards the deficiency:—*Held*: as between the youngest son & the persons taking the estate subject to the term, the whole amount of contribution of the real estate was to be borne by the latter.—*RAIKES v. BOULTON* (1860), 29 Beav. 41; 54 E. R. 540.

Annotations:—*Folld. Re Saunders-Davies, Saunders-Davies v. Saunders-Davies* (1887), 34 Ch. D. 482; *Re Bawden, National Provincial Bank of England v. Cresswell, Bawden v. Cresswell*, [1894] 1 Ch. 693.

5906. —[—]—Testator devised his real estate to the use of his wife during her life or widowhood, with remainder to the use of trustees for a term of 500 years, on trust to raise, by mortgage of the real estate or out of the rents & profits, portions of £5000 apiece for each of his younger children, with remainders in strict settlement, testator's eldest son taking the first life estate. Testator's general personal estate was insufficient for the payment of his debts, & consequently, the specifically bequeathed personal estate & the real estate had to contribute:—*Held*: (1) as between the portioners & the persons entitled to the real estate on which they were charged, the former were not bound to contribute to make good the deficiency; (2) as between the real estate & the specifically bequeathed personal estate, the former must contribute in proportion to its full value, not in proportion to its value less the amount of the portions.—*Re SAUNDERS-DAVIES, SAUNDERS-DAVIES v. SAUNDERS-DAVIES* (1887), 34 Ch. D. 482; 56 L. J. Ch. 492; 56 L. T. 153; 35 W. R. 493.

Annotations:—*As to* (1) *Folld. Re Bawden, National Provincial Bank of England v. Cresswell, Bawden v. Cresswell*, [1894] 1 Ch. 693. *As to* (2) *Reid. Re Tunno's Estate, Rakes v. Rakes* (1890), 63 L. T. 23.

estate to A., subject to specified legacies, which she charged thereon, & exonerated her personal estate from them; secondly, she devised other real estate to B., subject to other legacies, which she also charged thereon, & from which her personal estate was also exonerated; thirdly, she devised other estates to C., subject to other legacies; fourthly, she devised other real estates to D., in trust, to sell & pay two

legacies; the residue of the purchase-money to E.; fifthly, she devised other lands to F., subject to a legacy, & bequeathed stock to G., & her household goods, plate, cash, & other personal property to H. She bequeathed the residue of her property, real & freehold & personal, after payment of her just debts, funeral expenses, etc., & legacies to A. whom she appointed her sole residuary legatee; & if such

residue should prove insufficient for these purposes, she ordered that such deficiency should be paid out of the produce of the sale of the lands devised to D.; & appointed A. & F. her exors. Testatrix had no other lands but those specifically devised. Afterwards, by a codicil duly attested & made in England, her will being then in Dublin she bequeathed the legacy to C charged it on her real & personal

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5907. — Legacies charged on realty.]—*Re* BAWDEN, NATIONAL PROVINCIAL BANK OF ENGLAND *v.* ORESSWELL, BAWDEN *v.* ORESSWELL, No. 5757, *ante*.

5908. Ascertainment of respective values.—From death of testator.]—*FIELDING v. PRESTON*, No. 5902, *ante*.

SUB-SECT. 6.—LIABILITY OF PROPERTY APPOINTED UNDER GENERAL POWER OF APPOINTMENT.

5909. General rule.]—*BAINTON v. WARD* (1741), 2 Atk. 172; cited in 2 Ves. Sen. at p. 2; 7 Ves. 503, n.; 26 E. R. 507, L. O.

Annotations:—*Consd.* *Holmes v. Coghill* (1806), 12 Ves. 206; *Fleming v. Buchanan, Downs v. Buchanan* (1853), 3 De G. M. & G. 976. *Expld.* *O'Grady v. Wilmot*, [1916] 2 A. C. 231. *Reid.* *Re Roper, Roper v. Doncaster* (1888), 39 Ch. D. 482.

5910. —.]—Freehold estates over which testator has a general power of appointment, & which he appoints by his will, are assets for payment of his simple contract debts, but are only applicable for that purpose after all testator's own property has been previously so applied.

Personal estate, or real estate appointed by a testator, is to be applied only in aid of the assets which are really the property of testator. The personal estate, & the real estate, including property specifically devised or bequeathed, must be applied before the appointed estate (*TURNER, L.J.*).—*FLEMING v. BUCHANAN, DOWNS v. BUCHANAN* (1853), 3 De G. M. & G. 976; 1 Eq. Rep. 186; 22 L. J. Ch. 886; 22 L. T. O. S. 8; 43 E. R. 382, L. J.J.

Annotations:—*Apprvd.* *Beyfus v. Lawley*, [1903] A. C. 411. *Consd.* *Re Hadley, Johnson v. Hadley*, [1909] 1 Ch. 20; *O'Grady v. Wilmot*, [1916] 2 A. C. 231. *Reid.* *Re Parkin, Hill v. Schwarz*, [1892] 3 Ch. 510; *Re Devon's S. E. White v. Devon, Re Steer, Steer v. Dobell*, [1896] 2 Ch. 562; *Re Wernher, Wernher v. Beit*, [1918] 2 Ch. 82.

5911. —.]—The donee of a general testamentary power of appointment over a fund borrowed money & as security covenanted with the lender that he would make a will appointing that the loan should be a first charge on the fund & that he would not revoke the will. He made a will accordingly & died:—*Held*: the lender was not entitled to priority as regards the fund over the appointor's general creditors; for personalty appointed by will under a general power is subject to the payment of the appointor's debts.

The property appointed is in such a case treated as assets of testator exercising the power, & the assets so appointed are regarded as property bequeathed by him. When I say assets I do not mean general assets, but assets nevertheless applicable to the payment of the appointor's debts after all his own property has been exhausted (*LORD LINDLEY*).—*BEYFUS v. LAWLEY*, [1903] A. C. 411; 72 L. J. Ch. 781; 89 L. T. 309, H. L.; *affg.* *S. O. sub nom.* *Re LAWLEY, ZAISER v. LAWLEY*, [1902] 2 Ch. 799, C. A.

Annotations:—*Consd.* *O'Grady v. Wilmot*, [1916] 2 A. C. 231. *Reid.* *Stamp Duties Comr. v. Stephen*, [1904] A. C. 137; *Re Hadley, Johnson v. Hadley*, [1909] 1 Ch. 20; *Re Wernher, Wernher v. Beit*, [1918] 2 Ch. 82. *Mentd.* *Re Purdie's Settlement, Rose v. Hill* (1904), 48 Sol. Jo. 534; *Re Whitehead, Whitehead v. Street* (1913), 108 L. T. 368.

5912. Necessity for exercise of power.]—A power,

estate; & ratified & confirmed her will in all other respects:—*Held*: (1) C's legacy was not charged on the lands specifically devised to A., B., C., & F.; (2) the residue of the purchase-money of the lands devised to D., in trust for

E., after the payment of the two legacies, was subject to C's legacy, as E. was to be considered a residuary & not a specific devise.—*DYER v. BRASSONNETT* (1856), 4 L. Ch. R. 382.—*IR.*

unless executed, is not assets for debts.—*HOLMES v. COGHILL* (1806), 12 Ves. 206; 33 E. R. 79, L. O.

Annotations:—*Consd.* *Hixon v. Oliver* (1806), 13 Ves. 108. In *Holmes v. Coghill* the Master of the Rolls seems to think Cts. of Equity were not altogether warranted in supplying defects in the execution; the want of execution they cannot supply (*LORD MANNING, C.*). *Expld.* *Re Lovelace's Settlement*, (1859), 28 L. J. Ch. 489. *Reid.* *Ewart v. Ewart* (1853), 1 Eq. Rep. 536; *Fleming v. Buchanan, Downs v. Buchanan* (1853), 3 De G. M. & G. 976; *Jackson v. Orick* (1871), 19 W. R. 547; *Ashby v. Costin* (1888), 21 Q. B. D. 401; *Re Roper, Roper v. Doncaster* (1888), 39 Ch. D. 482; *Re Creed, Thomas v. Hudson* (1905), 49 Sol. Jo. 566; *O'Grady v. Wilmot*, [1916] 2 A. C. 231. *Mentd.* *Hope v. Hope* (1854), 5 Giff. 13; *Cowper v. Mantell* (1856), 42 Beav. 223.

SUB-SECT. 7.—LIABILITY OF WIDOW'S PARAPHERNALIA.

See HUSBAND & WIFE.

SUB-SECT. 8.—LIABILITY OF LAPSED SHARES.

5913. Of residuary estate—Whether primarily liable.—For costs of petition to decide question of construction of will.—Testator by his will recited that on his marriage he had entered into a bond to leave his wife the sum of £800 on his death, & that he intended shortly to distribute a sum of £6,000 in his lifetime amongst her relations, in lieu of any claims under the bond. Testator then directed that in case of his death before carrying his intention into effect the said sum of £6,000 should be divided between & amongst the said relations of his wife in such manner, shares & proportions as would have been the case if his wife had died possessed of the said sum a spinster & intestate. Testator's wife had died before the date of his will, & had left sixteen next of kin, five of whom died before testator:—*Held*: the lapsed shares, being the only residuary property over which the ct. had power, should bear the costs of the petition for determining the question raised upon the construction of the will.—*Re HAM'S TRUST* (1851), 2 Sim. N. S. 106; 21 L. J. Ch. 217; 61 E. R. 281; *sub nom.* *HAM'S WILL CASE*, 15 Jur. 1121.

Annotations:—*Consd.* *Re Hodgson, Ex p. Cunliffe* (1854), 18 Jur. 786. *Appld.* *Scott v. Cumberland* (1874), L. R. 18 Eq. 573. *Reid.* *Fenton v. Wills* (1877), 7 Ch. D. 33; *Re Jones, Jones v. Calless* (1878), 39 L. T. 287. *Mentd.* *Cruse v. Howell* (1858), 4 Drew. 215; *Fittroy v. Richmond* (1859), 28 L. J. Ch. 750; *Re Rees, Williams v. Davies* (1890), 44 Ch. D. 484.

5914. —.]—For costs of petition of payment out of legacy.—A legacy of £2,000 being given to H. & D. for life, with remainder to their issue, & in default of issue to fall into the residuary estate, & H. & D. being dead without issue, the trustees paid it into ct., under the Trustee Relief Act, in the names of H. & D. The trustees at the same time paid into ct., under the same Trustee Relief Act, another legacy of £5,000, in which C. was interested. C. presented a petition to have his share of the £5,000 legacy paid to him, & have his costs paid out of the £2,000 legacy, treating it as residue. There was no suit for the administration of the estate:—*Held*: the ct. had no jurisdiction to order payment of the costs of the petition out of any other fund than the £5,000 legacy.—*Re HODGSON'S TRUSTS* (1854), 2 Eq. Rep. 1083; 2

PART IV. SECT. 7, SUB-SECT. 8.

s. Of residuary estate—Subject to payment of debts—Whether primarily liable.]—A lapsed share of a residue of real & personal estate, devised

W. R. 539; *sub nom. Re HODGSON, Ex p. CUNLIFFE*, 18 Jur. 786.

5915. ——— For debts & legacies.]—

(1) Testator directed that his debts should be paid by his exors.; he then gave two legacies, one to one of his extrices., to be paid to her in addition to what was afterwards devised to her; & gave the residue of his personal estate & all his real estate to five persons, whom he appointed exors., in equal shares, as tenants in common:—*Held*: the legacies were charged on the real estate.

(2) One of the five devisees died in testator's lifetime:—*Held*: as between the heir & devisees the lapsed share was, in the hands of the heir, liable to bear a ratable proportion only of the debts & legacies.—*PEACOCK v. PEACOCK* (1865), 34 L. J. Ch. 315; 12 L. T. 299; 11 Jur. N. S. 280; 13 W. R. 516.

Annotations:—*As to* (2) *Consd. Ryves v. Ryves* (1871), L. R. 11 Eq. 539. *Reid. Stead v. Hardaker* (1873), L. R. 15 Eq. 175; *Scott v. Cumberland* (1874), L. R. 18 Eq. 578.

5916. ———.]—Testator directed his debts to be paid in the first instance by his exor. & extrix. He then gave all the residue of his real & personal estate to his brother & sister, to hold the same unto his said brother & sister, their heirs, exors., administrators, & assigns; but in case his brother died in the lifetime of his sister, without leaving issue, then he gave his share & interest in the property to his sister absolutely, & he appointed his brother & sister exor. & extrix. of his will. The brother died before testator, leaving a son, who was testator's heir-at-law, & testator's personal estate was not sufficient for payment of his debts:—*Held*: the gift of the residue to testator's brother & sister was a gift to them as tenants in common, & the share of the sister & the share of the brother, which had lapsed to the heir-at-law, must bear the debts equally.—*RYVES v. RYVES* (1871), L. R. 11 Eq. 539; 40 L. J. Ch. 252.

Annotation:—*Reid. Stead v. Hardaker* (1873), L. R. 15 Eq. 175.

5917. ——— & expenses.]—Testatrix, being possessed of personal estate gave to her niece, subject to all legacies & bequests, the residue of her estate up to the end of the year 1855; & she gave all accumulations from that date equally between her great-nephews. The share of residue to the niece lapsed by her death in the lifetime of testatrix:—*Held*: the only residue was that given to the niece, which lapsed, & was liable to all the expenses & debts.

Semble: wherever there is a lapsed share of residuary estate, whether personal or real, the lapsed share is the primary fund for payment of debts & expenses.—*GOWAN v. BROUGHTON* (1874), L. R. 19 Eq. 77; 44 L. J. Ch. 275; 31 L. T. 533; 23 W. R. 332.

Annotations:—*Dbtd. Trethewy v. Helyar* (1876), 4 Ch. D. 53; *Blann v. Bell* (1877), 7 Ch. D. 382. *Expld. Re Jones, Jones v. Cales* (1878), 10 Ch. D. 40. *Distd. Hurst v. Hurst* (1884), 28 Ch. D. 159. *Reid. Shephard v. Beetham* (1877), 46 L. J. Ch. 763.

5918. ——— For costs of administration suit.]—Testatrix, after directing payment of her just debts, funeral & testamentary expenses, gave her residuary & personal estate amongst four persons by name, one of whom died in her lifetime:—*Held*: the lapsed share was not primarily liable for the costs of an administration suit, but the costs

must be paid before the residue was divided.—*TRETHEWY v. HELYAR* (1876), 4 Ch. D. 53; 46 L. J. Ch. 125.

Annotations:—*Folld. Fenton v. Wills* (1877), 7 Ch. D. 33; *Re Giles* (1886), 55 L. J. Ch. 695. *Reid. Re Jones, Jones v. Cales* (1878), 10 Ch. D. 40; *Re Hall-Dare, Le Marchant v. Lee Warner*, [1916] 1 Ch. 273. *Mentd. Re Clay, Clay v. Clay* (1884), 32 W. R. 516; *R. v. Income Tax Acts Special Purposes Comrs., Ex p. Barnardo's Homes National Incorporated Assocn.* (1921), 7 Tax Cas. 646.

5919. Of realty—Charged with payment of debts—Applied in same order as if taken by devisee.]—Testator devised his freehold, customary freehold, copyhold & leasehold estates for the benefit of his seven children; & he gave his remaining personal estate to A., exonerated from his debts; & he declared that his freehold, customary freehold & copyhold estates, should be the primary fund, & that his leaseholds should be the secondary fund, for the payment of his debts. J., one of the children, died in testator's lifetime, whereby his share lapsed:—*Held*: as between the heir-at-law, & the next of kin of J., & the residuary devisees, & legatee under the will of testator, the share intended for J. of the freehold, copyhold & leasehold estate, was to be applied in the same order & manner, & to the same extent, as if J. had survived, & the heir & the next of kin of J., were respectively entitled to what remained after such application.—*FISHER v. FISHER* (1838), 2 Keen, 610; 7 L. J. Ch. 176; 48 E. R. 763.

Annotations:—*Folld. Peacock v. Peacock* (1865), 34 L. J. Ch. 315; *Ryves v. Ryves* (1871), L. R. 11 Eq. 539. *Reid. Stead v. Hardaker* (1873), L. R. 15 Eq. 175.

5920. ———.]—*WOOD v. ORDISH*, No. 5857, *ante*.

SUB-SECT. 9.—MARSHALLING.

A. In General.

Marshalling in equity, *see, generally*, EQUITY, Vol. XX., pp. 499 *et seq*.

5921. Personalty sufficient for debts but not for legacies — Right of legatees to marshal.]—The personal estate being amply sufficient for the debts, though not equal to the discharge of the legacies in full, & the real estate being devised, the ct. would not under a direction to the exors. to pay the debts & funeral expenses, as soon as conveniently may be, marshal the assets in favour of the legatees.—*KEELING v. BROWN* (1800), 5 Ves. 359; 31 E. R. 629.

Annotations:—*Apld. Powell v. Robins* (1809), 7 Ves. 209. *Consd. Spong v. Spong* (1829), 3 Bl. N. S. 84. *Apld. Mirehouse v. Scaife* (1837), 2 My. & Cr. 697. *Reid. Harris v. Watkins* (1854), Kay, 438.

5922. Legacy satisfied out of personalty—Right of simple contract creditors to resort to realty.]—B., having covenanted to settle lands of £100 *per annum* on his wife for life, devised to her an estate of the annual value of £50, & directed his exors. to purchase sufficient land to make up the annual value of it £100, & then devised all his real estates, nor thereinbefore devised to A., his eldest son, his heirs & assigns, but in case he should die without issue before 21, over:—*Held*: A. took by devise, & the simple contract creditors, but not the legatees, were entitled to resort to the real estate for so much of the personal estate as should be exhausted in making up the estate devised to the wife.—*SCOTT v. SCOTT* (1759), Amb. 383; 1 Eden, 458; 28 E. R. 762.

Annotations:—*Consd. Mirehouse v. Scaife* (1837), 2 My. &

subject to the payment of debts, is not liable to the debts of testator, in exoneration of the rest of the residuary estate but ratably with it.—*Re RATHBORN* (1860), 11 I. Ch. R.

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PART IV. SECT. 7, SUB-SECT. 9.—A.

t. *Estate insufficient for debts*—*Without resort to protected policy*

money.]—Where testatrix possessed of a policy by statute rendered not available for payment of debts directed the expenses to be paid out of her estate, & her estate independently of

Sect. 7.—Order of application of assets: Sub-sect. 9, A.]

Cr. 695. Reff. Cogswell v. Armstrong (1855), 3 K. & J. 327. *Mentd. Doe v. Timins* (1818), 1 B. & Ald. 530; *Wood v. Skelton* (1833), 6 Sim. 176.

5923. — Liability of legatees to refund to creditors.]—Testator left assets sufficient to pay all debts & legacies, the legatees received payment, which the creditors might also have had, if they had demanded it in time; they lay by for eleven years & the estate was wasted:—*Held*: the legatees should refund.—*HARDWICK v. MYND* (1792), 1 Anst. 109; 145 E. R. 815.

5924. Bond creditor satisfied out of personality—Right of legatees to stand in place of creditor.]—One seized in fee owed debts by bond, & devised his lands to his heir in tail, & gave several legacies; after which he died leaving the heir his exor.; the heir with the personal estate paid off the bond-debts, by which means there were not assets to pay the legacies:—*Held*: the legatees were without remedy, the land being devised in tail to the heir. Otherwise had the land descended to such heir in fee.—*HERNE v. MEYRICK* (1712), 1 P. Wms. 201; 2 Salk. 416; 1 Eq. Cas. Abr. 143; 24 E. R. 355.

Annotations:—Apld. Chitton v. Burt (1720), Prec. Ch. 540. *Distd. Lutkins v. Leigh* (1734), Cas. temp. Talb. 53. *Consd. Forrester v. Leigh* (1753), Amb. 171. *Reff. Mirehouse v. Scaife* (1837), 2 My. & Cr. 695.

5925. ——[One died indebted by bond, & by will gave a legacy of £500, & devised his lands in fee to S. leaving a personal estate sufficient only to pay the bond:—*Held*: the legatee should not stand in the place of the bond creditor to charge the land, in regard the land was specifically devised; *secus* if the land had descended to the heir.—*CLETON v. BURT* (1720), 1 P. Wms. 678; 24 E. R. 566; *sub nom. CHITTON v. BURT*, Prec. Ch. 540, L. C.

Annotations:—Consd. Galton v. Hancock (1744), 2 Atk. 430; *Forrester v. Leigh* (1753), Amb. 171; *Spong v. Spong* (1827), 1 Y. & J. 300; *Wythe v. Henniker* (1833), 2 My. & K. 635; *Tombs v. Roch* (1846), 2 Coll. 490. *Reff. Oneal v. Mead* (1720), 1 P. Wms. 693; *Mirehouse v. Scaife* (1837), 2 My. & Cr. 695; *Re Bate, Bate v. Bate* (1890), 59 L. J. Ch. 277.

5926. ——[(1) A specific or other legatee shall stand in the place of a bond or judgment creditor, if these take their satisfaction out of the personal estate.

(2) The personal estate not to be applied in ease of the real, to the defeating of any legacy.—*TIPPING v. TIPPING* (1721), 1 P. Wms. 729; 24 E. R. 589, L. C.

Annotations:—As to (1) Reff. Tombs v. Roch (1846), 2 Coll. 490. *As to (2) Apld. Boynton v. Boynton* (1784), 1 Cox, Eq. Cas. 106. *Generally, Mentd. Seymore v. Tresilian* (1737), 3 Atk. 358; *Probert v. Clifford* (1739), Amb. 6; *Graham v. Londonderry* (1746), 3 Atk. 393; *Churchill v. Small* (1753), 1 Keny. Ch. 6.

5927. ——[Legatees not entitled to stand in the place of bond creditors, & to have satisfaction out of real estate devised; but are entitled to stand in place of mtgees.—*FORRESTER v. LEIGH (LORD)* (1753), Amb. 171; 27 E. R. 114, L. C.

Annotations:—Follid. Wythe v. Henniker (1833), 2 My. & K. 635. *Consd. Mirehouse v. Scaife* (1837), 2 My. & Cr. 695. *Reff. Ez p. Baine* (1841), 1 Mont. D. & De Ge. 492; *Johnson v. Child* (1844), 4 Hare, 87; *Tombs v.*

Roch (1846), 2 Coll. 490; *Re Stephenson, Ex p. Stephenson* (1847), 17 L. J. Ch. 6; *Paterson v. Scott* (1852), 1 De G. M. & G. 531; *Bond v. England* (1855), 1 Jur. N. S. 918.

5928. Mortgage satisfied out of personality—Right of legatees to stand in place of mortgagee.]—

A. devised, as touching his worldly estate, after payment of his debts which he willed to be first paid, his lands in mtge. to B., his wife, for life, & after her death to C., & directed the residue of his personal estate to be placed out at interest; B. to have the interest during her life, & after her death to C., & gave B. £1,500 provided she accepted the devises & bequests in lieu of dower; there was not sufficient personal estate to pay the debts & legacies; if the mtgee. take part of the personal estate, the legatees shall, for so much, stand in his place.—*LUTKINS v. LEIGH* (1734), Cas. temp. Talb. 53; 25 E. R. 658, L. C.

Annotations:—Consd. Forrester v. Leigh (1753), Amb. 171; *Re Smith, Smith v. Smith*, [1899] 1 Ch. 366. *Reff. Aldrich v. Cooper* (1803), 8 Ves. 382; *Clarendon v. Barham* (1842), 1 Y. & C. Ch. Cas. 688; *Paterson v. Scott* (1852), 1 De G. M. & G. 531.

5929. When special fund created for debts—Fund misapplied.]—Right of creditors to resort to realty devised.]—*COOPE v. CRESSWELL*, No. 5663, ante.

5930. — Fund insufficient—Whether outstanding liabilities cast on residue.]—*Re TOWNLEY, PUBLIC TRUSTEE v. ALLDER*, No. 5534, ante.

5931. Demonstrative legacies charged on deficient fund—Right of legatees to throw creditors on descended estates.]—*SELLON v. WATTS, SMITH v. WATTS*, No. 4963, ante.

5932. Part of specific legacy applied in payment of debt—Right of legatee to compensation out of residuary estate.]—B. gave all his shares in a co. to his son if he had attained 21 at B.'s death, & if not to a trustee in trust to transfer them to his son when he had attained 21. The son was an infant at B.'s death. The exors. with the sanction of the ct. transferred some of the shares to a creditor in payment of a debt. The son afterwards attained 21. The shares had fallen in value:—*Held*: (1) the son was entitled to compensation out of B.'s residuary estate for the shares so transferred, but for the purpose of compensation the value of the shares must be ascertained as at the date when the son attained 21; (2) it made no difference in this respect that the shares were given to a trustee & not directly to the son, & the son was entitled to the income received from the shares from the death.—*Re BROADWOOD, LYALL v. BROADWOOD*, [1911] 1 Ch. 277; 80 L. J. Ch. 202; 104 L. T. 49.

5933. Right of pecuniary legatees to marshal against realty passing under residuary devise.]—*MIREHOUSE v. SCAIFE*, No. 5824, ante.

5934. In favour of equitable mortgagee.]—Testator gave freehold & leasehold estates charged with the payment of his debts & legacies, to his wife for life, & then to fall into the residue of his estate. He gave the residue to H. & five other persons, & appointed H. exor. The wife & all the residuary legatees survived testator, who died considerably in debt. H., who proved the will,

the policy money was insufficient for payment of her debts:—*Held*: the creditors were entitled to have the assets marshalled, & the expenses paid out of the policy money.—*ALLEN v. EDMONDS* (1886), 12 V. L. R. 789. AUB.

5931 i. Demonstrative legacies charged on deficient fund—Right of legatees to throw creditors on descended estates.]—

Real estate was devised on trust to pay weekly sums to testator's daughters for life, & to pay the balance of the income to his son for life & then to the son's children. The son died in the lifetime of the daughters leaving no children. In default of personality the income of the real estate was expended in payment of testator's debts. There was a large arrear of the weekly payments due to the daughters

at the date of their respective deaths:—*Held*: the arrears were not a charge on the corpus & were not payable out of rents & profits after the death of the daughters & there was an intestacy as to the interest given to the son's children, but that interest having descended to the son as testator's heir-at-law, the assets must be marshalled against the heir to the extent of rents descended so as to

purchased the interests of four of the other residuary legatees, & afterwards in 1845, he deposited title deeds of the freehold & leasehold estates with B. to secure a debt contracted by him personally with B. in 1843. The deposit was accompanied by a memorandum speaking of "my house & premises at E." & undertaking to execute a legal mtge. In 1843 & 1845 there were debts of testator still unpaid:—*Held*: this was a good equitable mortgage of the five-sixth of H., & the mtgee. was entitled, in case of deficiency, to have assets marshalled.—*HAYNES v. FORSHAW* (1853), 11 Hare, 93; 1 Eq. Rep. 527; 22 L. J. Ch. 1060; 22 L. T. O. S. 62; 17 Jur. 930; 1 W. R. 346; 68 E. R. 1201.

Annotation.—*Consd. Farhall v. Farhall* (1871), 7 Ch. App. 123.

5935. Executor also legatee & mortgagee of testator's real estate—Whether bound to satisfy mortgage out of first sufficient personalty.]—Where the exor. of a testator is a mtgee. of the real estate, & also a legatee under his will, he is not bound to satisfy the mortgage debt out of the first sufficient sum of personal assets that comes to his hands; the reason being, that if he were compelled to do so, & thus to exhaust the personal estate, he would be entitled to come against the real estate to the extent to which the legacy remained unsatisfied.—*BINNS v. NICHOLS* (1866), L. R. 2 Eq. 256; 35 L. J. Ch. 635; 14 W. R. 727.

Annotation.—*Mentd. Re Pardoe, McLaughlin v. Penny*, [1906] 1 Ch. 265.

5936. Direction in will for creation of rentcharges—Property insufficient to provide for rentcharges & mortgages.]—Testator devised property which was subject to mtges. at the date of his will & death, on trust for sale, rentcharges of specified amounts to be created, & reserved thereout for the benefit of daughters, & their families. The property was insufficient for creation of the rentcharges, & payment of the mortgage debts. There was no "contrary or other intention" signified by testator within Real Estate Charges Act, 1854 (c. 113):—*Held*: on the principle of marshalling the rentcharges were entitled to have the property sold, reserving the rentcharges, any deficiency of the proceeds for satisfaction of the mtge. debts to be made good out of the general personal estate.—*Re FRY, FRY v. FRY*, [1912] 2 Ch. 86; 81 L. J. Ch. 640; 106 L. T. 999; 56 Sol. Jo. 518.

5937. Mortgage of realty comprised in voluntary settlement — Right of beneficiaries under settlement to have mortgage discharged out of unsettled estate—Settlement containing covenant for quiet enjoyment.]—B. executed a voluntary settlement of real estate to uses in favour of his four children & he covenanted that the estate should remain to those uses & for quiet enjoyment. B. afterwards mortgaged the settled estate with his own unsettled estates & died:—*Held*: the children were entitled to throw the mtges. on the unsettled estate & as against legatees, to prove under the covenants against the settlor's assets for the damage they had sustained by the mtge.—*HALES v. COX, Re HALES* (1863), 32 Beav. 118; 1 New Rep. 344; 8 L. T. 134; 9 Jur. N. S. 1305; 11 W. R. 331; 55 E. R. 46.

Annotations.—*Apld. Mallott v. Wilson*, [1903] 2 Ch. 494. *Reid. Re Walhampton Estate* (1884), 26 Ch. D. 391; *Harding v. Howell* (1889), 14 App. Cas. 307. *Mentd. Re Jones, Farrington v. Forrester*, [1893] 2 Ch. 461.

5938. ———.]—By a voluntary settlement

of 1866, real estate was granted unto & to the use of a trustee upon certain trusts; the settlement contained the usual covenant for further assurance, but no power of revocation by the settlor. In 1867, the trustee executed a deed of disclaimer, & the settlor also purported to put an end to the settlement. In 1888, the settlor mortgaged part of the property comprised in the voluntary settlement; in 1899, this mtge. was paid off, & a transfer thereof taken for the benefit of the settlor's estate:—*Held*: the beneficiaries under the settlement were entitled to have the settlor's estate marshalled, & the mtge. discharged out of the unsettled portion of his assets.—*MALLOTT v. WILSON*, [1903] 2 Ch. 494; 72 L. J. Ch. 664; 89 L. T. 522.

5939. Lien for unpaid purchase money—Right of legatee to marshal—Lien satisfied out of purchased estate.]—M. agreed to purchase an estate of pltf.'s for £1,200, but died before he had paid the whole purchase money; N. by will, after giving £800 legacy to his sister, devised the estate purchased, & all his personal estate, to K., & made him exor.; K. committed a *devastavit* of the personal, & died, & the purchased estate descended on B., his son. The ct., to give the legatee a chance of being paid her legacy out of the personal assets, directed pltf. to take his satisfaction upon the purchased estate for the remainder of the purchase money.—*POLLKIFFEN v. MOORE* (1745), 3 Atk. 272; 26 E. R. 959.

Annotations.—*Expld. Blackburn v. Gregson* (1785), 1 Bro. C. C. 420. *Consd. Austen v. Halevy* (1801), 6 Ves. 475; *Mackreth v. Symmons* (1808), 15 Ves. 329; *Selby v. Selby* (1828), 4 Russ. 336; *Wythe v. Henniker* (1833), 2 My. & K. 635; *Sproule v. Prior* (1836), 8 Sim. 189. *Reid. Fawell v. Heelis* (1773), Amb. 724.

5940. ——— Lien satisfied out of personalty.]—(1) If the vendor of an estate, the contract for which was not completed in the lifetime of testator, who was the purchaser, is afterwards paid his purchase-money out of the personal assets, the simple contract creditors of testator shall stand in the place of the vendor, with respect to his lien on the estate sold, against the devisee of that estate.

(2) *Qu.*: if a pecuniary legatee would be entitled to the same benefit against the devisee.—*SELBY v. SELBY* (1828), 4 Russ. 336; 6 L. J. O. S. Ch. 117; 38 E. R. 832.

Annotations.—*As to (2) Reid. Sproule v. Prior* (1836), 8 Sim. 189; *Birds v. Askey* (No. 2) (1858), 24 Beav. 618.

5941. ———.]—Testator directed estates to be sold, & the produce to be applied in payment of the mtges. due from him, & the residue of the produce to be considered & applied as part of the residue of his personal estate; & he gave & devised the residue of his real & personal estate upon trust, after payment of his just debts, for the benefit of all his children; & testator afterwards by a codicil confined the residuary gift of the produce of the estates directed to be sold, to his younger children:—*Held*: the pecuniary legatees were not entitled to stand in the place of a vendor to testator, part of whose purchase-money remained unpaid at testator's death, to the extent to which the purchase-money had been paid out of the personal estate.—*WYTHE v. HENNIKER* (1833), 2 My. & K. 635; 3 L. J. Ch. 24; 39 E. R. 1087.

Annotations.—*Reid. Clarendon v. Barham* (1843), 1 Y. & C. Ch. Cas. 688; *Paterson v. Scott* (1853), 1 De G. M. & G. 531; *Birds v. Askey* (No. 2) (1858), 24 Beav. 618.

5942. ———.]—Pecuniary legatees

exonerate rents specifically devised.—*Re JENNINGS* (1905), 1 Tas. L. R. 169.—*AUD.*

a. To pay simple contract debt—

Creditor's action.—The ct. will not marshal assets for the payment of a simple contract debt out of real estate, where the bill has not been

filed on behalf of all the creditors of the deceased.—*CONNOLLY v. M'DERMOT* (1846), 3 Jo. & Lat. 260.—*IR.*

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are entitled to stand in the place of the vendor against an estate purchased & devised by testator, the purchase-money for which is paid after testator's death out of his personal estate.—**LILFORD (LORD) v. POWYS KECK** (1865), L. R. 1 Eq. 347; 35 Beav. 77; 35 L. J. Ch. 302; 14 W. R. 240; 55 E. R. 823.

5943. ———.]—A. agreed to purchase an estate, & died leaving the greater part of the purchase-money unpaid. The ct., at the suit of a legatee under A.'s will, ordered his assets to be marshalled, on account of the vendor's lien for the unpaid purchase-money.—**SPOULE v. PRIOR, THOMPSON v. PRIOR** (1836), 8 Sim. 189; 6 L. J. Ch. 1; 59 E. R. 76.

Annotations:—*Reid. Birds v. Askey* (1858), 24 Beav. 618. *Mentl. Clarendon v. Barham* (1842), 1 Y. & C. Ch. Cas. 688.

5944. Lien for trust funds lent to testator—Right of legatees to have lien satisfied out of purchased estate.]—A trustee advanced to B., one of his *cestuis que trust*, a part of the trust funds, to enable him to purchase a real estate. B. died without having repaid the money, having devised the estate, & his personal estate was insufficient to pay his debts & legacies:—**Held:** (1) there was a lien on the estate for the trust funds; (2) the pecuniary legatees had, as against the devisees, a right of marshalling, so as to have the lien satisfied, primarily, out of the purchased estate.—**BIRDS v. ASKEY** (1858), 24 Beav. 618; 53 E. R. 497.

Annotation:—*As to (2) Follid. Lilford v. Powys Keck* (1865), L. R. 1 Eq. 347.

B. Where Debts charged on Real Estate.

5945. Satisfied out of personality—Right of legatee to marshal.]—**HASLEWOOD v. POPE**, No. 5657, *ante*.

5946. ———.]—**BRADFORD v. FOLEY** (1791), 3 Bro. C. C. 351, n; 29 E. R. 577.

Annotations:—*Reid. Paterson v. Scott* (1852), 21 L. J. Ch. 346; *Re Stokes, Parsons v. Miller* (1892), 67 L. T. 223.

5947. ———.]—**WEBSTER v. ALSOP** (1791), 3 Bro. C. C. 352, n; 29 E. R. 578.

Annotations:—*Reid. Paterson v. Scott* (1852), 21 L. J. Ch. 346; *Re Stokes, Parsons v. Miller* (1892), 67 L. T. 223.

5948. ———.]—Testator devised real estates upon trust for payment of his debts, funeral & testamentary expenses, & subject thereto upon various trusts, & bequeathed legacies & annuities:—**Held:** a case for marshalling at the instance of a legatee of an annuity where the personal estate had been exhausted in payment of debts.—**PATERSON v. SCOTT** (1852), 1 De G. M. & G. 531; 21 L. J. Ch. 346; 18 L. T. O. S. 343; 16 Jur. 898; 42 E. R. 658, L. JJ.

Annotation:—*Reid. Re Stokes, Parsons v. Miller* (1892), 67 L. T. 223.

5949. ———.]—Testator bequeathed legacies to A., B. & C., payable out of his personal estate, & he devised his real estates, subject to the payment of his debts, to D. & E. The personal estate being exhausted in payment of debts:—**Held:** the legatees were entitled, on the principle of marshalling, to have recourse, for payment, to the real estate, to the prejudice of the devisees.—**SURTEES v. PARKIN** (1854), 19 Beav. 406; 52 E. R. 407.

Annotation:—*Reid. Re Stokes, Parsons v. Miller* (1892), 67 L. T. 223.

5950. ———.]—**Administration of Estates Act, 1833 (c. 104).]**—The above Act has not affected the law as to the marshalling of assets in favour of pecuniary legatees against devisees of real estate charged with, or devised subject to, tes-

tator's debts. The question now, as before the Act, is one simply of intention on the whole of the will; & a mere charge of debts upon the real estate, or a mere devise of the real estate subject to testator's debts, without any trust, is sufficient, in the event of the personal estate proving inadequate to pay both debts & legacies, to entitle the legatees to come upon the real estate so far as the personality has been applied in payment of debts.—**RICKARD v. BARRETT** (1857), 3 K. & J. 289; 69 E. R. 1118.

Annotation:—*Reid. Re Stokes, Parsons v. Miller* (1892), 67 L. T. 223.

5951. ———.]—Testator directed his just debts & funeral expenses to be paid as soon after his decease as convenient, & gave specific & general legacies, & specifically devised his real estate. There was no residuary bequest. The residuary personal estate was insufficient for payment of the debts:—**Held:** though the direction to pay debts operated to charge them on the real estate, the whole of the general personal estate not specifically bequeathed was primarily liable for the payment of the debts, funeral & testamentary expenses, & the general legatees had no right of marshalling against the real estate.—**Re BATE, BATE v. BATE** (1890), 43 Ch. D. 600; 59 L. J. Ch. 277; 62 L. T. 559.

Annotations:—*Distd. Re Stokes, Parsons v. Miller* (1892), 67 L. T. 223. *Consd. Re Butler, Le Bas v. Herbert*, [1894] 3 Ch. 250. *W.F. Re Salt, Brothwood v. Keeling*, [1895] 2 Ch. 203; *Re Roberts, Roberts v. Roberts*, [1902] 2 Ch. 834.

5952. ———.]—Testatrix, after directing her debts & funeral & testamentary expenses to be paid by her exors. as soon as conveniently might be, & making a certain specific bequest, gave a legacy of £500 to M. She then made other specific bequests, & devised & bequeathed the residue of her personal estate & all her real estate to her trustees upon trust for sale & conversion, & to hold the proceeds of sale upon trust for certain beneficiaries therein mentioned, & she appointed her trustees exors. of her will. The personal estate not specifically bequeathed was insufficient to pay the legacies in full after satisfying the debts & funeral & testamentary expenses:—**Held:** M. was entitled to have the assets marshalled so that her legacy of £500 might be considered a charge on the real estate to the extent to which the personal estate had been applied in the payment of the debts & funeral & testamentary expenses.—**Re STOKES, PARSONS v. MILLER** (1892), 67 L. T. 223.

Annotations:—*Consd. Re Butler, Le Bas v. Herbert*, [1894] 3 Ch. 250. *Follid. Re Salt, Brothwood v. Keeling*, [1895] 2 Ch. 203; *Re Roberts, Roberts v. Roberts*, [1902] 2 Ch. 834. *Reid. Re Kempster, Kempster v. Kempster* (1906), 94 L. T. 248.

5953. ———.]—Testator, after directing payment of his funeral & testamentary expenses & debts, gave a legacy of £1,500 to his son S., & devised & bequeathed all his real & the residue of his personal estate upon trusts for sale & investment, to pay the income to his wife for life, & after her death to divide the estate among his children. The personal estate was insufficient to pay the legacy in full after satisfying the debts, funeral & testamentary expenses:—**Held:** S. was entitled to have the assets marshalled so as to stand in the place of creditors against the real estate to the extent to which the personal estate had been applied in the payment of debts & funeral & testamentary expenses.—**Re SALT, BROTHWOOD v. KEELING**, [1895] 2 Ch. 203; 64 L. J. Ch. 494; 43 W. R. 500; 39 Sol. Jo. 468; 13 R. 499.

Annotations:—*Follid. Re Roberts, Roberts v. Roberts*, [1902] 2 Ch. 834. *Reid. Re Kempster, Kempster v. Kempster* (1906), 94 L. T. 248.

5954. ———.]—Where a will contains a general direction for payment of debts, & the personal estate is insufficient, pecuniary legatees are entitled to have the assets marshalled as against specific devisees of the real estate.—*Re ROBERTS, ROBERTS v. ROBERTS*, [1902] 2 Ch. 834; 72 L. J. Ch. 38; 87 L. T. 523; 51 W. R. 89; 47 Sol. Jo. 30.

Annotation:—*Feld. Re Kempster, Kempster v. Kempster*, [1906] 1 Ch. 446.

5955. ———.]—**Land Transfer Act, 1897 (c. 65).**—Although Part 1 of above Act has rendered unnecessary an express charge of debts on real estate, it has not affected the application of the doctrine of marshalling in favour of pecuniary legatees where land is devised subject to an express charge of debts & the personalty is exhausted in paying debts.—*Re KEMPSTER, KEMPSTER v. KEMPSTER*, [1906] 1 Ch. 446; 75 L. J. Ch. 286; 94 L. T. 248; 54 W. R. 385; 50 Sol. Jo. 271.

Annotation:—*Reid. Re Balls, Trewby v. Balls*, [1909] 1 Ch. 791.

See Administration of Estates Act, 1925 (c. 23), s. 3 (a).

C. Where Legacies charged on Real Estate.

5956. **General rule—Realty liable when personalty exhausted.**—If a legacy of £500 be given to A. chargeable upon the real & personal estate, & another legacy of £500 to B. chargeable upon the personal estate only, & the personal estate be only £500, in this case A. shall not have anything out of the personal estate, but shall be wholly satisfied out of the real estate; for although where there is a debt by judgment or statute, which chargeth the real estate, there this ct. cannot hinder the creditor's coming upon the personal estate, because he hath right to do so by law, & it is not in testator's power to take that right away; still there the other creditors have an equity to charge the real estate for so much as is taken out of the personal estate, & may prefer a bill for that purpose, but in the case of legatees, the party shall not be sent round about, but the legatee, who has a charge upon the real estate, must take his satisfaction there, & shall not come upon the personal estate.

If a man hath two daughters, & deviseth to one £1,000 out of his real estate, & to another £1,000 out of his personal estate, there if the real estate be evicted, that legacy is lost, & shall never come into an average with the other upon the personal estate.—*COLCHESTER v. STAMFORD (LORD)* (1692), *Freem. Ch.* 124; 22 E. R. 1101.

5957. ———.]—*GRISE v. GOODWIN* (1703), *Freem. Ch.* 264; 22 E. R. 1200.

5958. ———.]—Where provision is made by testator to pay a debt out of his real estate, a term for years or his personal estate shall not be applied for that purpose, so as to sink the legacy.—*LUCY v. GARDENER* (1723), *Bunb.* 137; 145 E. R. 623.

5959. ———.]—A. by will gave several legacies, some charged on the real estate & others not:—*Held*: if the personal estate proved not sufficient to pay all the legacies charged on the real estate should be paid thereout; or if they had been paid out of the personal estate the other legacies as to so much, should stand in their place

upon the land.—*BLIGH v. DARNLEY (EARL)* (1731), 2 P. Wms. 619; 24 E. R. 886.

Annotations:—*Reid. Mirehouse v. Scaife* (1837), 3 My. & Cr. 695. *Mentl. Wharam v. Broughton* (1748), 1 Ves. Sen. 180; *Walker v. Bell* (1816), 3 Madd. 31.

5960. ———.]—An additional legacy to A. charged upon real & personal estate; other legacies not charged upon the real estate:—*Held*: if A. exhausted the personal estate, the other legatees should have satisfaction out of the real estate devised.—*HANBY v. ROBERTS* (1751), *Amb.* 127; 27 E. R. 83; *sub nom. HANBY v. FISHER* 2 Coll. 512, n.; *sub nom. HAMLY v. FISHER*, 1 Dick. 104, L. C.

Annotations:—*Conrad. Mirehouse v. Scaife* (1837), 3 My. & Cr. 695. *Reid. Spong v. Spong* (1829), 3 Bl. N. S. 84; *Tombs v. Roch* (1846), 2 Coll. 490; *Cogswell v. Armstrong* (1855), 2 K. & J. 237.

5961. ———.]—**Application of rule—To legacy by codicil.**—A. gave legacies by his will, & other legacies by his codicil, & the lands were charged with the legacies in the will only, & the personal estate was not sufficient to pay all the legacies:—*Held*: the legacies in the will should be charged on the land & the legacies by codicil on the personal estate.—*MASTERS v. MASTERS* (1717), 1 P. Wms. 421; 24 E. R. 454.

Annotations:—*Reid. Brudenell v. Boughton* (1741), 2 Atk. 268; *Norman v. Morrell* (1799), 4 Ves. 769; *Bonnet v. Bonner* (1807), 13 Ves. 379; *Mirehouse v. Scaife* (1837), 3 My. & Cr. 695; *Williams v. Hughes* (1857), 24 Beav. 474. *Mentl. St. Albans v. Beauleck* (1743), 2 Atk. 636; *Hatton v. Hooley* (1773), *Lofft*, 192; *Habergham v. Vincent* (1793), 4 Bro. C. C. 353; *Smith v. Jersey* (1821), 3 Bl. 290; *Ferraris & Croker v. Hertford* (1843), 3 Curt. 468.

5962. ———.]—Testatrix after giving an annuity & legacies devised her real estate subject to the said annuity & legacies & her debts & funeral & testamentary expenses, & the debts of her late brother. The assets were marshalled in favour of a legatee by a codicil.—*NORMAN v. MORRELL* (1799), 4 Ves. 769; 31 E. R. 398.

Annotation:—*Apld. Paterson v. Scott* (1852), 1 De G. M. & G. 531.

5963. ———.]—**To land passing under residuary devise.**—*MIREHOUSE v. SCAIFE*, No. 5824, ante.

5964. ———.]—**To single legacy charged.**—The rule, where there are two classes of legatees, the one having a charge upon real estate, the other having no such charge, & the personalty is not sufficient to satisfy both, that the legatees whose legacies are so charged shall be paid out of the land, in order to leave the personal estate to those who have no other fund, applies equally to the case where one of the legacies only is charged upon real estate. The ct. does not construe a charge upon real estate of one only of several legacies if the personal estate should not be sufficient, as intended for the exclusive benefit of that legatee, but construes the intention of testator to be that all his legacies shall be paid; & therefore that the charge is to take effect if the personal estate be insufficient for the payment of all the legacies.—*SCALES v. COLLINS* (1853), 9 Hare, 656; 68 E. R. 676.

5965. **Legacies charged on two mortgaged estates.**—One estate sufficient to pay mortgage & legacies—Other estate only sufficient to pay mortgage.—Where two estates charged with legacies have been mortgaged by a devisee, who afterwards has become bkpt., & one estate is sufficient to pay the mtge. money, & also the legacies, while the other is only sufficient to pay the mtge. money,

PART IV. SECT. 7, SUB-SECT. 9.—C.

b. *Annuity charged on several lots*

—*Sale of one lot—Annuitant's lien.*

—Testator devised certain lots of

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land to his sons charged with an annual sum for the support of his widow. One of the sons mortgaged a portion of the property to deft. who proceeded to sell, whereupon the widow claimed

a lien:—*Held*: all the land bound by the charge must be marshalled in such a way that all of the lots should contribute.—*GASS v. DICKIE* (1915), 48 N. S. R. 483.—CAN.

M M

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the legacies will be thrown upon the former estate.—*Re TRISTRAM, Ex p. HARTLEY* (1835), 1 Deac. 288; 2 Mont. & A. 496; 5 L. J. Bcy. 13.

5966. Effect of lapse of charged legacy.]—Legacy, charged upon real estate, & payable at a future day, sinks as to the real estate by the death of the legatee before the time of payment; & the assets cannot be marshalled.—*PEARCE v. LOMAN* (1796), 3 Ves. 135; 30 E. R. 934, L. C. Annotations.—*Fidd. Parker v. Hodgson* (1861), 1 Drew. & Sm. 568. *Reid. Tombs v. Roch* (1846), 2 Coll. 490.

5967. —.]—Testator gave a legacy upon the death of his granddaughter to her child or children, to be paid to such child or children at his, her or their respective ages of twenty-one years, & directed that the shares of such child or children as at the time of his granddaughter's death should be under the age of twenty-one years should bear interest at the rate of five per cent. & charged the legacy on his residuary real & personal estate, & the personal estate was deficient.

The granddaughter died, leaving one child, who afterwards died under twenty-one:—*Held*: the legacy sank into, & was not raisable out of, testator's real estate.—*PARKER v. HODGSON* (1861), 1 Drew. & Sm. 568; 30 L. J. Ch. 590; 4 L. T. 762; 7 Jur. N. S. 750; 9 W. R. 607; 62 E. R. 495.

D. Between Specialty Creditors.

5968. Bond creditor & judgment creditors.]—One dies leaving a debt by judgment, & another by bond; the judgment creditor levies his debt out of the personal estate; whether the bond creditor shall in equity stand in the place of the judgment creditor, & charge the land with his debt.—*POREY v. MARSH* (1690), 2 Vern. 182; 23 E. R. 719.

5969. Realty mortgaged—Specialty creditors & mortgagee.]—A person mortgaged freehold estates, & two months afterwards, he surrendered copy-

holds to the use of the mtgee., to secure the same debt; in a suit, after the death of the mtgor., for the administration of his assets the freeholds were sold with the consent of the mtgee., & the personal estate having been exhausted, the mtge. debt was, by order of the ct., satisfied out of the proceeds of the freeholds:—*Held*: the specialty creditors of the mtgor. were entitled to stand in the place of the mtgee. against the copyholds, to the extent of the sum which the mtgee. had received from the freehold estate.—*GWYNNE v. EDWARDS* (1825), 2 Russ. 289, n.; 38 E. R. 349. Annotation:—*Reid. Barnes v. Racster* (1842), 1 Y. & C. Ch. Cas. 401.

E. Between Specialty and Simple Contract Creditors.

NOTE.—Having regard to Administration of Estates Acts, 1869 (c. 46), & 1925 (c. 23), ss. 32, 34, the decisions relating to this subject are set out in the form in which they appear below.

5970. Former law.]—*POVYE'S CASE* (1680), Freem. Ch. 51; *SAGITARY v. HYDE* (1687), 1 Vern. 455; *SPRIGNALL v. DELAWNE* (1687), 2 Vern. 36; *GOREE v. MARSH* (1690), Freem. Ch. 113; *NEAVE v. ALDERTON* (1695), 1 Eq. Cas. Abr. 144; *HUNT v. BLETROE* (1708), 2 Eq. Cas. Abr. 683; *SNEED v. CULPEPPER (LORD & LADY)* (1717), 2 Eq. Cas. Abr. 255; *FINCH v. WINCHELSEA (EARL)* (1719), cited 3 P. Wms. 399, n.; *HASLEWOOD v. POPE* (1734), 3 P. Wms. 322; *LACAM v. MERTINS* (1749), 1 Ves. Sen. 312; *FENHOULHET v. PASSAVANT* (1754), 1 Dick. 253; *ANON.* (1772), Loft, 66; *LOWTHIAN v. HASSEL* (1793), 2 Dick. 737; *ALDRICH v. COOPER* (1803), 8 Ves. 382; *LOMAS v. WRIGHT* (1833), 2 My. & K. 769; *SOAMES v. ROBINSON* (1833), 1 My. & K. 500; *CRADOCK v. PIPER* (1846), 15 Sim. 301.

F. In Favour of Charities.

See CHARITIES, Vol. VIII., p. 302, Nos. 812–814.

PART IV. SECT. 7, SUB-SECT. 9.—E.

5970 l. Former law.]—*ELLARD v. COOPER* (1851), 17 L. T. O. S. 67.—IR.

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